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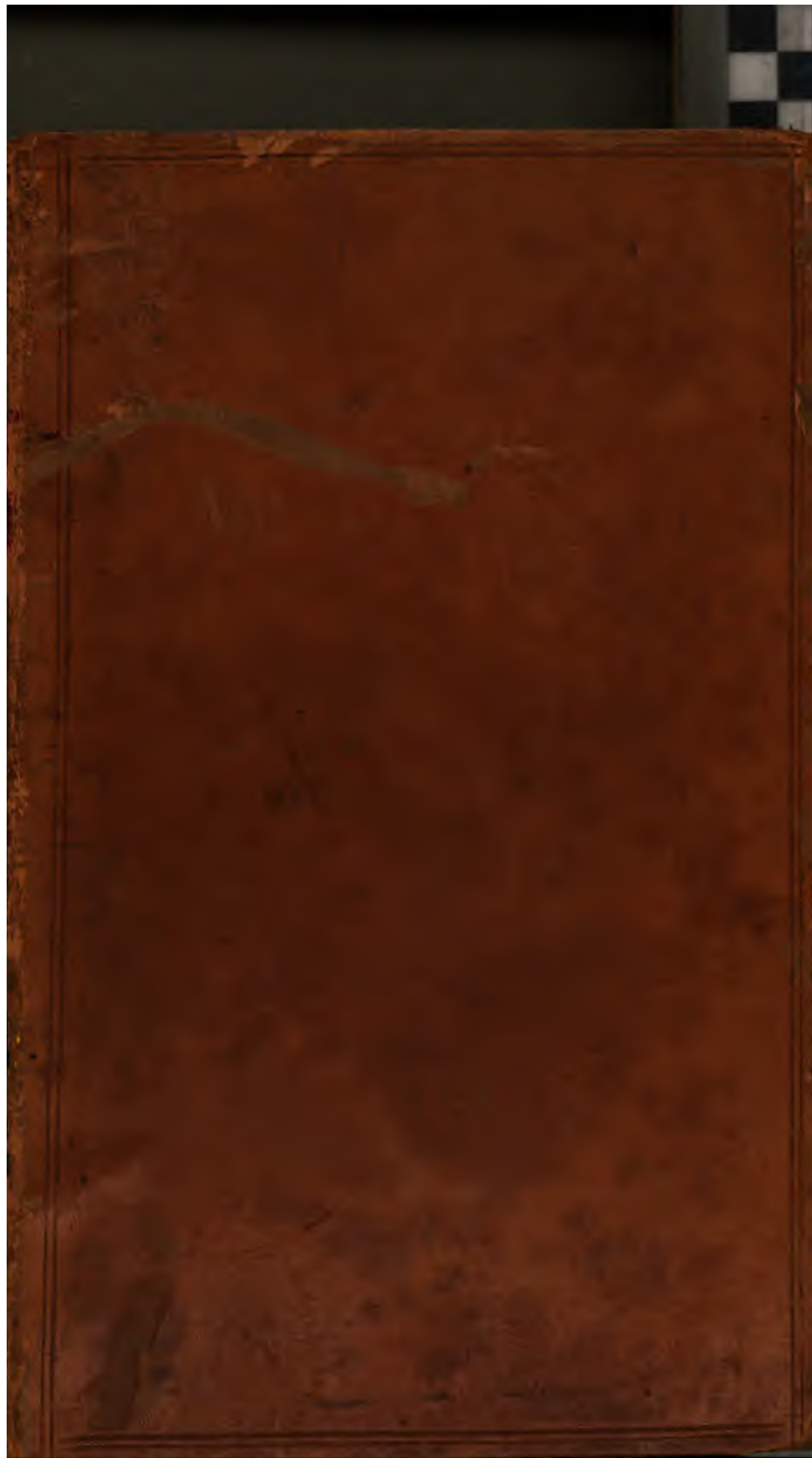
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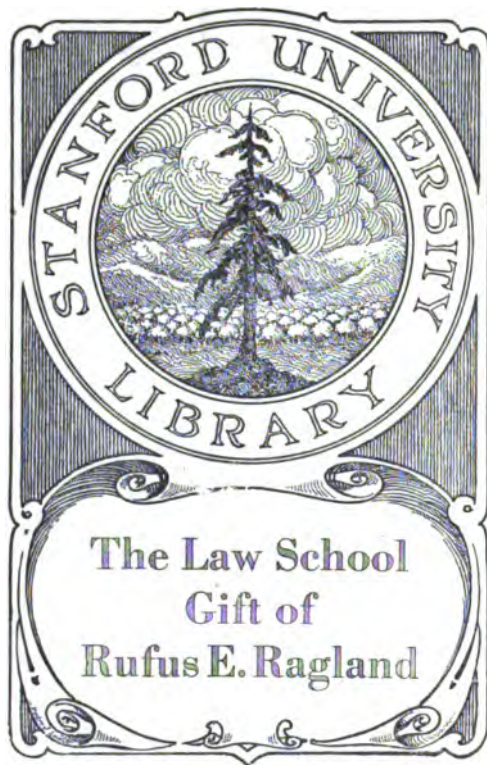
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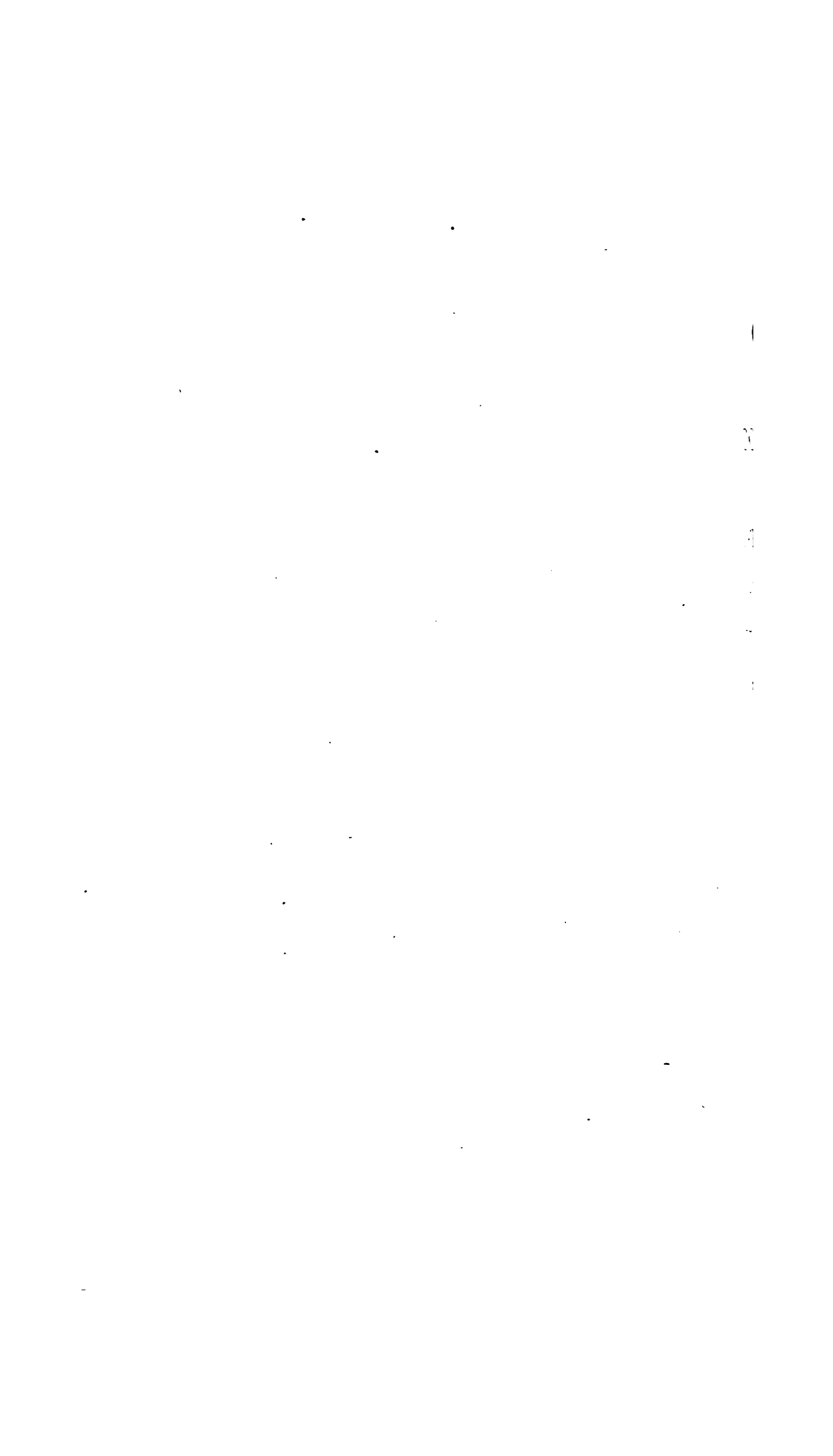
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Anna P. Treadwell





REPORTS
OF
CASES
DECIDED IN THE
HIGH COURT OF CHANCERY,
BY
THE RIGHT HON. SIR LANCELOT SHADWELL,
VICE-CHANCELLOR OF ENGLAND.
WITH NOTES AND REFERENCES
TO BOTH ENGLISH AND AMERICAN DECISIONS.

BY JOHN A. DUNLAP,
COUNSELLOR AT LAW.

VOL. XVI.
CONTAINING SIMON'S CHANCERY REPORTS, VOLS. 9 & 10.
1837, 1838, 1839, 1840, WITH A FEW CASES IN 1841 AND 1842.

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OF LINCOLN'S INN, ESQ. BARRISTER AT LAW

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LORD COTTENHAM, LORD CHANCELLOR.

LORD LANGDALE, MASTER OF THE ROLLS.

SIR LANCELOT SHADWELL, VICE-CHANCELLOR.

SIR JOHN CAMPBELL, ATTORNEY GENERAL.

**SIR R. M. ROLFE & SIR THOMAS WILDE,
SOLICITORS GENERAL.**

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CASES IN CHANCERY

BEFORE

THE VICE-CHANCELLOR.

BRASIER v. HUDSON.

1837: 21st and 22d November.—Vendor and Purchaser; Receipt clause.

A. being entitled to 4500*l.* secured on his father's estate, and payable after his father's death, borrowed 1500*l.* of B. and assigned to him the 4500*l.* with power to sell the same and to give an effectual discharge to the purchaser. A. afterwards borrowed money of other persons, and gave similar securities to them. The estate was subsequently sold under the father's will. Held, that the purchaser of the estate could not safely pay the whole 4500*l.* to B. on his sole receipt; but that all the other persons who had charges on that sum must be made parties to the conveyance and give receipts for the portions of it to which they were respectively entitled.

A. being entitled to a sum of money payable at a future time, assigned it to B. and C. (who were bankers and copartners) to secure moneys to be advanced, by them or either of them, to A. C. survived B. Held that, as the security was made to B. and C. jointly, C. alone could give a sufficient discharge for the whole amount due on the security:

THE late H. Z. Jervis having devised his estates to the plaintiffs in trust to sell, the plaintiffs agreed to sell part of the estates to the defendant: and the bill was filed to compel a specific performance of the contract. At the hearing of the cause, a specific performance was decreed, and it was referred to the master to settle the conveyance. The master settled the conveyance accordingly, and made the personal representatives of certain persons named Francis Rufford, Thomas Biggs, William Walker and Henry Jervis the son of H. Z. Jervis and Sarah his wife, parties to it. On the hearing of exceptions taken by the plaintiffs to the master's report, the question was whether the personal representatives of any of those persons *were necessary parties. [*2] That question arose under the following deeds.

By indentures of lease and release dated the 26th and 27th of April, 1803, part of the estate agreed to be sold, was conveyed to trustees for a term of 1000 years, in trust, within six months after the decease of the survivor of H. Z. Jervis and Sarah his wife, to raise, by sale or mortgage of the term, the sum of 4500*l.* with interest from the day of the decease of the survivor of H. Z. Jervis and Sarah his wife, and to pay the same to Henry Jervis, his executors, &c., and, subject thereto, to H. Z. Jervis in fee.

By an indenture of the 19th of April, 1806, Henry Jervis assigned the 4500*l.*

1837. *Brasier v. Hudson.*

and interest to Thomas Gent, by way of mortgage, for securing the repayment of 1500*l.* with interest : and the trustees assigned the term of 1000 years to H. Pipe, in trust to raise the 4500*l.* by sale or mortgage, and, after retaining the expenses of the trust, to pay Gent the 1500*l.* and interest and the expenses incurred by him in the receipt and recovery thereof, and to pay the overplus to Henry Jervis : and Gent and Pipe, or either of them, their or either of their executors, administrators or assigns were empowered, in case default should be made in payment of the 1500*l.* to sell the 4500*l.* and the term ; and it was declared that the receipts of them or either of them, their or either of their executors, administrators or assigns should be good receipts or discharges to the purchaser ; and that in case Gent, his executors, &c. should receive the 4500*l.* and interest, or any part thereof, by virtue of the assignment, he and they should stand possessed of the moneys to arise [*3] from the sale or sales thereof, upon trust to retain and *pay to himself and Pipe the expenses of the sale, and in the next place to retain the 1500*l.* and interest, and to pay over the residue of the trust moneys (if any) to Henry Jervis, his executors, &c. The deed also contained a power of attorney from Henry Jervis to Gent, enabling Gent to sue for and receive the 4500*l.*, and to give receipts, releases, &c. for the same.

By an indenture of the 11th of June, 1806, made between Henry Jervis of the one part, and Francis Rufford and Thomas Biggs, bankers and copartners, of the other part, Henry Jervis assigned the 4500*l.* to Rufford and Biggs, with full power to them or the survivor of them, his executors, administrators and assigns, in the name or names and as the attorney or attorneys of Henry Jervis, his executors and administrators, to receive and enforce payment of the 4500*l.* and to give acquittances or discharges for the same, without any obligation on the part of the persons paying the same to see to the application or be answerable for the misapplication or non-application of the moneys paid by them respectively : and it was declared that Rufford and Biggs, their executors, &c., should stand possessed of the 4500*l.*, upon trust, after reimbursing Pipe all the expenses which he should be put to by reason of the trusts of the deed of April, 1806, and after paying Gent the 1500*l.* and interest, to pay to W. Walker a bond-debt of 500*l.* due to him from H. Jervis, and then to retain their costs of executing the trust thereby reposed in them, and, in the next place, to retain to themselves, or the survivor of them, his executors or administrators, all sums of money, not exceeding 1500*l.*, which, at the time of receiving the thereby assigned moneys, should be due to them, or the survivor of them, or the executors, administrators or assigns of [*4] such survivor, by *reason of advances made to Henry Jervis, and upon trust to pay the overplus to Henry Jervis, his executors, &c. : and Rufford and Biggs, or the survivor of them, his executors or administrators, were empowered, without any consent or concurrence on the part of Henry Jervis, his executors, &c. to raise, by sale or mortgage of the 4500*l.*, or any part thereof, such sums of money as, from time to time, should be due to Walker, his exe-

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cutors, &c., and also to Rufford and Biggs, or the survivor of them, or the executors, &c., of such survivor, from Henry Jervis, his heirs, executors, &c.: and it was declared that the persons who should become the purchasers, or advance any sums of money upon the security of the 4500*l.*, and pay their money to Rufford and Biggs, or the survivor of them, or the executors, &c., of such survivor, should not be obliged to see to the application of such money, or be answerable or accountable for the misapplication or non-application thereof, or be required to see that any previous notice of sale or mortgage had been given to Henry Jervis, his executors, &c., or be obliged to inquire whether such sale was necessary for the purposes thereinbefore expressed; and that all receipts for the purchase or mortgage money which should be given by Rufford and Biggs, or the survivor of them, his executors, &c., should be good and effectual discharges for the sums therein acknowledged to be received, and that every sale which should be entered into, and assignment which should be executed by Rufford and Biggs, or the survivor of them, his executors, administrators or assigns, should be binding and conclusive on Henry Jervis, his executors, administrators and assigns.

The 1500*l.* due to Gent was paid by Richard Croydon, and thereupon by an indenture of the 27th of *April, 1809, made between Gent of [*5] the first part, Pipe of the second part, Henry Jervis of the third part, Croydon of the fourth part and John Hudson of the fifth part, Gent and Henry Jervis assigned the 4500*l.* to Croydon; and Henry Jervis authorized and empowered Croydon, his executors, administrators and assigns, either in his or their own name or names, or in the name or names and as the attorney or attorneys of H. Jervis, his executors or administrators, to recover and receive the 4500*l.* and interest, and to give receipts, acquittances and discharges for the same to any person or persons whomsoever: and Pipe assigned the term of 1000 years to Hudson, in trust to raise the 4500*l.*, by sale or mortgage, and, after retaining the expenses of the trust, to pay the 1500*l.* and interest to Croydon, and to pay the overplus (if any) to Henry Jervis: and Croydon and Hudson, or either of them, their or either of their executors, administrators or assigns, were empowered to sell the 4500*l.* and the term; and it was declared that the receipts of them, or either of them, their or either of their executors, administrators or assigns, should be good discharges to the purchasers thereof; and that if Croydon, his executors, &c., should receive the 4500*l.* under the assignment thereby made of that sum, then he and they should stand possessed of the moneys to arise from the sale, upon trust, to retain the expenses of the sale, and also the 1500*l.* and interest, and to pay the overplus (if any) to Henry Jervis, his executors, &c.: and it was declared that the person or persons who should become the purchasers, or advance any money upon the security of the 4500*l.* and premises thereby assigned, and pay their purchase money, or the money advanced by them, to Croydon and Hudson or the survivor of them, or the executors, &c., of such survivor, should not be *obliged to see to the application of the same money, or be answerable or [*6]

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accountable for the misapplication or non-application thereof, or be obliged to inquire whether the sale was necessary for the purposes thereinbefore expressed, and that the receipts which should be given for such purchase or mortgage money, by Croydon and Hudson, or the survivor of them, his executors, &c., should be good and sufficient discharges for the sum or sums thereby acknowledged to be received, and that every such sale or assignment which should be made by Croydon and Hudson, or the survivor of them, his executors, &c., should be binding and conclusive on Henry Jarvis, his executors, &c. (a)

H. Z. Jarvis survived his wife, and died in 1821.

By an indenture of the 9th of March, 1824, made between the plaintiffs, and Henry Jarvis and certain other persons, it was agreed, amongst other things, that a suit which had been instituted, by Henry Jarvis, against his late father, should be compromised and put an end to, that the father's estates should be sold pursuant to his will, and that Henry Jarvis should, if required, concur in the sale and conveyances of the estates, but that the concurrence of him, his heirs, executors or administrators, should not be deemed necessary for perfecting the title of the purchaser, the same being intended for the further satisfaction and content only of the purchaser.

Henry Jarvis afterwards died. Rufford, Biggs and Walker were dead also.

Biggs survived Rufford.

[*7] *The 4500*l.* not having been raised, and the sums secured by the indentures of June, 1808, and April, 1809, being still unpaid, the master made not only Croydon and Hudson, but also, as has been before mentioned, the personal representatives of Rufford, Biggs, Walker and Henry Jarvis, parties to the draft of the release and assignment of the estate agreed to be sold to the defendant. The plaintiffs excepted to the report for the following reasons:

First. Because the representatives of Rufford and Biggs were made parties to the draft for the purpose of discharging part of the hereditaments comprised therein, from the 4500*l.* or from such part of that sum as they were interested in under the indenture of the 11th of June 1808; whereas the representatives of Rufford and Biggs, or of either of them, were not necessary parties to the draft, because, under the indenture of the 27th of April, 1809, Croydon, who was made a party to the draft, was entitled to receive the whole of the 4500*l.*, and was empowered to give a good and sufficient receipt and discharge for the same, and to release and discharge therefrom the hereditaments charged therewith; and, moreover, he was the only necessary directing party, to the person in whom the term of 1000 years was vested, to assign the same to the defendant, or as he should direct.

Second. Because the representatives of Walker were made parties to the draft, for the purpose of discharging part of the hereditaments from the bond-

(a) All the above deeds were correctly copied from the papers in the cause.

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debt of 500*l.*, further secured on the 4500*l.* by the indenture of the 11th of June, 1808; whereas they were not necessary parties, as well on the grounds stated in the first reason, as because Walker was no party to the indenture of the 11th of June, 1808, nor was any estate or interest in the [*9] hereditaments vested in him, nor was any part of the 4500*l.* made payable to him, his executors, administrators or assigns, thereby.

Third. Because the administrator of Henry Jervis was made a party to the draft for the purpose of discharging part of the hereditaments from the residue of the 4500*l.* after payment of the charges to which the same had been subjected by Henry Jervis; whereas he was not a necessary party, as well on the grounds stated in the first reason, as because, by the indenture of the 9th of March, 1824, it was provided that the concurrence of Henry Jervis, his heirs, executors or administrators, in any sale, conveyance or assignment to be made as in the same indenture mentioned, should not, in any wise, be deemed necessary for the perfecting the title of the purchaser of the premises therein comprised.

Mr. Knight Bruce and *Mr. Coste*, for the plaintiffs, in support of the exceptions:—By the draft of the conveyance as now settled by the master, the 4500*l.* is not made payable to Croydon alone, but is parcelled out amongst the representatives of the several *puisne* incumbrancers. Croydon is the first incumbrancer on the sum in question; and we contend that a complete conveyance can be made to the purchaser, if the whole sum is paid to Croydon and he gives a receipt for it. The language of the power of attorney in Croydon's deed, is much more extensive than that which is usually found in deeds of the like nature. Croydon is appointed the attorney not only of H. Jervis, but also of his executors and administrators, and is authorized, either in his own name or in the name or names of H. Jervis, his executors or [*9] administrators, to recover and receive the 4500*l.* and to give receipts, acquittances and discharges for the same to all or any persons or person whomsoever: and in a subsequent part of the same deed, the receipt or receipts of Croydon and Hudson or either of them are declared to be good discharges to the purchaser. The word "purchaser," means any person who should pay the money. Croydon claims under Gent, who had the same powers as Croydon has. The court has no jurisdiction, in this suit, to compel the representatives of the subsequent incumbrancers to join in the conveyance; and, if they are necessary parties, a new bill must be filed against them.

Biggs survived Rufford, and, at all events, the representatives of the latter, are not necessary parties to the conveyance. Their security was made to them as joint tenants not as tenants in common, and the power of giving receipts was given to them or the survivor of them.

Then with respect to Walker's representatives; there can be no ground whatever for requiring their concurrence. No estate or interest, either in the 4500*l.* or in the term of 1000 years, was limited to Walker; the payment

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of his debt, was provided for by a deed to which he was not a party : he, therefore, cannot claim the benefit of that deed.

At all events the representatives of Henry Jervis are not necessary parties, as he has declared that the receipts of Croydon and of Rufford and Biggs or the survivor of them, should be sufficient discharges for himself, his executors and administrators.

[*10] *Mr. *Jacob* and Mr. *T. H. Hall* appeared for the defendant.

THE VICE-CHANCELLOR :—Supposing that the power of attorney is to be considered, in a court of equity, as remaining in force notwithstanding the death of Henry Jervis the party who gave that power, the question is whether, on account of the difference in the language used in the two parts of the deed, the party must not be taken to have intended that there should be an inherent difference between receipts given under the power of attorney, and those given under what is usually called the receipt clause. I do not think that the court has ever decided that a receipt given under the former, is to be taken as equivalent to a receipt given under the latter.

By the deeds in this case, the receipts of Croydon and the other incumbrancers on the 4500*l.*, are made sufficient discharges in the event only of the principal and interest due to them respectively, being raised by sale or mortgage either of the 4500*l.* or of the term of 1000 years. Consequently the receipt clauses in those deeds, are not applicable to the present case, where the money for which receipts are to be given, has been raised, not by sale or mortgage of either the 4500*l.* or the term, but by a sale of the inheritance of the estate. I think, therefore, that Croydon cannot give a discharge for the whole 4500*l.*; and that all the other persons whom the master has made parties, except Rufford's representatives, ought to remain so.

Although the deed executed to Rufford and Biggs was to secure sums advanced by them or either of them, yet, as the security was made to them jointly; the representative of the survivor is capable of giving a
 [*11] discharge *for the whole, as he is a trustee for the one who died first; and, consequently, Rufford's representatives are not necessary parties to the conveyance.

Trustees ; Power to appoint trustees.

A lady being entitled to 2,000*l.* charged on her father's estates and payable after the decease of her surviving parent, it was agreed, by her marriage articles, that, in the settlement to be made in pursuance thereof, there should be contained a power enabling her father, in his lifetime, or his executors, within six months after the 2000*l.* should become payable, to invest that sum, in the usual securities, in the names of trustees to be for that purpose appointed, and for the trustees or the survivor of them, from time to time, with the consent of the husband and wife or the survivor, or of their own proper authority, as the case should happen, to change the securities, and to pay the interest to the husband for life, to the wife for life, for her separate use, and to pay the principal to their children, and, in default of children, to the wife's next of kin or personal representatives. The husband died leaving his wife and four infant children surviving.

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No trustees of the 2000*l.* having been appointed, the wife after her husband's death, appointed two persons to be such trustees. Held that the appointment ought to have been made by the husband and wife jointly, and that the appointment made by the wife, was invalid.

ANN EMMA JERVIS, the only younger child of H. Z. Jervis and Sarah his wife, being entitled to 2000*l.* charged upon the estate agreed to be sold and payable after the decease of her surviving parent, by marriage articles dated the 24th of July, 1809, and made between Henry Jones Williams of the first part, H. Z. Jervis of the second part, and Ann Emma Jervis of the third part, after reciting that a marriage was intended to be solemnized between H. J. Williams and Ann Emma Jervis, H. J. Williams covenanted with H. Z. Jervis to settle certain estates in Montgomeryshire to the uses therein expressed : and it was agreed that, in the settlement to be made in pursuance of the articles, there should be contained a power enabling H. Z. Jervis, in his lifetime, or his executors and administrators, within six months after the 2000*l.* should become due and payable, to invest that sum in the usual securities, in the names of *trustees to be for that purpose appointed*, and for the trustees or the survivor of them, from time to time, with the consent of H. J. Williams and *Ann [*12] Emma his intended wife or the survivor of them, or of their own proper authority, as the case should happen, to call in the principal, and place the same out again on such new or other securities as they or he should think proper, and pay the income thereof to H. J. Williams during his life, and, after his decease, to permit Ann Emma Jervis to receive the income during her life, and her receipt alone, notwithstanding her future coverture and whether covert or sole, to be, from time to time, a sufficient discharge to the trustees, and the same not to be liable to the debts, control or engagements of any future husband ; and, after the decease of the survivor of H. J. Williams and Ann Emma Jervis, to pay the principal to such one or more of the children of the intended marriage in such shares, manner and form, or to such other uses and purposes as Ann Emma Jervis, notwithstanding her coverture, should, by deed or will, appoint, and, in default of such appointment, upon trust to pay the 2000*l.*, in equal proportions, to all the children of the marriage, at their respective ages of twenty-one years or days of marriage, which should first happen ; and, in case there should be no such children, or, being such, all of them should die before their portions became payable and no appointment should be made under the power given to Ann Emma Jervis, then upon trust to pay the 2000*l.* and the interest, dividends and produce thereof, to her next of kin or personal representatives.

The marriage took effect, but no settlement was executed in pursuance of the articles.

Mr. Williams died in 1819, leaving his wife and four children by her him surviving. In 1823 Mrs. Williams married William Butler ; and no trustees of the 2000*l.* having been appointed, an indenture dated the 31st of *July, 1835, (at which time two of Mrs. Butler's children by her [*13] former husband were infants,) was made between the plaintiffs, who

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were the executors and trustees of the will of H. Z. Jervis, of the first part, Mrs. Butler of the second part, and J. Miller and T. Beeston of the third part; and, thereby, the plaintiffs, (as the executors of H. Z. Jervis,) and Mrs. Butler, in exercise of the power or powers to them, or any or either of them for that purpose given by the articles, (a) and of all and every or any other powers or power, &c., appointed Miller and Beeston to be the trustees in whose names the 2000*l.* should be invested upon the trusts thereof declared by the articles. By a deed poll dated the 18th of December, 1836, and under the hands and seals of the plaintiffs and Mr. and Mrs. Butler, after reciting that it had been objected that the indenture of July, 1835, was not an effectual appointment of Miller and Beeston to be trustees of the 2000*l.*, and that Mr. Butler ought to have been a party thereto, and that he was desirous of removing such objection: the plaintiffs and Mr. and Mrs. Butler, in exercise of all powers enabling them in that behalf, appointed Miller and Beeston, their executors, administrators and assigns, to be the trustees in whose names the 2,000*l.* should be invested, and directed that that sum should be paid to them, their executors, administrators and assigns, and be invested by them, in their names, in manner and upon the trusts declared by the articles thereof.

The defendant objected to the draft of the conveyance as settled by the master, because the 2000*l.* was charged upon the estate therein comprised, and that sum was, by the articles, made subject to certain trusts, and some person or persons competent to receive the same and to discharge the premises therefrom, ought to have been made a party or parties to the conveyance: whereas no such person or persons was or were a party or parties thereto.

Mr. *Jacob* and Mr. *T. H. Hall* for the defendant, in support of the exception:—The question is, who had the right to nominate the trustees of the 2000*l.*? The marriage articles were a contract between the father and daughter and the intended husband. They would be the persons to nominate the trustees, if they were all living; but the father and Williames are dead. If trustees are to be appointed and all the parties interested in the fund are *sui juris*, they are the persons to appoint the trustees: but, here, the parties interested in the fund are Mrs. Butler, and her children by her first husband, some of whom are infants. Mr. Butler joined in the appointment; but he had no interest in the fund. The consequence is that the appointment that has been made, is invalid.

Mr. *Knight Bruce* and Mr. *Coote*, for the plaintiffs:—The power to appoint new trustees, is usually reserved to the tenant for life of the property. Mrs. Butler is the surviving tenant for life of the fund in question; and, as it is settled to her separate use, she is a *feme sole* with respect to it. Therefore the appointment of the trustees, has been made by the proper person.

THE VICE-CHANCELLOR:—The question before me, is a mere question of conveyance. Of course a title cannot be made unless the 2000*l.* is paid

(a) No such power was given, in express terms, by the articles.

 1839.—*Bainbridge v. Bainbridge*.

off; but the only question is, what hand shall appear, on the conveyance, as the hand to receive the money; and, therefore, the question [*15] is a mere question of conveyance, as I understand it.

Then the next question is, whether it is competent, to the party who alone is now alive, to nominate trustees under the articles? Now I am not called upon to decide the question, whether, (if it is said, upon articles, that trustees are to be appointed, and that is all) who are the persons to appoint those trustees; because it rather appears to me that these articles themselves do furnish an answer to the question, and for this reason, namely because they provide that, in the settlement, there shall be contained a power enabling the father or his executors, within a certain time, to invest the sum of 2000*l.*, at interest, in government or real securities, in the names of trustees to be for that purpose appointed; and then the articles proceed thus: "and for the trustees or the survivor of them, from time to time, with the consent and approbation of the said H. J. Williames and Ann Emma, his intended wife, or the survivor of them, or of his or their own proper authority, as the case shall happen, to place the same out again on such new or other stocks or funds, or on government or real securities, as they or he shall think proper." Here then the articles point to this, namely, that there is to be an operation upon the trust money, after the payment, with the consent of the husband and wife or the survivor, or by the trustees or the survivor; and there is no allusion to anything to be done by the husband and wife or the survivor, till after the time at which the money has been invested.

I am not bound to give any opinion as to whether the concurrence of the the father was necessary. I do not think it was; but I am not bound to give my opinion on that question. I cannot, however, but think that according to the true construction of these articles, the trustees, in the first instance, ought to have been appointed by the husband and wife jointly; and I am not at liberty to say that it was the intention of the parties that if the trustees were not nominated by the husband and wife jointly, the nomination by either of them should be good: and therefore, my opinion is that what has taken place has not cured the difficulty; but it may be remedied by an order in a short cause.

Allow the exception; and refer it back to the master to review his report.

BAINBRIDGE v. BAINBRIDGE.

1837: 24th November.—Will; Construction.

A testatrix being entitled to her son's residuary estate (the amount of which was unascertained at her death) bequeathed as follows: "If any debts due me at my decease, I request my executors will collect and pay into the hands of my children." Held that the son's residue passed by the bequest.

Mrs. BOLT, being the residuary legatee of her deceased son, made her will containing the following bequest:—

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"If any debts due to me at my decease, I request my executors will collect and pay into the hands of my children." At Mrs. Bolt's death the amount of her late son's residuary estate was unascertained, and no part of it had been paid over to her. The question at the hearing of the cause, was whether the son's residuary estate passed by the above mentioned bequest.

Mr. *Knight Bruce* and Mr. *L. Wigram* for the plaintiffs.

Mr. *Wray* and Mr. *Turner* for the defendants.

[*17] *THE VICE-CHANCELLOR :—If the son's executor had become bankrupt whilst the residue remained in his hands, it would have been a debt in equity, and would have been provable, by the mother, as a debt due to her from his estate. I am of opinion, therefore, that the son's residue did pass, by the mother's will, as a debt due to her.

 IRVING v. THOMPSON.

1839: 25th and 31st July.—Discovery; Pleading; Parties.

If a person who is not a party to an action is made a party to a bill of discovery in aid of the defence to the action, he may demur, notwithstanding the bill charges that he is interested in the subject of the action.

The cases of *The Bishop of London v. Fytche*, 1 Bro. C. C. 96, and *Fenton v. Hughes*, 7 Ves. 267, observed upon, and the reports of those cases corrected.

THE plaintiff was the chairman of the Alliance Marine Insurance Company; and, as such, was empowered to sue on behalf of the company. The defendants were H. Thompson and C. Kruger. The bill alleged that, in August, 1837, Thompson effected a policy of insurance, with the company, on a foreign ship, called the *Gustav*, and her cargo, from Dantzic to Hull; that the ship was lost on her voyage, by the perils of the sea; that the defendants claimed to be solely and exclusively interested in all the benefit to be derived from the policy, and had produced certain papers, to the company, in support of a claim made, by the said defendant, (a) as after mentioned, for the full amount insured by the policy, and, by one of such papers, it was alleged that the goods mentioned in the policy and to the amount therein mentioned, were on board the ship previously to and at the time when she was lost; that the company had, recently and long since the policy was effected, discovered and the fact was that the ship was unseaworthy when she left

Dantzic, and that the goods mentioned in the policy were never on
[*18] board her; or, if they had been put on board, that they were *unshipped and were not on board when she was lost; that the shipment of goods mentioned in the policy was a fraudulent shipment; that, in Trinity term then last, Thompson commenced an action, in the court of exchequer, against the plaintiff, for the purpose of recovering the sum insured from the company,

(a) So in brief.

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and had averred in his declaration the interest in the ship and cargo to be in himself and Kruger or one of them. The bill then contained various charges which, if admitted, would have shown that the vessel was unseaworthy, and that the goods were not on board when she was lost; and it prayed for a discovery of the matters alleged, and a commission to examine witnesses abroad in aid of the defence to the action, and for an injunction to restrain the action. Kruger put in a general demurrer to the bill.

Mr. *Knight Bruce* and Mr. *Willcock*, in support of the demurrer, said that the bill was filed, not to have the policy delivered up, which was relief, but merely for discovery in aid of the defence to the action; that no person who was not a party to the record at law, ought to be made a party to such a bill, and, therefore, Kruger had been improperly made a party to the bill in this case; that consistently with the allegations in the bill, Kruger might have no interest in either the ship or cargo, but might be a mere witness. *Fenton v. Hughes*, (a) *Glyn v. Soares*, (b) *Tooth v. The Dean and Chapter of Canterbury*. (c)

Mr. *G. Richards* and Mr. *Stinton* in support of the bill, said that it was sufficiently averred, in the bill, that Kruger was interested in the subject matter of the action; that though, in general cases, where [*19] discovery was sought in aid of a defence at law, it was not allowable to make any person who was not a party to the record at law, a party to the record in equity, yet bills for discovery in aid of the defence to actions on policies of insurance were excepted from the general rule, and for the last fifteen years, it had been the practice in the court of exchequer, to make all the persons who were interested under the policy on which an action was brought, parties to the bill of discovery, whether they were parties to the record at law or not; that, formerly, declarations in actions on policies of insurance, contained several counts, one averring the interest to be in A. another averring it to be in B. and so on, but, since the new rules for regulating pleadings at law had been made, declarations in actions on policies of insurance, were not allowed to contain more than one count on the same policy, and, ever since, the practice had been to aver that A. B. and C. some or one of them, were or was interested in the vessel insured; that, when the bill in this case averred that Thompson and Kruger, or one of them, claimed to be interested in the ship and cargo, it adopted the language of the declaration, and could not, consistently with truth, have averred otherwise. *Bell v. Ansley*, (d) *Glyn v. Soares*, (e) *Janson v. Solarte*, (f) *Kensington v. White*. (g)

THE VICE-CHANCELLOR:—I should like to take a little time before I decide this case; for I wish to consult the registrar's book as to a case that I have in my mind; and I should feel a delicacy in deciding anything that might militate against the decision of the Lord Chief Baron, in [*20]

(a) 7 Ves. 287.

(b) 3 Myl. & Keen, 450. See 467, 469, 471.

(c) Ante, Vol. 3, p. 49.

(d) 16 East, 141.

(e) 1 Youn. & Coll. 644.

(f) 2 Youn. & Coll. 127.

(g) 3 Price, 164.

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Glyn v. Soares, more especially as I understand that an appeal from his decision in that case, is now pending in the house of lords.

31st July.—THE VICE-CHANCELLOR :—The bill is filed by the chairman of the Alliance Marine Insurance Company, who, by the act of parliament by which the company was established, is authorized to sue on behalf of the company ; and it represents that the defendant Thompson, on the 26th of August, 1837, caused a policy to be effected, with the Alliance Company, on the ship *Gustav* (which appears to be a foreign vessel) and on certain goods on board it. The bill then states that Thompson and a person of the name of Kruger, claimed to be solely and exclusively interested in all the benefit to be derived from the policy of insurance, and that Thompson and Kruger had produced certain papers to the Alliance Company in support of the claim “made by the said defendant as hereinafter mentioned :” that, I suppose means Thompson. And then it states that the company have, recently and long since the policy was effected, discovered, as the fact is, that the goods in question were either never shipped, or, if they were shipped, they were unshipped before the vessel sailed : and then it states that Thompson, in Trinity term last, commenced an action, on the plea side of the court of exchequer, against the plaintiff, for the purpose of recovering, from the Alliance Company, a sum of 680*l.* upon the policy, “and has delivered a declaration in such action, and, in such declaration, has averred the interest in the ship and in the goods comprised in the policy, to be in himself, the said defendant, W. Thompson, and Kruger, or one of them.” and then the bill avers that the ship was lost by the perils and dangers of the sea ; and when it states that the [*21] *plaintiff, on behalf of the company, had requested Thompson to discontinue the action : and then a variety of circumstances are charged to show that there has been a fraud committed upon the Alliance Company. Nothing particular turns upon that. Then it charges possession of books and papers, and prays a discovery and injunction : and to this bill a general demurrer has been put in on the part of Kruger.

It was argued before me that this demurrer ought to be overruled, and mainly upon the authority of a case that recently came before the Lord Chief Baron of the court of exchequer, the case of *Glyn v. Soares*. The circumstances of that case are extremely long and extremely complicated, and I should be very unwilling to be thought, for the purpose of deciding the case now before me, to give any opinion upon the judgment which was pronounced in that case, especially as his lordship’s decision is, as I understand, now depending before the house of lords upon appeal. The facts of the case of *Glyn v. Soares*, are stated both in *Mylne & Keen* and also in the reports of *Younge & Collyer* in the court of exchequer ; and I should mention that it occurred to me, in reading the case as it is reported in *Mylne & Keen* that, in page 453, there is a passage so printed as certainly to create a difficulty to any one who reads it for the first time. It is this : in p. 453 it is stated : “that, in filing this bill of discovery, the plaintiffs, the

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bankers, (that is Glyn & Co.) acted, merely, as they were advised that as the agents of the plaintiff Edward Richardson they were bound to do, and by the directions of Edward Richardson, who, as the party beneficially interested, had the sole management of the action in aid of the defence to which the discovery was sought :” whereas what is meant to be expressed, is that he had “the sole management of the defence to the action ; be- [*22] cause he was the party who was sued at law. I only mention it because it created a very great difficulty to me when I was reading it over, and it is evidently a mistake arising from the omission of some words. However, the case of *Glyn v. Soares* depended on a great variety of complicated circumstances, and it is not my intention to give any opinion upon the judgment. But I cannot help observing upon some parts of it, which appear to me to have proceeded on a mere misapprehension of the circumstances of the cases to which the learned Lord Chief Baron alludes.

His lordship, in pages 683 and 684, speaks, very largely, about the case of *Fenton v. Hughes* ; and, after stating the case, says : “ Lord Eldon took time to consider of it. What is his judgment ? He says that he has looked with great anxiety into the bill, to see if he could discover any sort of interest that Bate had to make him any thing but a witness ; and he goes through the topics to show that Bate was clearly a witness at law for the party who filed that bill ; that if he could not be a witness on the other side, by reason of any interest yet undiscovered, that was for the advantage of the plaintiff in equity ; and he comes to the conclusion that there is not such a charge of interest in Bate as justified him in retaining the bill against him.” Then Lord Abinger goes on to say this ; “ Now, if the bill had stated that the plaintiff in the action and Bate had agreed to divide the profits, or if it had stated that Bate had some such interest in the suit as identified him in interest with the plaintiff in the action, though not himself a plaintiff on the record, I should have thought it probable, from Lord Eldon’s judgment, that he would not have allowed the demurrer.” What then “were the facts of the [*23] case in *Fenton v. Hughes* ? I myself had occasion, at a certain time, to send for the original brief in that cause. Mr. Bate was the person who demurred : and in this bill of *Fenton v. Hughes* which Lord Eldon read over and yet was unable to discover anything that showed that Bate had any interest other than that as a witness, it was charged that Bate was interested in the success of the action and was to be entitled to all or some part of the money to be recovered thereby, and that he was or would be liable to pay all or some part of the costs in case Hughes should not recover, or that there had been some agreement, bargain or understanding, between Bate and Hughes and the attorney who carried on the action, respecting the costs of such action, which was carried on at the risk and expense of Bate. So then there were actually those very allegations in the bill which Lord Abinger supposes that, if they had been in it, Lord Eldon would have come to a different conclusion from that which he adopted. Whereas Lord Eldon, see-

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ing all those very allegations in the bill, did deliberately come to the conclusion which he did adopt.

Then Lord Abinger, in another part of his judgment, relies upon the case of *The Bishop of London v. Fytche*, and he says, in p. 685: "There is a case, however, which appears to me to decide the very question, that is, the case of *The Bishop of London v. Fytche and Eyre*."^(a) Now that was nothing more than this, that Mr. Fytche, being the patron of a living, presented a clerk, and the bishop of London refused to institute him on the ground of a simoniacal transaction, upon which Mr. Fytche brought a *quare impedit* against the bishop, and then the bishop filed a bill of discovery. [*24] Now Lord Abinger assumes that the bill of discovery was filed both against Fytche, the patron, and Eyre, the clerk; and he says: "the bishop filed a bill of discovery both against Fytche and Eyre, that is to say, against both the owner of the advowson and the clerk, suggesting that a bond had been given to place Eyre under an obligation of resigning at the request of the patron; and he required a discovery of that fact." Then his lordship speaks about the importance of the case and the way it was argued, and so on; and he says, in page 687: "From this it seems clear that the clerk was no more a party to the record from his name being inserted in the declaration, than any individual is a party whose name is found in an allegation of special damages by reason of the loss of his custom and trade. Therefore the case of *The Bishop of London v. Fytche* is a direct decision that, where a party is interested in the subject matter of the suit, a bill of discovery may be sustained against him, though not a party to the record at law, as well as against an individual who is a party on that record." But what was the fact? Why the fact was that the bill was filed against Mr. Fytche alone; and, on the 13th of June, 1781, Lord Thurlow overruled the demurrer of Fytche, the sole defendant, who was the patron; and, consequently, all the force and authority which seems to be derived from that case, is derived from what is evidently a mistake in the printed case in Brown; and which is a mistake of a very extraordinary kind; because, in the title of the case it would seem as if Fytche were the only defendant; but, then the reporter happens, in a subsequent paragraph, to say, the [*25] defendants,^(b) and from thence it was assumed that the clerk was the party who had demurred, and that Lord Thurlow overruled the demurrer of the clerk: and upon that which is a mere vain hypothesis, depending upon an assumption of that which turns out not to be a fact, Lord Abinger has mainly rested his decision in *Glyn v. Soares*.

The way in which, as I best recollect, I happened to become acquainted with the real facts of the case of *Fenton v. Hughes*, was this: in the year 1813, a bill of discovery was filed by Powell against Yeatts and another

(a) 1 Bro. C. C. 96.

(b) At the commencement of the report it is stated that the bill was filed by the bishop against the defendant the patron, and the clerk presented by him.

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person named Wellington, who was not a party to the action that had been brought; but there were certain charges in the bill, tending to show that Wellington had an interest in the subject of the action; and he demurred. The demurrer came on for argument, on the 2d of August, 1813, before Sir Thomas Plumer, V. C. (who at that time may be supposed to have been deeply imbued with the practice of the court of exchequer,) and, according to my note of what he said, he was very much affected by the charges that were contained in the bill in *Powell v. Yeatts*; and he said (I have my own note before me): "I feel myself tied down by admissions in the demurrer: it is not a case of a naked witness;" and the demurrer was overruled, but, in the meantime, the parties who were in support of the demurrer, procured the original brief in *Fenton v. Hughes*: and, according to my note, upon producing the brief in that cause, on the 14th of the same month of August, the demurrer was allowed. I have had the registrar's note book before the Vice-Chancellor, searched, and I find that it exactly tallies with my own note, namely, that, on the 2d of August, the demurrer was overruled, and, on the 14th of August, the demurrer was allowed, and allowed notwithstanding the *feeling which Sir T. Plumer had with respect [*26] to the charges in *Powell v. Yeatts*: because when the original brief in *Fenton v. Hughes* was produced, Sir Thomas Plumer was convinced that charges as strong as those which were contained in the bill in *Fenton v. Hughes*, could not have the effect of making a party who was not a party to the record at law, (whatever might be the charges as to his interest in the result of the action) to be considered, in this court, as anything more than a mere witness.

Now I have read over again, for the second time since the year 1813, a copy of the original bill in *Powell v. Yeatts*; and there is a long transaction stated, with respect to a dealing in wool, between Messrs. Powell, in Bristol, and two gentlemen who were partners, Osborn Yeatts and Samuel Yeatts. Then there was a sale; and then, to a certain extent, the sale was rescinded, and money was paid for what they call a rue(a) bargain, and, ultimately upon different dealings which were had with the wool, an action was brought, by Osborn Yeatts, for several sums of money to recover (I think it was stated) what he had paid to Messrs. Powell; and then the bill stated this: "that it has been agreed, between Osborn Yeatts and James Wellington, that James Wellington shall have some share of or benefit from the damages to be recovered in such action." Then it charged that there then or lately were, in the possession or power of Osborn Yeatts, William Ebsworth, and James Wellington, divers documents, &c., the production of which would verify the truth of what the plaintiff stated. Now it was upon *the hearing of what was so stated, in this bill, as to Well- [*27] ington, that Sir T. Plumer said he felt himself tied down by the

(a) A rue bargain is one which one of the parties is at liberty to rescind, on paying a certain sum to the other.

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admissions in the demurrer, and that it was not a case of a naked witness; but, nevertheless, when the still stronger allegations were produced which were found in the case of *Fenton v. Hughes*, Sir T. Plamer thought that if one of the defendants on the record in equity, was not a party to the action, all the allegations about his interest in the action, were perfectly immaterial; and so it was that he ultimately did allow the demurrer.

I see nothing in this case which tends to show that Kruger is anything else than a party who may have a benefit from the action, but he is not a party to the record at law: and I cannot but think, notwithstanding the doubts and difficulties which seem to have weighed in the mind of the Lord Chief Baron in *Glyn v. Soares*, that this is a perfectly plain case; that this is a case which is bound by the decision in *Fenton v. Hughes*, followed up, as it has been, by the decision in *Powell v. Yeatts*, and that, therefore, this demurrer must be allowed.

I should mention, with respect to the case of *Few v. Guppy* (which is referred to by the Lord Chief Baron, and is to be found in Mr. Hare's excellent work on Discovery,)(a) that, in the first instance, the motion was made (as I understand the report) in that cause only in which a bill of discovery had been filed, and the motion was made for the production of documents referred to in the schedule. I was of opinion that, as the motion was, in reality, against the *cestui que trusts*, the production could not be directed unless they [*28] were parties. *There was, to a certain extent, an appeal from that decision to Lord Lyndhurst, C.; but not strictly an appeal, because the motion before me had been made in the suit for discovery only; but the parties made their motion before the Lord Chancellor, both in the original cause out of which the bill of discovery grew, and also in the suit which was merely for discovery; and, upon that motion, the documents were ordered to be produced; because, the motion being made in that manner, it then did appear that those persons who were the *cestui que trusts*, and who were the plaintiffs in the original cause, were, in effect and virtually, the plaintiffs in the action; for the action, as I understand the report, had been brought by a person who was the trustee, at the suggestion of the *cestui que trusts*, and by virtue of an order made in the original cause; and so the documents were ordered to be produced. It appears to me, therefore, that what is attributed, by Mr. Hare, to Lord Lyndhurst, in his judgment on the case, was really extrajudicial; because, if the matter was so circumstanced before him that, at all events, the papers must be produced, it was not necessary to go into a statement of what his lordship's opinion was or might have been if the motion had been made before him only in the cause in which there was a bill of discovery.

However it does appear to me that, notwithstanding what has been stated so confidently with respect to the practice of the court of exchequer; the decisions to which I have referred actually bind this case.

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I should notice also that, although it has been stated that it has been constantly the practice, for the last fifteen years, in the court of exchequer, to file bills for discovery merely, against parties who are not the parties to the record at law, but who are averred to have an interest in the sub- [*29] ject of the action, it certainly did not appear to Lord Eldon that such was the practice of the court of exchequer; because, in the case of *Bromley v. Holland* (a) his lordship says: "So upon bills to have promissory notes delivered up in complicated cases and as the evidence may be lost; and so upon bills to have void policies of insurance delivered up, which, in the cases in the court of exchequer, is always prayed, and which may be, though they are not usually, followed up to a decree, upon this principle." Then he states the principle. He, therefore, evidently takes it for granted that the practice is, in the court of exchequer, to file a bill not merely to have a discovery, in which case the bill would only be against the person who is party to the record at law, but for the purpose of having the policy delivered up: and it is quite plain that, when the bill is so framed, all persons ought to be made parties who are charged on the face of the bill, or who appear on the face of the bill, to have an interest in the policy, although they may not be parties to the record at law. And, as none of the numerous bills that have been filed during the last fifteen years in the court of exchequer, have been produced, I cannot but think that there has been a mistake in the statement that has been made respecting the practice of that court; but, if there has not, my opinion is the mere practice of the court of exchequer, which, perhaps, has never been made the subject of discussion, cannot have the effect of altering that which I take to be the clear law of this court.

Therefore, upon the authorities which I have mentioned, I think I am bound to allow the demurrer.[1]

(a) 7 Ves. 3; see 20.

[1] The decision in this case was sanctioned by Lord Cottenham in *Kerr v. Rew*, 10 Sim. 370. So, in *Balls v. Margrave*, 3 Beav. 449, Lord Langdale, M. R., declared that he had "no authority to alter the practice of the court, which does not permit any person to be made a defendant to a bill for discovery, in aid of an action, who is not a party to that action."

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[*30] *BETWEEN THE ATTORNEY GENERAL, AT THE RELATION OF THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF LEEDS, INFORMANT, AND THE SAID MAYOR, ALDERMEN AND BURGESSES, PLAINTIFFS; AND JOHN WILSON AND OTHERS, DEFENDANTS.[1]

1837; 22d, 23d, 24th, 28th and 29th November.—Municipal Corporation Act; Jurisdiction; Pleading; Liability of Corporators individually.

This court still has jurisdiction to relieve against collusive alienations of corporate property, notwithstanding the remedy provided by the 97th section of the municipal corporation act: but as, by that act, corporate property is applicable to public purposes, the attorney general must sue, in such cases, in conjunction with the corporation.

The municipal corporation act has not destroyed the individuality of the old corporations, but has merely varied the mode in which the officers are to be chosen.

If some of the members of a corporation are instrumental in unlawfully dispossessing the corporation of its property, they are personally liable.

THE information and bill stated letters patent of King Charles the Second, by which the town of Leeds was incorporated, and the mayor, twelve aldermen, and twenty-four assistants were directed to be chosen out of the inhabitants, and the aldermen and assistants were to be called the common council of the borough, and were to aid, counsel and assist the mayor in the well ruling and governing of the borough and in all disposals of lands, tenements and profits to the same belonging, and in all matters and things appertaining or belonging thereto, for the better advantage, promotion, maintenance and benefit of the borough; and the mayor, aldermen and assistants were to have the government of all the real and personal property of the corporation, and power to dispose thereof as they should deem most beneficial for the good rule and government of the borough.

The information and bill further stated that, on the 30th of May, [*31] 1835, (previous to which day notice had *been given, in the house of commons, of the intention of the government to bring forward a bill for the reform of municipal corporations,) the corporation was possessed of 6500*l.* three per cents, then standing in the names of Edward Markland, deceased, and of the defendants Christopher Beckett and John Wilson, as trustees for the corporation, and of certain other property of small amount: that, on the 30th of May, 1835, a meeting of some of the members of the corporation was held, at which a resolution, purporting to be a resolution of the mayor, aldermen and assistants, was passed to the following effect: "resolved unanimously that the sum of 6500*l.* three per cent. consols, being the property of this corporation, be absolutely transferred and alienated to John Wilson, Esq., William Beckett, Esq. and John Blayds, Esq. (three of the defendants,) so as thereby to vest the same in those gentlemen, and divest this corporation of all power and control over the same," but no actual transfer or assignment was

[1] S. C. Post, 526.

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then made in pursuance of the resolution: that Wilson, Beckett and Blayde were informed of the resolution shortly after it was passed, and there was some understanding between them and some of the members of the corporation that they were not to be entitled to the stock for their own benefit, but were to hold and dispose of it for such purposes as the corporation or the court of the mayor, aldermen and assistants should thereafter direct: that several meetings, purporting to be courts of the mayor, aldermen and assistants, were held after the 30th of May and before the 9th of September, 1835, (being the day on which the royal assent was given to the act of parliament after mentioned,) but no resolution was passed respecting the stock.

The information and bill then stated that, by the municipal corporation act (5 & 6 Will. 4, c. 76,) it was *enacted that so much of all [*32] laws, statutes and usages, and so much of all royal and other charters, grants and letters patent then in force relating to the several boroughs named in the schedules to the act, as were inconsistent with the provisions of the act, should be repealed: Sect. 1.—That, after the first election of councillors under that act in any borough, the body corporate named in the schedules in connection with such borough, should take and bear the name of the mayor, aldermen and burgesses of such borough: Sect. 6.—That a mayor, alderman and councillors should be elected in a manner therein mentioned, and called the council of such borough: Sect. 25.—And that they should appoint a town clerk and treasurer of the borough: Sect. 58.—That, after the election of the treasurer, the rents and profits of all hereditaments, and the interest, dividends and annual proceeds of all moneys, goods, chattels and valuable securities belonging or payable to the body corporate, or to any member or officer thereof in his corporate capacity, should be paid to the treasurer of the borough, and all the moneys which he should so receive should be carried by him to the account of a fund to be called "*The Borough Fund*," and such fund, subject as therein mentioned, should be applied towards the payment of the salaries of the mayor and other officers of the borough and for certain other public purposes, and that the surplus of the fund, if any, should be applied, under the direction of the council, for the public benefit of the inhabitants and the improvement of the borough: Sect. 92.—That it should be lawful for the council first to be elected under the provisions of the act, to call in question all purchases, sales, leases and demises not made in pursuance of some such *bona fide* agreement or resolution made or entered into, in such manner as was *authorized [*33] by the act, before the 5th of June, 1835, and all contracts for purchase, sale, lease or demise of any lands, tenements and hereditaments, and all divisions and appropriations of the moneys, goods and valuable securities, or any part of the real or personal estate of which, on or before the said 5th of June, the body corporate of which they were the council, whether in their own right or as trustees for charitable or other purposes, were seised or possessed,

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which should have been made or contracted between the said 5th of June, and the day of the declaration of their election. Sect. 97.(a)

[*34] The information and bill next stated that Leeds was one of the

(a) The 94th section of the act, to which the 97th section refers, but which was not set forth in the information and bill, was as follows ; “ And be it enacted that it shall not be lawful for the council of any body corporate to be elected under this act, to sell, mortgage or alienate the lands, tenements or hereditaments of the said body corporate, or any part thereof, except in pursuance of some covenant, contract or agreement *bona fide* made or entered into on or before the 5th day of June in this present year, by or on behalf of the body corporate of any borough, or of some resolution duly entered in the corporation books of such body corporate on or before the said 5th day of June, or to demise or lease, except in pursuance of some covenant, contract or agreement *bona fide* made or entered into on or before the said 5th day of June by or on the behalf of such body corporate, or in pursuance of some resolutions duly entered in the corporation books of such body corporate on or before the said 5th day of June, or except in the cases hereinafter mentioned, any lands, tenements or hereditaments of such body corporate, or any part thereof, or to enter into any new covenant, contract or agreement (except in the cases hereinafter mentioned) for demising or leasing any such lands, tenements or hereditaments, or any part thereof, for any term exceeding thirty-one years from the time when such lease shall be made, or, if made in pursuance of a previous agreement, then from the time when such agreement shall have been entered into ; and in every lease which the said council is not hereby restrained from making, there shall (except in the cases hereinafter mentioned) be reserved and made payable during the whole of the term thereby granted, such clear yearly rent as to the council shall appear reasonable, without taking any fine for the same ; provided nevertheless, that in every case in which such council shall deem it expedient to sell and alienate or to demise and lease for a longer term than thirty-one years, or upon different terms and conditions than those hereinbefore mentioned, any of the said lands, tenements or hereditaments, it shall be lawful for such council to represent the circumstances of the case to the lords commissioners of his majesty's treasury, and it shall be lawful for such council, with the approbation of the said lords commissioners, or any three of them, to sell, alienate and demise any of the lands, tenements and hereditaments of the said body corporate, in such manner and on such terms and conditions as shall have been approved by the said lords commissioners ; provided always, that notice of the intention of the council to make such application as aforesaid shall be fixed on the outer door of the town hall, or in some public and conspicuous place within the borough, one calendar month at least before such application ; and a copy of the memorial intended to be sent to the said lords commissioners shall be kept in the town clerk's office during such calendar month, and shall be freely open to the inspection of every burgess at all reasonable hours during the same.”

The 97th section, which was much relied and observed upon, both in the argument and in the judgment, requires to be set forth more fully than the information and bill stated it. It is as follows : “ And be it enacted that it shall be lawful for the council first to be elected in any borough under the provisions of this act, to call in question all purchases, sales, leases and demises not made in pursuance of some such *bona fide* covenant, contract, agreement or resolution made or entered into as aforesaid before the 5th day of June, and all contracts for the purchase, sale, lease or demise of any lands, tenements and hereditaments, and all divisions and appropriations of the moneys, goods and valuable securities, or any part of the real or personal estate of which, on or before the 5th day of June, in this present year, the body corporate of which they are the council, whether in their own right or as trustees for charitable or other purposes, was seized or possessed, which shall have been made or contracted between the said 5th day of June and the day of the declaration of their election ; and, for that purpose, if it shall appear to the said council that there is ground for believing that any such purchase, sale, lease or demise, or such contract, or such division or appropriation of the premises was collusively made for no consideration, or for an inadequate consideration, it shall be lawful for the council of such borough, at any time within six calendar months next after the first election of councillors under this act shall have been declared in such borough, upon

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boroughs mentioned in the schedules to the *act: that the council of [*35]
 the borough, as constituted by the act, had discovered that the 6,500%
 stock was *assigned or transferred to Wilson, Beckett and Blayds [*36]

notice of their intention being first given in the London Gazette, and also affixed on the outer door of the town hall or in some public place within the borough, to cause the value of the lands, tenements, hereditaments and premises in question to be inquired of and found by a jury of twelve indifferent men of the county in which, or adjoining to which in the case of Berwick-upon-Tweed, and of all counties of cities and towns corporate, such lands, tenements, hereditaments or premises do lie; and in order thereto, the said council is empowered to summon and call before such jury all persons having the custody and possession of any deed or agreement concerning the said lands, tenements, hereditaments and premises made or entered into since the said 5th day of June, and to cause all such deeds and agreements to be produced before the said jury and examined by them, and to examine upon oath every person who shall be thought necessary to be examined (which oath the mayor is hereby empowered to administer,) and the council shall, by ordering a view or otherwise, use all lawful means for the information, as well of themselves as of the said jury, in the premises, and the jury shall find the value of the said lands, tenements, hereditaments and premises, and the consideration which shall have been given, and also that which ought of right to have been given for the purchase, sale, lease, demise or appropriation thereof according to the terms of such purchase, sale, lease, demise, contract or appropriation, and taking into account all the circumstances under which the same shall have taken place; and if the jury by their oaths shall find that no consideration, or a consideration less than that which they shall have so found to be the value which ought therefor to have been given, shall have been conclusively given, or contracted to be given by the terms of any such purchase, sale, lease, demise, contract or appropriation, the party to such purchase, sale, lease, demise, contract or appropriation, shall have his option either to reconvey and restore the lands, tenements, hereditaments and premises in question, and to abandon the contract to which he shall have been party, upon receipt in each case of the consideration, if any, which he shall have given for the same, or to give, therefor, in each case such additional consideration, so that the whole consideration given shall be that which ought of right to have been given, so found by the jury as aforesaid; and in every such case as last aforesaid the additional consideration given, or to be given, shall be endorsed on the original deed or conveyance, and unless he shall so do within one calendar month next after the finding of the jury, every such purchase, sale, lease, demise, contract and conveyance shall be absolutely void and of none effect as against the said body corporate and their successors; and in every case in which any such contract shall have been abandoned as aforesaid, or in which any such purchase, sale, lease, demise, contract or conveyance shall become void and of none effect under the provisions of this act, the party who would otherwise have had the benefit of the same shall be remitted to his former estate, title and interest (if any) in the premises, as if no such contract, purchase, sale, lease or demise had been made or entered into; and for summoning and returning such juries, and for imposing fines on the sheriff, his deputy, bailiff or agent, and on the persons summoned and returned on the said jury, and on any person required to give evidence, who shall in this behalf contravene the provisions of this act, the council of every such borough shall have all the powers given in that behalf to the trustees or commissioners of any turnpike-road, by an act made in the third year of his late majesty George the Third, intituled 'an act to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England,' and all the costs of the said jury, and of all witnesses tendered by the said council to be examined before the said jury shall in every case be borne by the council and paid out of the borough fund; provided nevertheless, that it shall be lawful for his majesty, if he shall think fit, by the advice of his privy council, upon petition to him setting forth the special circumstances under which any purchase, sale, lease, demise, contract or appropriation of any of the said lands, tenements, hereditaments and premises shall have been made since the said 5th day of June, to order that the same shall not be called in question, under the provisions of this act, and in such case as last aforesaid the same shall not be called in question or set aside, or affected under the provisions of this act:

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[*37] some time after the 30th of May, 1835, but without any *consideration, and as trustees for the mayor, aldermen and assistants, or of the corporation of which they were the officers, and that the same stock was directed to be transferred or assigned as aforesaid, by the meeting held on the 30th of May, 1835, to the defendants Wilson, Beckett and Blayds collusively and without consideration, and in order to disappoint, as far as possible, the objects and intention of parliament in passing the act, and that the only division or appropriation which was made of the stock was made between the 5th of June, *1835, and the day of the declaration of the election of the council of the borough within the meaning of the act of parliament, and, in fact, no transfer or assignment was made, or, at least, completed, and no trust was declared of the stock until after the 5th of June, 1835, nor was any such trust declared until after the act of parliament had passed, and, although it was alleged that the stock, or certain parts thereof, had been since sold and disposed of, they had been sold and disposed of contrary to the express provisions of the act, and had been applied in a manner which, even if the act had not been passed, would have been improper and unjustifiable: that, shortly before the 30th of May, 1835, a scheme or plan was formed, by or with the privity of some of the members of the old corporation, for preventing the 6500*l.* stock from passing into the hands or coming under the control of the members of the new corporation which might be established under the act of parliament then expected to be passed, in the course of a short time, for the reform of municipal corporations, and it was, then or shortly afterwards, suggested or arranged, by or between such members of the old corporation, that the matter should be contrived so as to enable the mayor, aldermen and assistants to repossess themselves of the stock in case the act should not pass, or they or their political friends should become the governing body of the new corporation, and, in fact, the transfer and assignment directed to be made and afterwards made of the stock, and many of the trusts subsequently declared thereof, were made in pursuance of the aforesaid scheme or plan, and, in carrying or attempting to carry the same into effect, several meetings of the said members were held, and the name and seal of the old corporation and the names of the mayor, aldermen and assistants, [*39] were improperly and irregularly used by the members *engaged therein: that, during the year 1835, the defendant Wright was the mayor of Leeds, and the defendants Hall, Christopher Beckett and Bramley were three of the aldermen of the corporation, and the defendant Charlesworth was one of the assistants, and those five defendants were the members of the corporation who were engaged in transacting and carrying into effect the

provided always, that in every case in which such petition shall have been presented, it shall be lawful for his majesty, if he shall think fit, to enlarge the time within which (in case his majesty shall not think fit to make such order as aforesaid) the council may have power as aforesaid to call in question any purchase, sale, lease, demise, contract or appropriation referred to in such petition."

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aforesaid scheme or plan, and they were the only members of the corporation who attended all the meetings held for that purpose, and, if any other members were present at some of such meetings they were not present at all of them: that no trust was ever declared of the stock by the mayor, aldermen and assistants, but it was alleged that on the 30th of May, 1835, an indenture was made between the old corporation of the one part, and Wilson, William Beckett and Blayds of the other part, whereby the corporation assigned the stock to Wilson, William Beckett and Blayds, but they were not to be entitled to it for their own benefit, and they became and were trustees thereof for the old corporation: and it was also alleged that, on the 24th of November, 1835, Wilson, William Beckett and Blayds executed a deed of that date, and which was expressed to be made between them, of the one part, and the mayor, aldermen and burgesses of the other part, and thereby, after reciting the deed of the 30th of May, 1835, and that the stock had been assigned to Wilson, William Beckett and Blayds, to the end that the same might be applied by them to certain public and corporate purposes as thereafter mentioned, the parties of the one part covenanted, with the parties of the other part, to stand possessed of the stock as follows, that is to say, upon trusts to pay certain sums to the recorder and deputy-recorder of the borough and certain other sums to the treasurers for the time being of the Leeds Infirmary, the Leeds Fever Hospital and Public Dispensary [*40] and to the incumbents, for the time being, of certain churches in Leeds, and, as to the residue of the stock, in trusts to pay and discharge all such debts, sums of money, engagements, expenses, claims, dues and demands whatsoever which then were, or should be thereafter due, owing, contracted, made or entered into, by, from or with the mayor, aldermen and burgesses, and also all other sums of money which might be ordered to be paid or applied by the mayor, aldermen and burgesses, or by certain persons therein named (forming the committee appointed by the mayor, aldermen and burgesses for the purpose of settling the amount of the sums so to be paid as aforesaid, and of ordering the payment thereof,) and, subject thereto, upon trust for the mayor, aldermen and burgesses, their successors and assigns.

The information and bill further stated that none of the before mentioned deeds were executed by the corporation: and it charged that the name of the mayor and the seal of the corporation were not set or affixed to the deed of the 30th of May, 1835, at the meeting held on that day or at any court of the mayor, aldermen and assistants duly convened for the purpose, and, at all events, they were not properly and regularly set and affixed thereto, and that the deed was not delivered to Wilson, W. Beckett and Blayds, until April, 1836: that Wilson, W. Beckett and Blayds never gave any directions respecting the deed of November, 1835, or the trusts thereof, and, if they executed it, they never obtained any previous authority for that purpose, either from the corporation or the mayor, aldermen and assistants, and that the trusts therein declared were only inserted therein in pursuance of some

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[*41] direction to that *effect from some of the members of the corporation : that the trusts of the 6500*l.* stock were never duly declared by the mayor, aldermen and assistants, nor were any trusts declared thereof until November, 1835 : that the recorder and deputy-recorder declined to receive the sums given or voted to them : that Wright, Hall, Christopher Beckett, Bramley and Charlesworth were the chief contrivers and promoters of and were the only members of the corporation who assisted in all the before mentioned proceedings with respect to the 6500*l.* stock, and they were personally responsible for that sum or so much thereof as had not been applied in payment of debts properly incurred by the corporation, and that Wilson and C. Beckett were also personally liable for having transferred the stock in manner aforesaid.

The information and bill prayed that it might be declared that the transfer and alienation of the stock to Wilson, William Beckett and Blayds, was fraudulent and void, and that the same might be set aside, and that it might be declared that the last named defendants, and also Wright, Hall, Christopher Beckett, Bramley and Charlesworth were respectively liable to make good the same sum, or so much thereof as should not have been applied in payment of debts properly incurred by the corporation, and that they might be decreed to make good and pay the same to the plaintiffs or their treasurer; and that Wilson, William Beckett and Blayds and certain of the other defendants in whose names some parts of the stock were still standing, might be declared trustees thereof for the plaintiffs, and might be decreed to transfer the same to them, and that, in the mean time, they might be restrained from disposing thereof.

[*42] *The information and bill was filed not only against the persons before mentioned as defendants, but also against the incumbents of the livings, and the treasurers of the hospitals and dispensary mentioned in the declaration of trust. Three demurrers to it were filed for want of equity : one by the incumcents and treasurers ; another by Wright, Bramley and Charlesworth, and another by Christopher Beckett.

Sir *Charles Wetherell*, Mr. *K. Bruce* and Mr. *Bethell* in support of the demurrers :—The corporation, which is the plaintiff on this record, is, in law, the same identical body as that which existed prior to the municipal corporation act : it is, therefore, the same body as that which did the acts complained of in the information and bill ; and, consequently, the corporation is now seeking to annul its own acts. In other words, the perpetrator of a fraud is asking to be relieved from the fraud he has committed.

The information and bill is founded on the municipal corporation act, and, no doubt, it will be contended that the disposition that was made of the 9500*l.* consols, was a fraud upon that act. But, before that act was passed, a civil corporation had an unrestricted right to alienate its property. The resolution by which the stock was disposed of, was passed in May, 1835, which was before the municipal corporation bill was even introduced into

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parliament; and, therefore, as the act contains no retrospective enactments depriving corporations of their *jus disponendi*, the disposition which was made of the stock was legal. *The Mayor and Commonalty of Colchester v. Lowten*,^(a) *Sutton's Hospital Case*.^(b) The purposes to which the stock was dedicated were proper and laudable purposes, and were, in fact, for [43] the benefit of the inhabitants of the borough: and, as the new corporation is to have the power of disposing of its property for the benefit of the inhabitants, why is not the old corporation to have the same power?

Next: admitting, for the present, that the disposition of the stock was a wrongful act and that this court still has jurisdiction to redress it, we contend that the record is improperly constructed. It ought to have been either an information or a bill, but not both. If the alienation of the stock was a fraud upon the public, an information ought to have been filed; if it was a fraud upon the corporation, then redress ought to have been sought by bill. In *The Attorney General v. Aspinall*^(c) an information only was filed; and it was upheld, by the Lord Chancellor, on that ground, mainly, and also because the town council had declined to interfere. The case was originally brought before Lord Langdale, M. R., and that learned judge was of opinion that the old governing body of a corporation was not forbidden or precluded by the act, from a fair application of the corporate property for the benefit of the inhabitants of the borough: and his lordship was of opinion that the purposes for which the property had been applied in that case, and which are very similar to the purposes to which the stock has been dedicated in the present case, ought to be considered as beneficial to the inhabitants; and he overruled the demurrer. It is true that Lord Langdale's decision was reversed by the Lord Chancellor; but his lordship did not differ substantially from Lord Langdale, but merely took a different view of some of the allegations in the information. Besides in *The Attorney-General v. Aspinall*, the acts complained of were not only completed but originated [44] after the municipal corporation act was passed.

Supposing that the disposition of the stock was a fraud upon the act of parliament, relief ought not to have been sought in this court; for, by the 97th section of the act, a new judicature is created, and the jurisdiction of this court, in cases like the present, is entirely superseded and excluded.

Lastly: at all events, the demurrers that have been filed by Wright, Bramley, C. Beckett and Charlesworth, must be allowed. Those gentlemen were individual corporators when the acts complained of were done. Those acts were the acts of the whole corporate body; and individual members of a corporation cannot be made answerable for every act done by the corporation during the time that they were members of the body.

The *Solicitor General*, Mr. Jacob and Mr. Walker, in support of the information and bill, contended that the alienation of the stock was an act

(a) 1 V. & B. 226. (b) 10 Co. 1. (c) 1 Keen, 513; see 544, and 2 Myl. & Craig, 613.

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done by some of the members of the corporation and not by the corporation itself, as no instrument had been executed under the common seal; that, supposing the alienation to have been made by the corporate body, the resolution in pursuance of which it was made, was not passed until after the corporation had notice that it was the intention of government to bring in a bill for the reform of municipal corporations, nor was the alienation completed until after the act had received the royal assent; that the record was properly constructed, for, by the act of parliament, the fund was made applicable to public purposes, and, consequently, the Attorney General became the [*45] trustee, and the town council, the cestuis que trust of "it, and a trustee and cestui que trust might join in a suit to recover the trust property from the holders of it; that the remedy given by the 97th section of the act was cumulative, and did not deprive the parties of their ordinary remedy in a court of equity; and lastly, that Wright, Bramley, Christopher Beckett and Charlesworth were personally liable, inasmuch as the alienation of the stock was not an act of the body corporate, but of those individuals who had availed themselves of their connection with the corporation to do the acts complained of.

They relied principally upon the Lord Chancellor's judgment in *The Attorney General v. Aspinall*, and also referred to 8 Anne, c. 19. *Beckford v. Hood*, (a) *Chapman v. Pickersgill*, (b) *Dummer v. The Corporation of Chippenham*, (c) and *Carter v. The Dean of Ely*. (d)

THE VICE-CHANCELLOR:—I have had an opportunity of considering this case during the argument, which has occupied several days: and, according to the view which I take of the case, it is not necessary for me to notice some of the arguments that have been used in support of these demurrers; for, upon looking through this very voluminous information and bill, I am bound to take it that there has been no final and effectual alienation of the stock in question by the corporation of Leeds.

The information and bill represents that, on the 30th of May, 1835, the corporation was possessed of the sum of 6500*l.* 3 per cent. consols, [*46] which was then "standing in the names of Edward Markland, and the defendants Christopher Beckett and John Wilson, as trustees for the corporation, and that, on the 30th of May, 1835, a meeting of some of the members of the corporation was held at which a resolution, purporting to be a resolution of the mayor, aldermen and assistants, was passed to the following effect, namely, that the 6500*l.* stock should be absolutely transferred and alienated to the defendants John Wilson, William Beckett and John Blayds, so as to vest the same in those gentlemen. But the information and bill alleges that no actual transfer or assignment of the stock was made in pursuance of that resolution, and that no communication respecting the subject and object of the resolution was made to Messrs. Wilson, Beckett and Blayds until after it was passed, but those gentlemen were informed of it shortly afterwards,

(a) 7 T. R. 620.

(b) 2 Wilson, 145.

(c) 14 Ves. 245.

(d) Ante, vol. 7, p. 211.

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and there was some understanding, between them and some of the members of the corporation, that they were not to be entitled to the stock for their own benefit, but were to hold and dispose of it for such purposes as the corporation or the court of the mayor, aldermen and assistants, should thereafter direct; and no resolution was passed at the meeting held on the 30th of May, declaratory of such purposes. The information and bill then states that the council of the borough, as constituted by the municipal corporation reform act, have discovered, and the fact is that the stock was assigned or transferred to Wilson, Beckett and Blayds, some time after the 30th of May, 1835, but without consideration and as trustees for the mayor, aldermen and assistants, or of the corporation of which they were the officers, and that the stock was directed to be transferred to Wilson, Beckett and Blayds collusively and without consideration, and in order to defeat the objects of the act, and that no trust was declared of the stock *until after the 5th of June, 1835, nor [*47] indeed until after the act had passed, and that such parts of the stock as had been since disposed of, had been applied in a manner which was contrary to the express provisions of the act, and which, even if the act had not passed, would have been improper and unjustifiable. The information and bill then states that the informant and plaintiffs had discovered, and the fact is, that, shortly before the 30th of May, 1835, a scheme or plan was formed by some of the members of the corporation for preventing the 6500*l.* stock from passing into the hands or coming under the control of the new or reformed corporation, and that it was arranged that the matter should be contrived so as to enable the mayor, aldermen and assistants to repossess themselves of the stock in case the act should not pass, or they or their political friends should become the governing body of the corporation to be established under the act; and that the transfer of the stock and the declaration of trust subsequently made, were made in pursuance of the before mentioned scheme, and that the name and seal of the corporation and the names of the mayor, aldermen and assistants, were improperly and irregularly used by the members engaged therein. Then it states that a deed of assignment (but which was no assignment at all) of the stock, is alleged to have been executed on the 30th of May, 1835, and a deed purporting to be a declaration of trust of the stock, on the 24th of November, 1835, but that neither of those deeds was executed by the mayor, aldermen or burgesses of the borough. It then charges that no trusts of the stock were declared by the corporation or the mayor, aldermen or assistants, nor were any declared by Wilson, Beckett and Blayds till after the act had passed. The information and bill then repeats that no assignment or declaration of trust of the stock was ever *duly executed [*48] by the corporation or the mayor, aldermen and assistants, nor were any trusts declared thereof until November, 1835.

Now I am of opinion upon these allegations, that, if the transfer of the stock took place as stated, the beneficial property in it was not altered, but it still remained in the corporation: for it was necessary for the corporation to

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do some corporate act, in order to divest themselves of the property in the 6,500*l.* consols, (that is to say,) it was necessary for them to execute some instrument under their common seal for that purpose; and as they did not do so, the stock remained vested in Messrs. Wilson, Beckett and Blayds, as trustees for the corporation. And, in my opinion, the resolution that was passed in May, 1835, taking it (as I am bound to do on the present occasion) to have been made in the way in which the information and bill represents, did not divest the corporation of their beneficial interest in the stock in question. The consequence is that the corporation may call on those who are the mere legal depositaries of the fund, for a transfer of it to new trustees or for any other purpose that they may think proper to direct.

It does not appear to me that the municipal corporation act has destroyed the identity of the old corporations; but it has continued the existence of the old corporations, varying, however, the mode in which certain corporate officers are to be chosen. This, however, is to be observed, that, although the mode of choosing the officers is altered, the corporation, in law, remaining the same, yet the application of the funds belonging to corporations, is varied. For the 92d section of the act, after directing the property [*49] of corporations to be applied to certain specified purposes, directs that the surplus (if any) shall be applied, under the direction of the council, for the public benefit of the inhabitants and the improvement of the borough: so that there is a sort of public trust affixed upon that which, before the act was passed, was mere corporate property, capable of alienation according to the uncontrolled will and pleasure of the body corporate. The novelty which has been introduced by the act is two-fold; first, the funds of corporations are to be applied to public purposes; and, secondly, they are to be applied under the direction of the council.

It seems to me, having regard to the allegations in this information and bill, that the corporation of Leeds are now merely calling for a restoration of their own property, with the beneficial interest in which they have never parted.

But it was said that they are not at liberty so to do, as the 97th section of the act has provided a new course of proceeding to be taken in cases where corporate property has been collusively alienated. But, after having frequently read over that section, the conclusion that I have come to, is that that section cannot be considered to have ousted this court of its general jurisdiction to enforce a mere trust: and I should have come to that conclusion even if the matter had not been so decided, as I think it has been.[1] It is

[1] Vide, *The Attorney General v. Aspinall*, 2 Myl. & Cr. 628, 629, n. 1, 2; where cases on this point are cited. *Sheriff v. Coates*, 1 Russ. & M. 159. *Coates v. The Clarence Railway Co.*, id. 181. *Frewin v. Lewis*, post, 66. S. C. 4 Myl. & Cr. 249. *Morris v. The Duke of Norfolk*, post, 472. *The Attorney General v. The Corporation of Norwich*, 1 Keen, 700. *Thompson v. Derham*, 1 Hare, 377, 378. In *The Attorney General v. The Corporation of Poole*, 4 Myl. & Cr. 22, Lord Cottenham, in asserting the jurisdiction of the court in a case in which a statutory remedy

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true that the act has, to a certain extent, changed the form of the remedy; for, as corporate property is now applicable to public purposes, it may be right that, in all future instances, the Attorney General should sue in conjunction with the corporation.[1] But for that circumstance, the corporation might have filed a bill against those individuals who *have [*50] placed themselves in the situation of trustees, and thereby have compelled them to give an account of their trust, and to make restitution, to the corporation, of its own property. In my opinion, it never could have been the intention of the legislature, by this 97th section, to oust this court of its general jurisdiction: for it is to be observed that the remedy is of an extremely minute and special nature; and, moreover, it is to be exercised only within a limited time; because it is enacted that it shall be lawful for the council, at any time within six calendar months next after the first election of councillors under the act shall have been declared, to summon a jury, in order that the matter complained of may be inquired into and rectified. Now it obviously might happen that the town council might not know the fact within the six months after the first election of councillors under the act: and it would be singular if an alienation of corporate property, however improper, should go unredressed, merely because the town council had not that information which would enable them to take proceedings for defeating it within the very limited time prescribed by the act. I cannot think that such was the intention of the legislature. And the latter part of the section throws light upon the question; for the power that is given to his majesty in council to order that, in certain cases, improper alienations of corporate property shall not be called in question, is not a general power to his majesty in council to order that those alienations shall not be called in question at all, but only to order that they shall not be called in question under the provisions of that act. The meaning of the legislature was that the power of the king in council should be limited to that which is mentioned in the antecedent part of the section, namely, to the proceedings which should be taken under the *provisions of the act; and the restrictive words which are [*51] there found were meant to be confined to that new mode of proceeding provided by the section itself, and which was to take place in a given form.

had been provided says, "It is then clear, upon the principles I have stated, that the fund which this information seeks to protect is a trust fund, and that as such, this court has its ordinary jurisdiction over it; but then it is said, that the acts constituting the subject matter of the present complaint, cannot be considered as breaches of trust, because they are acts which the corporation is, by the statute, expressly authorized to do, and for correcting any error or fault in the performance of which, a special jurisdiction is provided by the statute, namely, the lords of the treasury. Now, it must be admitted, that if it were not for those special provisions (assuming always that the fund is a trust fund,) this court would have jurisdiction to investigate any alleged breach of trust in the trustees of this fund. The inquiry then may be reduced to this, what are the special provisions of the statute, &c." The Lord Chancellor then pursues a critical examination of the statute in question, resulting in an affirmance of the jurisdiction of the court.

[1] When the Attorney General is a necessary party, see farther, *The Corporation of the Sons of the Clergy v. Mose*, post, 610.

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If, before the passing of the act now under consideration, this court had a right to interfere at the instance of corporations suing as *cestuis que trust* to protect their property in the hands of their trustees, there are in my opinion, no restrictive words in the act, to destroy that antecedent right; but there is only a cumulative right given, in a particular form, to set aside certain alienations of corporate property that might be discovered by the town council within a very limited time.

If, however, there were any doubt upon the point, it seems to me that what took place in the case of *The Attorney General v. Aspinall*, would be conclusive. For though the demurrer to the information was allowed by the Master of the Rolls, yet, when it was brought before the Lord Chancellor on appeal, his lordship overruled the demurrer. Now, how could he have done so, unless the general jurisdiction of this court to relieve against transactions of the nature there complained of, remained unaffected by the municipal corporation act. And I observe, from the language used by his lordship, when, as Master of the Rolls, he dissolved the injunction which had been granted on the original information, he did dissolve it for the express purpose of reserving to himself the determination of the question when those acts should have been completed, which were necessary to be done

before the question could be brought on for solemn argument and [*52] decision.(a) It is clear therefore that the Lord Chancellor considered that this court would have had jurisdiction to interfere in such a case as was stated on the original information: and, when his lordship overruled the demurrer that was filed to the supplemental information, he asserted and maintained that jurisdiction. Consequently, if I had any doubts upon the question now before me, they would be overruled by what was done by the Lord Chancellor in the case of *The Attorney General v. Aspinall*; and I take the liberty of saying that I entirely concur with his lordship in the opinion which he expressed in deciding that case. Therefore, generally speaking, the demurrers must be overruled.[1]

With respect to those defendants who are supposed to have acquired a right to certain portions of the 6500*l.* consols under the deed of November, 1835, I am quite clear that the information and bill can be maintained as against them. But it was said that there was some thing peculiar in the cases of Messrs. Wright, Bramley, Charlesworth and Christopher Beckett. Now, with respect to those gentlemen, it is to be observed that they were all members of the old corporation: Mr. Wright was the mayor, Mr. Beckett and Mr. Bramley were aldermen, and Mr. Charlesworth was an assistant: and the information and bill alleges that, shortly before the 30th of May, 1835, a scheme was formed by some of the then members of the corporation for preventing the 6500*l.* consols from passing into the hands or coming

(a) See *The Attorney General v. The Mayor of Liverpool*, 1 Myl. & Craig, 471.

[1] See the remarks of Lord Cottenham upon his judgment in *The Attorney General v. Aspinwall*, when the principal case came before him on the final hearing. Cr. & Ph. 22, 24.

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under the control of the members of the corporation to be formed under the act of parliament which was then in contemplation, and that the acts complained of were done in pursuance of that scheme, and that the four last named gentlemen, together with Mr. Hall, were the members of the corporation *who were engaged in contriving the scheme and carry- [*53] ing it into effect; and it charges that they are personally liable for those portions of the stock that were attempted to be alienated. Now that charge would be of no value, unless, as is the case, there were facts stated in the information in support of it. And I am of opinion that, if members of a corporation do contrive a scheme unlawfully to dispossess the corporation of its funds, they, *prima facie*, are personally answerable; and this court has, in former cases, made persons standing in the situation of these four defendants, personally liable for their wrongful acts, although they have derived no benefit from them.[1] Consequently the demurrers put in by those defendants, as well as the demurrer filed by those individuals who were intended to be benefited by means of the scheme, must be overruled.[2]

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[*54]

1837; 16th and 19th Nov. 1838; 31st Jan.—Practice; Contempt; Lord Bacon's 78th Order. A plaintiff may issue an attachment against a defendant for want of answer, although he is himself in contempt for non-payment of costs, which he has been ordered to pay to the defendant.

THE plaintiff, whilst he was in the custody of the sheriff under an attachment, obtained against him by the defendant, for non-payment of the costs of

[1] *Vide Robinson v. Smith*, 3 Paige, 222. *Verplank v. The Mercantile Ins. Co.*, 1 Edw. Ch. Rep. 84. *Attorney General v. Crompton*, 1 Yo. & Coll. C. C. 429; and particularly the judgment of the Lord Chancellor in the principal case.

[2] The decree of the Vice-Chancellor in overruling the demurrers does not appear to have been appealed from; but the principles on which he proceeded were sanctioned by the Lord Chancellor (Cottenham) on the final hearing of the cause. Cr. & Ph. 1. The decree directed was, (p. 29,) "It must declare that the 6500*l.* three per cents, and 500*l.* notwithstanding the deeds of the 30th of May, 1835, continued and was the property of the corporation of Leeds, at the time of passing the act, entitled 'an act to provide for the regulation of municipal corporations in England and Wales,' and was, therefore, from that time subject to the trusts and purposes prescribed by that act: and that the subsequent alienations of such stock and funds for any other purposes, and particularly the deeds of the 30th of May, and the 24th of November, 1835, were breaches of trust, and fraudulent and void; and that the three trustees and the five members of the corporation are liable to make good any loss which may arise therefrom. Then direct the several defendants to re-transfer the several sums transferred to them, and refer it to the master to inquire what parts of such stocks and funds, other than such as have been so transferred to others of the defendants, and therefore capable of being re-transferred, have been sold or disposed of, and when and by whom, and by whose direction or authority, and in what manner the same and the proceeds thereof, and each and every part thereof, have been paid, applied, and disposed of: with liberty to state special circumstances; the costs of the suit to the hearing to be paid by the three trustees and the five members of the corporation."

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a motion, issued an attachment against the defendant for want of answer. The defendant now moved that the attachment against him might be discharged, for irregularity, and that the bond which he had given to the sheriff, who had taken him on the attachment, might be cancelled.

Mr. *Wakefield* and Mr. *G. L. Russell*, in support of the motion, said that the attachment against the defendant, was irregular, because the plaintiff, when he obtained the order for it, was in contempt, and a party, whilst in that situation, could not make any application to the court. Lord Bacon's Orders,^(a) Gilb. For. Rom. 102. "It is to be observed, as a general rule, that the contemner who is in contempt, is never to be heard, by motion or otherwise, till he hath cleared his contempt and paid the costs."

Mr. *Knight Bruce* and Mr. *Bethell* appeared for the plaintiff.

The Vice-Chancellor thought that the motion ought not to be granted; but allowed it to stand over in order that the opinion of the officers of the court might be taken upon it.

1838; 31st *January*.—The motion was mentioned again on this day and a certificate in favor of it, signed by thirteen of the clerks in [55] court, was produced. All the registrars also, except Mr. Colville, concurred with the clerks in court.

The Vice-Chancellor, however was of opinion that he was not bound to decide according to the certificate, as no decided case was referred to in support of it, but the opinion of the clerks in court was founded on a theory of their own. His honor added that, if the meaning of Lord Bacon's order was that a party, when in contempt, could not apply to the court for any purpose whatever, the order, to that extent at least, could not be considered as remaining in force, as the practice of the court had been long at variance with it; and he did not think that he should be justified in granting the motion; but, as the clerks in court had certified in favor of it, he should not refuse it with costs, but would make no order.^(b)

(a) Beam. Ord. 35.

(b) See *Ricketts v. Mornington*, ante, vol. 7, p. 200. The decision reported above was affirmed by the Lord Chancellor, (see 3 Myl. & Craig, 197,) on the authority of two cases *Wild v. Hobson* and *Eddowes v. Neville*, with which Mr. Colville furnished his lordship.

Mr. Colville kindly informed the reporter that the bill in *Wild v. Hobson*, was dismissed, at the hearing, with costs: but the order on that occasion, commenced with a direction that the plaintiff should pay to the defendant the costs of his motions which had been refused in November, 1818, "as directed by the orders then made;" but for which direction, the order dismissing the bill, would have put an end to the process for compelling payment of the costs of the motions.[1]

[1] Vide *Bickford v. Skewes*, 10 Sim. 193. 2 Myl. & Cr. 53, n. 1.

1837.—Mocatta v. Lindo.

*MOCATTA v. LINDO.

[*56]

1837; 1st December.—Construction; Settlement; Portions.

By a marriage settlement, stock was settled, subject to life interests in the husband and wife, in trust for their children, share and share alike, the shares to be paid to them at twenty-one or marriage, and the shares of children dying leaving issue before their shares had become payable, were to be in trust for their issue, but in case any of the children should die before their shares should become payable without leaving any issue, then their shares were to be in trust for the surviving children. There were six children of the marriage, who all attained twenty-one; two of them died in the lifetime of their surviving parent. Held that the word "payable" must be held to mean "vested," and consequently, that the representatives of the deceased children were entitled to shares of the stock.

By the settlement on the marriage of Moses and Esther Lindo, Moses Lindo covenanted to lay out 1000*l.* in the purchase of stock in the names of the trustees, in trust for himself and his intended wife for their lives successively, and, after their several deceases, then upon trust for the benefit of all and every the child and children of the marriage, equally to be divided between and amongst them, if more than one, share and share alike, but, if there should be but one such child, then in trust for the benefit of such only child, and to be paid and payable to him, her or them respectively, on their respectively attaining the age of twenty-one years or day or days of marriage, which should first happen, and to the children or issue of such child or children of the marriage as should happen to die leaving a child or children before their respective shares thereof should become payable as before mentioned; and, in case any such child or children should happen to die before their shares should become payable, without leaving any issue, then all and every such share or shares of him, her, or them so dying, should go and accrue to the survivors or survivor of all and every of such child and children, and be paid and payable at the same time, and subject to the same chance of accruer or survivorship as their original shares thereof; and it was declared that the dividends and interest of the share of each and every such child of and in the capital stock, should be *applicable to the [*57] maintenance and education of such child and children respectively, and the overplus, if any, should be laid out and added to the capital to accumulate for such child and children's benefit respectively, and should be subject, in all respects, to the same contingencies as the capital of such child and children's share and shares was and were thereinbefore made subject and liable.

In the subsequent part of the settlement, the same words were twice repeated; once in declaring the trusts of certain reversionary property to which Mr. Lindo was entitled, and again in declaring the trusts of the property to which Mrs. Lindo was entitled.

Mrs. Lindo survived her husband, and died in 1837, leaving four children of the marriage, all of whom had attained twenty-one. There had been two other children, both of whom attained twenty-one but died without issue, one,

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in the lifetime of Mr. Lindo, and the other, after his death but in the lifetime of Mrs. Lindo.

The bill was filed, by the trustees of the settlement, against the surviving children and the representatives of the deceased children, praying that the rights and interests of the defendants in the trust funds might be ascertained and declared by the court, and that the plaintiffs might be indemnified and protected in the disposing thereof accordingly.

The question was whether the representatives of the deceased children were entitled to share in the trust funds, or whether those funds were wholly divisible amongst the surviving children, that is, whether the word [*58] "payable" in the limitation over to the surviving "children, was to be taken in its proper sense, or was to be held to mean "vested."

Mr. *Knight Bruce* and Mr. *Lowndes*, appeared for the plaintiffs.

Mr. *Wigram*, Mr. *Anderdon* and Mr. *Bacon*, for the surviving children, said that to construe the word "payable" as "vested," was doing a violence to the words used in the instrument; and that the circumstance which Lord Eldon, in his judgment in *Hope v. Lord Clifden*,^(a) stated to be the inducement for the court's adopting that forced construction, namely, that otherwise, the descendants of a child who had attained twenty-one but happened to die in the lifetime of its parents, would be left without any provision, did not exist in the present case, as provision was made, by the settlement, for the issue of children dying in their parents' lifetime and leaving issue.

Mr. *Richards*, Mr. *Heathfield* and Mr. *Goldsmid*, for the representatives of the deceased children, contended that the word "payable" must be taken to mean "vested." They cited *Walker v. Main*,^(b) and *Fry v. Lord Sherborne*.^(c)

THE VICE-CHANCELLOR :—It plainly appears to me that each child who who attained twenty-one, though it died in the lifetime of either parent, is entitled to one-sixth of the trust funds.^(d) [1]

(a) 6 Ves. 499, 507. (b) 1 Jac. & Walk. 1. (c) Ante, vol. 3, p. 243.

(d) See *Whatford v. Moore*, ante, vol. 7, p. 574, and 3 Myl. & Craig, 274.

[1] In a recent case, the word "vested" was, under the terms of the will, construed to mean "payable," so as to carry the residuary share of a deceased member of a class to the survivors. *Sillick v. Booth*, 1 Ye. & Coll. C. C. 121. A testator gave his residuary estate to his wife for life, and to be divided amongst and paid to his children on the whole of them attaining twenty-one, and not before, but the payment to be postponed till the death of their mother; and he directed maintenance to be allowed them in the event of the wife's death while the children were under twenty-one. There was a gift over to the children of any child who should die before receiving his share, and the testator provided that in case any of his children should die without leaving issue, his share should go over to the survivors. A child attained twenty-one after the widow's decease, but died without issue before receiving her share: it was held, that her representatives, and not the surviving children were entitled to her share. *Whiting v. Force*, 2 Beav. 571; and see *Watson v. Hayre*, post, 500, 501, and note, ibid.

1837.—*Neate v. The Duke of Marlborough.*

*KING v. HEMING.

[*59]

1837: 4th December.—*Plea and Pleading.*

If a plea purports to be a plea to the relief only, the defendant ought to give the discovery, otherwise the plea is bad.

In this case the defendant put in a plea to the bill, which commenced and concluded as follows: "This defendant, by protestation, &c., to all the relief sought by the said bill, doth plead in bar, and, for plea, saith, &c., all which matters and things this defendant doth aver to be true and is ready to prove as this honorable court shall direct: and he doth plead the same in bar to all the relief sought by the said bill, and doth humbly demand the judgment of this honorable court whether he ought to be compelled to make any other answer thereto."

It was objected, for the plaintiff, that, as the plea was confined to the relief sought by the bill, the defendant ought to have given the discovery, and, as he had not done so, the plea must be overruled.

THE VICE-CHANCELLOR:—In point of form the plea is wrong. I do not see why the defendant has pleaded to the relief only. I admit that, if a plea is put in which shows that the plaintiff is not entitled to the relief, it protects the defendant from giving the discovery: but if the defendant, on the face of his plea, pleads to the relief only, he professes that he will give the discovery.

Sir W. Horne and Mr. Lovat, in support of the plea.

Mr. Knight Bruce, Mr. Wakefield and Mr. James Russell, in support of the bill.

*NEATE v. THE DUKE OF MARLBOROUGH.

[*60]

1837: 5th December.—*Judgment Creditor; Demurrer.*

A court of equity will not assist a judgment creditor to obtain payment of his debt, unless he has sued out execution; and, if he does not state that he has done so, in his bill, the defendant may demur.

THE plaintiff was a judgment creditor of the Duke of Marlborough: and the object of the bill was to obtain payment of the judgment debt out of an annuity of 3000*l.* a year, which the bill represented to be payable to the Duke, out of certain freehold as well as copyhold and leasehold estates and canal shares, under the trusts of certain deeds in August, 1818, the judgment was signed in November, 1818, and had been, ever since, regularly kept on foot. The bill alleged that the plaintiff would be wholly unable to recover his debt, unless the court would assist him in obtaining payment of it out of the Duke's equitable interest under the deeds of August, 1818.

The Duke, and General St. John who was the trustee of the estates, put in demurrers to the bill.

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Mr. *Knight Bruce*, Mr. *Jacob*, Mr. *Wray* and Mr. *G. Richards* supported the demurrers on three grounds: first, because part of the property out of which the annuity was payable, namely, the copyhold estates and canal shares, were not liable to be taken in execution: (a) secondly, because the Duke's right to the annuity was of a fluctuating and contingent nature, as it depended upon the Duchess' consenting to receive 13,000*l.* instead of 16,000*l.* a year to which she was entitled under the deeds: and, thirdly, (which was the only ground that it was thought necessary to notice at any length)

[*61] "because the plaintiff had not sued out an *elegit* on his judgment. They said that a court of equity would not assist a judgment creditor to obtain payment of his debt out of the freehold estates of his debtor, unless he had sued out an *elegit* and placed the writ in the hands of the sheriff; for a court of equity did not give a judgment creditor more extensive rights than he had at law, and would not interfere on his behalf, unless the writ had been issued and the sheriff was prevented, by some legal impediment, from putting it in force. "Courts of equity will also lend their aid to enforce the judgments of courts of ordinary jurisdiction; and, therefore, a bill may be brought to obtain the execution or the benefit of an *elegit* or a *feri facias*, when defeated by a prior title either fraudulent or not extending to the whole interest of the debtor in the property upon which the judgment is proposed to be executed. In any case, to procure relief in equity, the creditor must show, by his bill, that he has proceeded at law to the extent necessary to give him a complete title. Thus, in the cases alluded to of an *elegit* and *feri facias*, he must show that he has sued out the writs the execution of which is avoided, or the defendant may demur; but it is not necessary for the plaintiff to procure returns to those writs." (b) *Shirley v. Watts*, (c) *Davidson v. Foley*, (d) *Williams v. Craddock*, (e) *Cuddon v. Hubert*. (f)

Mr. *Temple*, Mr. *Ellison* and Mr. *Jervis*, in support of the bill, said that as the property which the plaintiff sought to make available to the satisfaction of his debt, could not be reached at law, the suing out of an *elegit*

[*62] would have been a mere useless formality: and they cited **Forth v. The Duke of Norfolk*, (g) *Lord Dillon v. Plaskett*, (h) and *Lewis v. Lord Zouche*. (i)

THE VICE-CHANCELLOR:—The bill does not state that the deeds of August, 1818, contain any direct trust for the Duke, but, merely, that his receipt of the 3000*l.* a year is to depend upon the voluntary act of the Duchess, in relinquishing 3000*l.*, part of her annuity of 16,000*l.*, to the Duke; and, therefore, the bill has not so stated the existence of the fund which is sought to be made available to the payment of the plaintiff's debt, as that I can give relief. If,

(a) The law is altered in these and other respects, by the recent act for abolishing imprisonment for debt, 1 & 2 Vict. c. 110.

(b) *Mitt. Treat.*, 3d ed., 101, 102.

(c) *Ante*, vol. 4, p. 313.

(d) 2 *Bligh*, N. S. 239.

(e) 4 *Atk.* 200.

(f) *Ante*, vol. 7, p. 485.

(g) *Ante*, vol. 2, p. 388.

(h) 2 *Bra. C. C.* 203.

(i) 4 *Madd.* 508.

 1837.—*Josselyn v. Josselyn*.

however, the case had been stated otherwise, and as, it has been said, it was meant to be stated, I should still have been of opinion that no case had been brought forward on which this court could give relief. Lord Lyndhurst, in delivering his opinion in the case of *Lord Dillon v. Plaskett* did not mean to interfere with what is stated, by Lord Redesdale, to be the rule in cases like the present, namely, that in any case, to procure relief in equity, the creditor must show, by his bill, that he has proceeded, at law, to the extent necessary to give him a complete title, that is, he must have sued out a proper writ having regard to the nature of the property out of which he seeks satisfaction of his debt. Lord Redesdale cites cases in *Vernon & Atkins*, in support of the rule so laid down by him, and I am of opinion that it still continues to be the law of this court.

It is plain that what the court looks at, when it interferes to assist a judgment creditor, is the right which the creditor would have at law, but for certain impediments "which this court can remove, to enforce his judgment against that property as to which those impediments exist: and, as the bill does not state that any writ has been taken out with respect to the freehold estates comprised in the deeds of August, 1818, I am of opinion that the demurrers must be allowed: but, as the plaintiff does state a case of a judgment debt and that he does not accurately know the nature of the trusts of those deeds, I think that he ought to be allowed to amend his bill.(a)[1]

 JOSSELYN v. JOSSELYN.

1837; 19th December.—Will; Construction; Infant; Maintenance.

Testator gave his residuary personal estate to J. J. an infant, and directed his executors to place it out at interest to accumulate, and to pay the principal to the infant on his attaining twenty-four, and in the mean time to allow 60*l.* a year for his maintenance: and the testator gave the residue over, on the infant's dying under twenty-one. The court held that the residue was actually given to the infant, and that what followed the gift was merely directory as to the management of it; and, on the infant's attaining twenty-one, allowed the residue and accumulations to be transferred to him.

Testator gave his residuary estate to an infant, and directed 60*l.* a year to be allowed for his maintenance. The residue was of large amount: and the court, from time to time, considerably increased the maintenance.

JAMES JOSSELYN, the testator in the cause, disposed of his residuary personal estate in the following words: "All the rest, residue and remainder of my goods, chattels, ready money, securities for moneys in the public stocks or funds, debts and all other personal estate whatsoever, I give unto John Josselyn, the son of my late cousin John Josselyn, deceased: and I order and direct my executors, or the survivor of them, &c., to place [64] the same out on government or good real security, and the interest

(i) Affirmed by the Lord Chancellor except as to the leave to amend. See 3 *Myl. & Craig*, 407.]

[1] Vide 2 *Sim.* 393, n. 1. 3 *Myl. & Cr.* 417, n. 1; 421, n. 1.

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arising therefrom, as the same shall become due, to place out on the like securities, so as to accumulate, and the principal to be paid to the said John Josselyn *at his attainment of the age of twenty-four years*, and to pay and allow thereout the sum of 60*l.* per annum, for the board and education of the said J. Josselyn, until his attainment of the age of twenty-four years: and I further empower, order and direct my said executors or the survivor of them, &c., to lay out any part of the moneys, as they in their discretion may think proper, in the purchase of lands and real estate in the counties of Essex or Suffolk, for the benefit of the said John Josselyn, and to be conveyed to them accordingly: but in case the said John Josselyn shall happen to die under the age of twenty-one years, and without leaving issue of his body lawfully begotten, then living, and which shall be living until his, her or their age or ages of twenty-one years, then I give all the residue of my goods, chattels, moneys and personal estate, and all real estate (if any) of every kind and description, unto my said brother Mark Josselyn, if he shall be then living, during his life, and, after his death, to all his children lawfully to be begotten, equally to be divided between them: but, in case my said brother shall happen to die without leaving issue of his body lawfully begotten then living, and which shall be living until his, her or their age or ages of twenty-one years, then I give all the residue of my goods, chattels, moneys and personal estate, and also real estate, if any, of every kind and description, unto my cousin, Charles Josselyn, his executors and administrators.

The testator died on the 1st of June, 1824, and his will was proved [*65] by his executors Mark Josselyn and Charles Josselyn. Mark Josselyn died on the 13th of July, 1825, without having had any issue.

John Josselyn (who was the plaintiff in the cause) was eight years old at the testator's death. The property to which he became entitled under the will was of large amount; and, although the testator had directed that only 60*l.* a year should be allowed for his board and education during his minority, yet, by an order in the cause made in November, 1826, 182*l.* was allowed for his maintenance and education from the testator's death down to June, 1826, and 150 guineas per annum were allowed for his future maintenance and education: and, by two subsequent orders, one made in February, 1830, and the other in July, 1832, 300*l.* per annum, and 400*l.* per annum were allowed for the like purposes.[1]

The plaintiff attained twenty-one in August, 1837, and, thereupon, presented a petition stating that he was advised that, *on attaining that age, he became entitled, under the will, to a vested interest in the testator's residuary estate* and the accumulations thereof, and praying that the funds of which the residue and accumulations consisted, might be transferred to him.

Mr. Spence and Mr. Wood appeared in support of the motion.

Mr. Knight Bruce and Mr. Jacob for the defendant Charles Josselyn, and

[1] 7 Vide, *In the matter of Mary England*, 1 Rum. & M. 499, 500, and notes, Am. Ed.

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Sir *W. Horne*, for the defendant Royce, the executor of Mark Josselyn, and the only other party to the suit.

THE VICE-CHANCELLOR :—The residue is actually given to the [*66] plaintiff; and the words which follow the gift are merely directory as to the future management of what is before given. I shall, therefore, make an order according to the prayer of the petition.

FREWIN v. LEWIS.

1837: 21st and 23d Dec.—Poor Law Amendment Act; Jurisdiction; Injunction.

Although the poor law amendment act, enacts that no order of the poor law commissioners shall be removed by *certiorari* into any court of record except the king's bench, and that every order which shall be removed into that court, shall, nevertheless, until declared illegal, continue in force and be obeyed in the same manner as if it had not been so removed; yet the court of chancery has jurisdiction to restrain the commissioners and the guardians of a union, from acting upon an order, pending proceedings under a *certiorari* obtained by the plaintiff to try the validity of it.

The plaintiffs were the governors and directors of the united parishes, of St. Andrew, Holborn, above the Bars, and St. George the Martyr, elected under a local act of the 6th Geo. IV., c. 175. The defendants were the poor law commissioners and the guardians of the Holborn Union under the poor law amendment act, (4 and 5 Will. IV., c. 76.)

The bill alleged that, ever since the passing of the local act, the affairs of the two united parishes, so far as related to the poor, had been under the management of the board of governors and directors elected under that act; that, in March, 1836, the poor law commissioners issued an order directing that those parishes and certain other places should be formed into a union, to be called "The Holborn Union," and that a board of guardians for the union should be chosen according to the provisions of the poor law amendment act; and, by a subsequent order, they directed the poor rates of the union to be placed under the control of the guardians; and, under [*67] that order, the plaintiffs had paid over considerable sums to the guardians, and had put them in possession of the workhouse of the two parishes, which was vested in the plaintiffs by the local act. The bill further alleged that the plaintiffs had lately discovered that, by reason of the provisions of the local act, the poor law commissioners had no jurisdiction over the two parishes, and that the plaintiffs were entitled to continue in the possession of the funds and property of those parishes, and in the collection and disposition thereof; and that they had obtained a *certiorari* for removing the first order of the commissioners into the court of queen's bench, in order that the same might be quashed, and that the proceedings under the *certiorari* were still pending; that, whatever might be the decision of the court of queen's bench as to the legality of the order of the com-

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missioners, the intended enlargement of the workhouse was wholly unnecessary, and would be very burdensome to the parishioners. The bill prayed that it might be declared that the workhouse and the funds raised for the relief of the poor in the two united parishes, were still vested in the plaintiffs under the local act, and that neither the poor law commissioners nor the guardians of the Holborn Union had any power to alter the workhouse, or to dispose of the funds of the two parishes, that they might be restrained from so doing.

The defendants demurred generally to the bill.

The *Solicitor General*, Mr. *Wigram*, Mr. *W. T. S. Daniel*, Mr. *Tomlinson* and Mr. *Collins* appeared in support of the demurrer, and contended that, although the two parishes were united for certain purposes by [*68] the "local act, yet they did not constitute such a union as was contemplated and intended by the new poor law act; and also that, under the 105th section(a) of that act, the legality of orders made by the commissioners could not be called in question in any court except the court of queen's bench, and, consequently, that the court of chancery had no jurisdiction in the present case.

Mr. *Knight Bruce*, Mr. *Jacob* and Mr. *Stuart*, in support of the bill, said that the new poor law act did not apply to parishes which were united by local acts of parliament, and, consequently, that the powers vested in the plaintiffs by their local act, were not abridged or in any manner affected by the new act. *The King v. The Poor Law Commissioners in the matter of the Parish of St. Pancras*.(b) They contended, also, that, although the poor law commissioners were public functionaries; the court of chancery had jurisdiction to call in question and control their acts. *Rankin v. Huskisson*.(c) *Ellis v. Earl Grey*.(d) *Attorney General v. Forbes*.(e)

[*69] "THE VICE-CHANCELLOR:—The bill in the present case clearly shows that the legality of the orders of the poor law commissioners is, in fact, disputed, and the arguments used at the bar in support of the demurrers, show that it is at least disputable; and I think that I should be departing from that safe mode of proceeding uniformly adopted by judges sitting in courts of equity, if I were to take upon myself, in a case like the present, to decide what the law is, particularly as the question as to the legality of the orders, is now in a train for decision according to the method pointed out by the act of parliament, namely, the writ of *certiorari*. There being then, in fact, a dispute pending as to the legality of the orders of the commissioners, it is alleged,

(a) That section enacts, "that no rule, order or regulation of the commissioners or assistant commissioners, or any of them, shall be removed or removeable by writ of *certiorari* into any court of record, except his majesty's court of king's bench at Westminster, and that every rule, order or regulation which shall be removed by writ of *certiorari* into the said court of king's bench shall nevertheless, unless and until the same shall be declared illegal by that court, continue in full force and virtue, and be obeyed, performed and enforced, in such and the same manner and by such and the same ways and means as if the same had not been so removed."

(b) 6 Adol. & Ell. 1. (c) Ante, vol. 4, p. 13. (d) Ante, vol. 6, p. 214. (e) 2 Myl. & Craig, 123.

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by the plaintiffs, that certain things are proposed to be done by the board of guardians appointed under the new act, which tend to put in jeopardy, not only the funds belonging to the two united parishes of St. Andrew and St. George, but also the building which now exists in the shape of a workhouse, the property in which, the plaintiffs contend, is still vested in them under the provisions of the local act. There can be no doubt that this court has a plain right to exercise a jurisdiction for the preservation of property whilst a *bona fide* dispute is going on between two parties as to the right to that property, whether between individuals, or bodies corporate and individuals, or in any other form. Now, supposing it should turn out, by the decision of the Court of Queen's Bench upon the writ of *certiorari*, that all the orders of the poor law commissioners are wrong, and that the guardians are not justified in making the proposed alteration and enlargement of the workhouse, what reparation can the plaintiffs obtain? The act complained of will have *been done: the enlargement will have taken place. The [*70] alteration may be perfectly judicious if the union directed by the commissioners is to stand; but it will be most injudicious and detrimental to the interest of the parishioners if the two parishes are to continue as they existed under the act of the 6th Geo. 4. If the orders of the commissioners are held to be right by the Court of Queen's Bench, then, I apprehend, the only consequence will be that the measures which are complained of, will be carried into effect.

With reference to the observations made on the 105th section of the poor law amendment act, it appears to me that there is nothing to be found in that section which prevents any other court than the Court of Queen's Bench from incidentally judging of the legality of the orders of the poor law commissioners; because a case may arise in which the commissioners may direct some act to be done which will have the effect of trenching on the rights of some single individual. Can it be said that, in such a case, the individual would be deprived of his action of trespass, or of any other remedy which the law in general affords? The words of the section are: "that no rule, order or regulation of the said commissioners, or assistant commissioners, or any of them, shall be removed or removable by writ of *certiorari* into any court of record, except his Majesty's Court of King's Bench at Westminster; and that every rule, order or regulation which shall be removed by writ of *certiorari* into the said Court of King's Bench, shall, nevertheless, unless and until the same shall be declared illegal by that court, continue in full force and virtue, and be obeyed, performed and enforced in such and the same manner, and by such and the same ways and means as if the same had not been so removed," or, in other words, *that the removal of [*71] the order shall not, of itself, be taken to be conclusive of its illegality, during the time that the question of its legality is pending. So that that section only leaves the matter in the same state as if there had been no *certi-*

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orari at all : and I apprehend that, notwithstanding that clause, the rights of individuals are, by the frame of the statute, left untouched.

Inasmuch as the acts sought to be restrained by the injunction, are acts which can only be done by the board of guardians in consequence of an order of the poor law commissioners, I cannot see how the court can sever the one body from the other : and I apprehend that, in a case like the present, where there is a grave question depending as to the right to do the act complained of, this court will not, in the meantime, suffer one of the litigating parties to assume that the law is on his side, and to proceed to complete that act, the legality of which is to be tried in the pending litigation. The demurrers must, therefore, be overruled.(a)[1]

Upon the demurrers being overruled, Mr. *Knight Bruce* moved for and obtained an injunction according to the prayer of the bill.

(a) The rule *nisi* which had been granted for the *certiorari*, was discharged by the Court of Queen's Bench. See *The Queen v. The Poor Law Commissioners in the matter of the Holborn Union*, 6 Adol. & Ell. 56.

[1] Lord Cottenham, on appeal, 4 Myl. & Cr. 249, allowed the demurrers, on the authority of the case in the Queen's Bench, (6 Adol. & Ell. 56,) conceiving himself, though with marked reluctance, bound by that decision, of which "the Vice-Chancellor had not the benefit:" and his not being aware of that decision "may very well explain how his Honor came to a different conclusion." But the Lord Chancellor, with his accustomed energy, (p. 254,) still vindicates the jurisdiction of his court. He says: "The question of jurisdiction was raised, and it was argued by those who supported the demurrers that this court had no jurisdiction. Now I apprehend that the limits within which this court interferes with the acts of a body of public functionaries, constituted like the poor law commissioners, are perfectly clear and unambiguous. So long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this court will not interfere. The court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but, if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority. That distinction, which is very obvious, sufficiently explains all the grounds on which this court ever interferes with the acts of bodies constituted as these commissioners are. Many cases have come judicially before me, in which I have been called to act upon this principle; more especially in the instance of railway companies, canal companies, and other bodies incorporated by acts of parliament, as to which, while the court avoids interfering with that which they do while keeping within the limits of their jurisdiction, it takes care to confine them within those limits; and if, under pretence of an authority which the law does not give them to a certain extent, they go beyond the line of their authority, and infringe or violate the rights of others, they become like all other individuals, amenable to the jurisdiction of this court by injunction. The present bill does not state any such case, &c." See further, *Salmon v. Randall*, 3 Myl. & Cr. 439, 451, n. 1. *Wiggin v. The Mayor &c. of New York*, 9 Paige, 16, 20. *The Bushwick &c. Road Company v. Ebbets*, 3 Edw. Ch. Rep. 353.

1837.—Vigers v. Audley.

*VIGERS v. LORD AUDLEY.[1]

[*72]

1837: 5th and 6th Dec.—Pleading; Supplemental Bill.

Two members of a company filed a bill against the directors, and afterwards obtained an injunction against them. A new director was afterwards elected; and, on his doing an act in conjunction with one of the original directors, which was prohibited by the injunction, the plaintiffs filed a supplemental bill against him, stating that fact, but omitting the allegations in the original bill. Held that the plaintiffs had stated sufficient to maintain their supplemental bill.

THE question in this case arose upon the argument of a demurrer to a supplemental bill. That bill was filed on the 22d of July, 1837, by W. Vigers and John Timins, on behalf of themselves and all other the shareholders in the West Cork Mining Company, except the defendants thereto. It stated that, in October, 1836, the plaintiffs filed their original bill against Lord Audley, Pike, Prickett, Ellis, Warneford, Davis and Solari, as directors of the company; that the original bill stated, amongst other things, the formation of the company, an act of parliament enabling any director to sue and be sued on behalf of the company, and a contract alleged to have been entered into by Pike with Lord Audley for a lease of certain mines; and that the shareholders of the company were very numerous, and, therefore, they could not be made parties to the suit so as to enable the plaintiffs to prosecute it with effect. The supplemental bill then set out the prayer of the original bill, the object of which was to compel the directors to refund certain sums of money which they were alleged to have fraudulently paid to Lord Audley out of the funds of the company, and to restrain them from further disposing of or intermeddling with those funds. It next stated that, on the 2d of November, 1836, the Lord Chancellor granted an injunction restraining the directors from signing or issuing any bills of exchange, promissory notes or other securities, binding or pledging the company to the payment of any sums of money to Lord Audley: that, on the 23d of December, 1836, the plaintiffs filed a supplemental bill against the defendants to the original bill, "which, after stating to the purport and effect therein stated, prayed [*73] that all the therein mentioned discoveries, statements, facts and circumstances might be taken, treated and considered as supplemental to and in aid of the said original bill and of the relief sought thereby, and that the defendants might be restrained as therein mentioned and as prayed by the original bill, and otherwise as therein mentioned."

The first mentioned supplemental bill then stated that, on the 27th of December, 1836, an order was made by the Vice-Chancellor, restraining Pike, Prickett and Warneford from interfering with, possessing, receiving or disposing of the funds of the company, and that that order was afterwards affirmed by the Lord Chancellor: that Pike, with the aid and concurrence of Solari, or Pike and Solari conjointly, determined to nominate or obtain the

[1] S. C. but in a previous stage, 2 Myl. & Cr. 49.

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nomination of a temporary director of the company ; and, accordingly, Knapp was appointed or nominated by Pike, Solari and the other directors acting with them : that, in April, 1837, Knapp and Solari fraudulently concurred with Pike, in appointing Elkington (who was in insolvent circumstances) a temporary director: that the company being pressed to make some payments, Solari, Knapp and Elkington, acting in collusion together and with Pike, determined on borrowing money, on behalf of the company, from Solari ; and, under the pretence of some resolutions of Solari and of Knapp and Elkington as such temporary directors, Solari made some advances of money for the company; amounting, as he alleged, to 1139*l*. : that, in order to ruin the company or otherwise effect some sinister object of the said parties, a writ was, on the 14th of June, 1837, sued out, in the name of Solari, against Prickett, as a director of the company, as the nominal defendant in an action [*74] of debt at the *suit of Solari, for his alleged advances ; and, on the 19th of the same month, an appearance to the writ was entered, for Prickett, by Solari's attorney, and, on the 21st, a judgment by default was signed for Solari, and, in July following, execution was issued thereon, and the goods and chattels of the company were seized, and were advertised for sale on the 25th of that month : that an action had been commenced by Elkington, against Prickett, for a debt alleged to be due to him from the company, in which similar proceedings had taken place : that both those actions were fraudulent as against the shareholders : that Solari and Knapp being themselves, merely temporary directors, had no right or power to nominate Elkington as a director, and such appointment was altogether void.

The first mentioned supplemental bill prayed that all the aforesaid several matters might be taken as supplemental to the former suits, and that the plaintiffs might have all the same benefit thereof against the defendants as they were entitled to in respect of the several matters in their former bills alleged, and might have such and the like relief against the defendants, Knapp and Elkington, as was prayed by their former bills and as they were entitled to against the several other defendants therein named, and that Solari and Knapp might be restrained from proceeding with their actions.

Knapp but in a general demurrer.

Mr. *Wigram* and Mr. *Toller*, in support of the demurrer, said that Knapp was not required to answer the bills in the former suits, nor was it shown that he was, in any manner, bound by the orders made therein; [*75] that, as the same relief was prayed against him as was *prayed by the former bills and as the plaintiffs were entitled to against the other defendants therein named, it was not sufficient to refer to those bills, in the usual form, as being on the files of the court ; but the case made by those bills ought to have been stated over again ; for, as the record now stood, it did not appear that the plaintiffs had any equity to the relief prayed. *Phelps v. Sproule*.^(a)

(a) *Ante*, vol. 4, p. 318.

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Mr. *Knight Bruce*, Mr. *Wakefield* and Mr. *Rogers*, for the plaintiffs, said that the former bills were referred to as remaining filed as of record in the court, and, therefore, all their contents were embodied, by reference, in the bill demurred to: that, as equitable relief was sought against the directors, all of them must be parties to the discussion of the question: and, if a new director chose to intervene in matters which were in litigation, he must be made a party even if he were an innocent director, as the equity could not be administered without him: that, moreover, Knapp was charged with having, in collusion with Pike, borrowed money on behalf of the company, in disregard of the injunction that had issued against the other director; and that that and the other charges against him, showed that he was properly made a party to the bill.

THE VICE-CHANCELLOR:—All that I intended to do in *Phelps v. Sproule* was to act upon the proposition laid down by Lord Redesdale, namely, that a person who files a bill of revivor must show a title to revive; that is, he must state so much of the original bill as is necessary to show that he has a right to revive.^(a)

In this case the supplemental bill which has been demurred to, [*76] states that the original bill was filed against Lord Audley and certain other persons who were directors of the West Cork Mining Company, and that an injunction was asked for and granted to restrain the directors from issuing bills of exchange or other securities binding the company to the payment of any sums of money to Lord Audley. Then a supplemental bill was filed against the same defendants, and an injunction was granted which restrained Pike and two of the other directors from interfering with the funds of the company; and that injunction was upheld by the Lord Chancellor. Then it appears that Knapp was subsequently appointed a temporary director under circumstances that were collusive and fraudulent: and then it is stated that Solari, Knapp and Elkington, acting in collusion together and with Pike, determined on borrowing money from Solari, on behalf of the company, and that Solari, under the pretence of some resolutions made by him in conjunction with Knapp and Elkington as temporary directors, made some advances of money for the company. Now is not that, in substance, a violation of the injunction which was upheld by the Lord Chancellor? For the moment the money was borrowed for the company, it became the funds of the company, and, consequently, the act so stated to have been done by Knapp in collusion with Pike, after he had been elected a temporary director of the company, was, in effect, an interference with the funds of the company: and it would be strange to say that, if it was thought right to restrain Pike from interfering with the funds, a temporary director, subsequently elected, is at liberty to concur with him in doing an act which the Lord Chancellor had prohibited. As it then appears that the judges of the court have

(b) See Treat. on Plead., 3d edit. p. 59, and 4th edit. p. 76.

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[*77] granted injunctions, no further statement *was necessary for the purpose of showing that the plaintiffs had an equity.

It is not necessary for a plaintiff, when he files a supplemental bill to state in it all the circumstances of the case at length. All that is requisite is that he should state so much of the case as shows that there was an equity; and, as the plaintiffs in this case have stated that the judges of the court have granted injunctions in the prior stages of the cause, they have stated sufficient to show that there was an equity: and the consequence is that the demurrer must be overruled.[1]

GIBBINS v. MAINWARING.

1837: 13th December.—Receiver; Practice.

Receiver granted against a defendant who was out of the jurisdiction.

In this case, Mr. *Knight Bruce*, for the plaintiff, moved for a receiver against the defendant, who was out of the jurisdiction.

The Vice-Chancellor made the order.(a) [2]

[*78] *THE ATTORNEY GENERAL v. THE LONDON AND SOUTHAMPTON RAILWAY COMPANY.

1837; 14th December.—Construction of Railway Act, as to crossing roads.

By the Southampton Railway act, it was enacted that it should be lawful for the Company, according to the provisions and subject to the restrictions of the act, to construct in, upon, across under, or over, any lands, streets, roads, rivers, &c., such bridges, arches, piers, &c., as they should think proper: that, where any bridge should be erected for carrying the railway over or across any road, the span of the arch should be formed so as to leave a clear and open space, under every arch, of not less than fifteen feet: that in all cases in which any road should be found necessary to be cut through, diverted, taken or so much injured, as to be impassable for passengers or carriages, the Company should, before any road should be so cut through

(a) See *Tanfield v. Irvine*, 2 Russ. 149.

[1] Vide *Woods v. Woods*, 10 Sim. 197. *Byrne v. Byrne*, 1 Flann. & Kel. 446.

[2] "As a general rule a receiver is not granted without notice to the defendant, unless the time for his appearance has expired; except where such defendant has fraudulently withdrawn himself from the jurisdiction of the court, to prevent the service of process upon him. But under special circumstances, where it is necessary to appoint a receiver of the property of an absentee to prevent its being wasted or removed beyond the jurisdiction of the court, a receiver will be appointed *ex parte*. In the present case it was not shown that the defendant had any property of a perishable nature, or any choses in action which would be in danger of being lost if not collected immediately; or that any other special circumstances existed to render it necessary or proper to put a receiver upon the defendant's property, without giving him an opportunity to be heard." Walworth, Ch. *Sanford v. Sinclair*, 8 Paige, 373. A receiver cannot be appointed upon personal notice, served upon the defendant personally, or without leave of the court; and such leave will not be granted, unless it appear that the plaintiff has used due diligence to compel an appearance. *Ramsbottom v. Freeman*, 4 Beav. 145. And see 2 Russ. 152, n. 1. *Stratton v. Davidson*, 1 Russ. & M. 484, 485, and n. Am. Ed. *The People v. Norton*, 1 Paige, 17. *Bloodgood v. Clark*, 4 Paige, 577. *Gibson v. Martin*, 8 Paige, 481.

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&c., cause a sufficient carriage or horse-road, as the case might require, to be made instead thereof, as convenient for passengers and carriages as the road to be cut through, &c., or as near thereto as might be, and should cause the same to be put into good order where the former road could not be more easily restored; and, when the road cut through, &c. should be a turnpike road, the substituted road, if temporary, should be set out and made as aforesaid, and the principal road should be restored within six months; and the railway, where it should cross such turnpike road, should be constructed and kept in repair so as to prevent, as far as practicable, any obstruction to the passage along the road. Held, that the company, in carrying a bridge over a turnpike road, might erect the piers upon the road, and were not bound to leave more than a clear open space of fifteen feet under each arch, notwithstanding the original width of the road would be considerably lessened thereby.

By the London and Southampton Railway act (4 & 5 Will. 4, c. 88,) it was enacted that, for the purposes and subject to the restrictions of the act, it should be lawful for the company, and they were thereby empowered for the purposes and according to the provisions and subject to the restrictions of the act, to make or construct in, upon, across, under or over any lands, streets, rivers, roads, &c., such inclined planes, tunnels, embankments, bridges, arches, piers, roads, &c., as they should think proper: sect. 9. That, where any bridge should be erected by the company, for the purpose of carrying the railway over or across any turnpike road *or other public high- [*79] way, the span of the arch of such bridge should be formed and continued of such width as to leave a clear and open space under every such arch of not less than fifteen feet: sect. 74. That, in all cases in which, in the exercise of any of the powers granted by the act, any part of any carriage or horse road, either public or private, should be found necessary to be cut through, diverted, raised, sunk, taken or so much injured as to be impassible for passengers or carriages or the persons entitled to the use thereof, the company should, at their own expense and before any road should be so cut through, diverted, raised, sunk, taken or injured as aforesaid, cause a sufficient carriage or horse road (as the case might require) to be set out and made instead thereof, as convenient for passengers and carriages as the road to be cut through, diverted, &c., or as near thereto as might be, and should cause the same to be put into good and substantial order and condition, where the former road could not more easily be restored; and, where the road cut through, diverted, &c., should be a turnpike road, the substituted road, if temporary, should be set out and made as aforesaid, and the principal road should be restored within six calendar months next after the commencement of the operation; and that the railway, where it should cross such turnpike road, should be constructed and kept in repair in such manner as to prevent, as far as might be practicable, any obstruction to the passing along such turnpike road: sect. 77.

The railway company having made preparations for erecting an arch across the turnpike road from London to Portsmouth, at Ditton Marsh, where the road was thirty-eight feet wide, the information was filed, alleging that the clear space under the arch would be of the width *of [*80]

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wenty-four feet only, which was much less than the average width of the road, and wholly inadequate to the great traffic on it; and, consequently, the projected lessening of its width, would be attended with danger and inconvenience to the public, and would be, in fact, a public nuisance. The information prayed that the company might be restrained from proceeding to erect the arch, and from erecting any other arch or building upon or across the road which would so obstruct or narrow it as to be a nuisance or injury to the public.

A motion was now made for the injunction, supported by affidavits verifying the statements in the information. Affidavits also were made on behalf of the company, showing that the road, in certain parts of it where the traffic was greater than at Ditton Marsh, was not twenty four-feet wide.

Mr. *Knight Bruce*, Mr. *Foster* and Mr. *Sugden*, in support of the motion:—According to the construction which the company put upon the act a width of fifteen feet is all that they can be required to give in any case. But it is evident that a width that may be sufficient at one place, may be wholly insufficient at another, and, consequently, the legislature does not say that, where the company are under the necessity of carrying a bridge over a road the span of the arch shall, in no case, be greater than fifteen feet, but merely that, in no case, shall it be less. The legislature considered that a space of fifteen feet was the least width that the safety and convenience of the public could, in any case, require: but it did not mean to enact

that no greater space should be allowed, where the safety and convenience of the public required it. **Prima facie*, the road as it now is, must be taken not to be wider than is requisite: indeed some of our affidavits state that a width of forty feet is necessary; but they all agree that a less width than thirty feet will be both dangerous and inconvenient to travellers on the road. The defendants' affidavits do not state that the present road is unnecessarily wide; but they merely contain the speculative opinions of the deponents as to what the convenience of other persons may require. The 77th section of the act aids the construction which we contend for; for it enacts that a new road, where it is necessary to make one, shall be set out and made as convenient for passengers and carriages as the old one. Can it then be said that a road which is only fifteen feet wide, is as convenient for passengers and carriages as one that is thirty-eight feet wide? The new highway act (5 & 6 Will. 4, c. 50, s. 69,) shows that the legislature considers thirty feet to be the proper width of a public road: for it imposes penalties on persons making encroachments within fifteen feet of the centre of the road.

In *Blakemore v. The Glamorganshire Canal Navigation*,^(a) Lord Brougham, C., speaking of acts of parliament of the same nature as the one now under consideration, says: "When I look upon these acts of parliament,

(a) See 1 Myl. & Keen, 162.

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I regard them all in the light of contracts made, by the legislature, on behalf every person interested in any thing to be done under them: and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than any thing in the whole system of administration under *our [*82] constitution. Such acts of parliament have now become extremely numerous; and from their number and operation, they so much affect individuals, that I apprehend those who come for them to parliament, do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else:—that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals.” This is the true point of view in which all acts of parliament like the present, ought to be regarded.

Mr. *Wigram* and Mr. *Duckworth* for the defendants:—By the 9th section of the act, the company are empowered to construct bridges and arches upon as well as across and over turnpike roads, *as they may think proper*; and, therefore, if the words, “according to the provisions and subject to the restrictions of the act” had been omitted, the company might have made the arches of the bridge of any width that they pleased. The restriction imposed by the act, is that a clear and open space shall be left, under every arch, of not less than fifteen feet. Taking then both the sections together, it is clear that the company are empowered, by the act, to construct bridges over turnpike roads, and to make a roadway, under each arch, of the width of fifteen feet. The legislature considered that that was the width which the safety and convenience of the public required: and the act nowhere says that the company are not to diminish the width of roads where they are unnecessarily wide. If it had been the intention of the legislature that the existing width of the roads should be preserved, it would “have been easy to say so. The [*83] trustees of the road had notice that it was the intention of the company to apply for the act, why then did they not procure a special provision to be inserted in the act, for preserving the original width of their road? Special clauses are inserted in the act for the protection of the river Wey navigation and other public undertakings.

The Court of Chancery never interferes to restrain a general nuisance, without sending the question to be tried in a court of law. *The Attorney General v. Cleaver.* (a)

Mr. *Knight Bruce* in reply:—The act gives no power to the company, in crossing the road, to occupy any part of it with a pier, buttress or any other building. In the 9th section, the words “in and upon” apply to lands only: the words “across and over,” are applicable to roads and rivers: and it is observable that all the prepositions used in the 9th section, except “across and over,” are omitted in the 74th section. The provision that there shall be, at

(a) 18 Ves. 211.

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least, a certain space under each arch, cannot be construed as a provision that there shall be no greater space. The minimum is fixed, but the maximum is not, unless the words "not less than" are to be taken to mean "not more than." At all events the act gives no power to the company to touch the surface of any road.

THE VICE-CHANCELLOR :—In this case it is observed that, by the 9th section of the act of parliament, it is enacted that, for the purposes and [*84] subject to the restrictions of the act, it shall *be lawful for the company, their deputies, engineers, contractors, servants, agents and workmen, and all other persons by them authorized, for the purposes and according to the provisions and subject to the restrictions of the act, to make or construct in, upon, across, under or over the railway or other works, and in, upon, across, under or over any lands, streets, hills, valleys, roads, rivers, canals, brooks, streams or other waters, such inclined planes, tunnels, embankments, bridges, arches, piers, roads, ways, passages, conduits, drains, culverts, cuttings and fences as the company should think proper. Now, if it stood there, there would be a general power given to the company not merely to make a bridge over or across a road, but also to erect piers and arches in and upon the road. But that general power, given by the 9th section, is clearly intended to be restricted to a certain extent ; for the company are only enabled to do those things which the 9th section empowers them to do, according to the provisions and subject to the restrictions of the act ; and, when you look at the 74th section, you see that it enacts that "where any bridge shall be erected by the company for the purpose of carrying the railway over or across any turnpike road or other public highway, the span of the arch of such bridge shall be formed, and shall, at all times, be and be continued of such width as to leave a clear and open space under every such arch of not less than fifteen feet, and of a height, from the surface of such turnpike road to the centre of such arch,*of not less than sixteen feet, and of a height, from the surface of any other public highway to the centre of such arch, of not less than fourteen feet ;" *prima facie*, therefore, one would have supposed that the general power given to the company by the 9th section, would have been capable of being exercised by them in any way they thought [*85] *proper, provided that in crossing a turnpike road by a bridge, they did not make the open space under the arches, less than fifteen feet wide. It was obviously the intention of the legislature to empower the company to erect the piers of the arches on the road, provided a clear, open space of not less than fifteen feet was left, for the public, between the piers.

But it was said that that was not the construction which ought to be put upon the two sections before mentioned ; for, if we look at the 77th section of the act, we shall find these words : "that, in all cases in which, in the exercise of any of the powers hereby granted, any part of any carriage or horse road, either public or private, shall be found necessary to be cut through, diverted, raised, sunk or so much injured as to be impassable for passengers

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or carriages or the persons entitled to the use thereof, the company shall at their own expense and before any road shall be so cut through, diverted, raised, sunk, taken or injured as aforesaid, cause a sufficient carriage or horse road, as the case may require, to be set out and made instead thereof, as convenient for passengers and carriages as the road to be cut through, diverted, raised, sunk, taken or injured as aforesaid, or as near thereto as may be, and shall cause the same to be put into good and substantial order and condition where the former road cannot more easily be restored; and, when the road cut through, diverted, raised, sunk, taken or injured, shall be a turnpike road, the substituted road, if temporary, shall be set out and made as aforesaid, and the original road shall be restored within six calendar months next after the commencement of the operation; and the railway, where it shall cross such turnpike road, shall be "constructed and kept in repair in such manner [*86] as to prevent, as far as may be practicable, any obstruction to the passage along such turnpike road." Now that section points at two things; first, where it may be necessary to divert the road temporarily, and, secondly, where it may be necessary to divert it, absolutely and altogether, for an indefinite period of time; and then it provides that, where the railway crosses the road, it shall be constructed and kept in repair so as to prevent, as far as may be practicable, any obstruction to the passage along the road. But that provision appears to me not to be a general provision, applying to all the other sections of the act, but only to the particular case contemplated in that section, namely, to a case where there may be a diversion of a road for any particular purpose, either temporarily or absolutely; but it has no relation to the case contemplated by the 74th section which is only a modification of the general power given by the 9th section.

It seems to me to be useless for the court to consider whether the enactments of the act may or may not produce inconvenience, or, perhaps, damage to the public. The legislature gives what power it thinks proper, either to an individual or to a body corporate, and defines that power in the manner which it considers most fit; and it is not the province of a judge to determine what the convenience or inconvenience of the public may require.

In my opinion it is plain beyond a doubt, upon this act of parliament, that, if a clear open space of not less than fifteen feet is left under the arch of the bridge, the company may erect the piers of the bridge on "the [*87] road, and may make the bridge in any manner they may think proper; and, therefore, I think that there is no foundation for this application.

But though this is my opinion, and, that being so, it would not be right for me to grant the injunction; yet if the relators think it right to take the opinion of a court of law upon the question raised by this information, I will give them leave so to do; but, at present, I shall not grant the order that is asked for: and I shall reserve the consideration of the costs of the motion, if the relators think proper to take the opinion of a court of law, until I know the result of the proceedings at law.

 1838.—Ward v. Cooke.

WARD v. COOKE.

1838: 12th Jan.—Opening Biddings.

Four lots were sold for 610*l.*, 60*l.*, 20*l.* and 20*l.* severally, to the same person. The court opened the biddings on an advance of 160*l.* on 710*l.*, the whole amount of the sales, but would not order the lots to be resold in one lot.

THE estate directed to be sold by the decree in this cause, was put up for sale in twenty-two lots, but only eighteen of the lots were sold. Afterwards the remaining four lots were again put up for sale, and all of them were purchased by the same individual, for the several sums of 610*l.*, 60*l.*, 20*l.* and 20*l.*, amounting together to 710*l.*

Mr. *G. Richards* now moved that the biddings for the four lots might be opened, upon an advance of 100*l.* upon the 710*l.*, and that the lots might be resold in one lot. He cited *Brookfield v. Bradley*. (a)

Mr. *Knight Bruce* and Mr. *Campbell*, for one of the parties in the cause, opposed the motion on the ground that Mr. *Richards*' client was present at the sale.

[*88] *The Vice-Chancellor said that he would not alter the original scheme of sale, without some reason being assigned for it; but that, if Mr. *Richards*' client would advance 160*l.* upon the whole amount of the biddings, he would order them to be opened.[1]

 GREENAWAY v. ROTHERHAM.

1838: 16th Jan.—Feme-coverte; Infant; Next Friend.

A suit was instituted by husband and wife and their infant children, by their father as next friend, respecting separate property of the wife in which the children also were interested. Pending the suit, the husband absconded. Held that the court could not appoint a next friend for the wife and a new next friend for the children, but it ordered that a person to be named by the wife, should be allowed to prosecute the suit on behalf of the plaintiffs.

THIS suit was instituted by a husband and wife, and their infant children, by their father as their next friend, in respect of separate property of the wife, in which the children also were interested. In the progress of the suit the father absconded and went abroad; and, thereupon, the wife presented a petition praying that some person might be appointed her next friend, and that a new next friend might be appointed for her children.

Mr. *Elderton* appeared in support of the petition.

(a) 1 Sim. & Stu. 23.

(1) Vide *Williamson v. Dale*, 3 Johns. Ch. Rep. 292. *Lansing v. McPherson*, 3 Johns. Ch. Rep. 424. *Garretts v. Edwards*, 1 Sim. & Stu. 20, 21, n. 1. The rules as to opening biddings do not apply to the sale of a colliery. *Williams v. Attenborough*, Turn. & Russ. 70. As to the course of practice in regard to opening biddings; see *ibid.* 76, 77.

1838—Gibbs v. Hooper.

The Vice-Chancellor said he had no jurisdiction to make the order asked for, but that he would order that some person to be appointed by the wife, should be allowed to prosecute the suit in the name of the plaintiffs, without prejudice to any lien which the husband's solicitor might eventually have for his costs.

*GIBBS v. HOOPER.

[*89]

1838; 19th January.—Annuity; Memorial.

The memorial of an annuity, after setting forth the grant, from which it appeared that the consideration for the annuity was 455*l.*, averred that the true and *bona fide* consideration for the annuity was 450*l.*, and that the said sum of 450*l.* was paid to the grantor by the grantee. The memorial stated also that the grantee's execution of the deed, was attested by three persons whose names it mentioned, but the name of only one of them was indorsed on the deed. Held, that the grant of the annuity and all the securities for it, were void.

The question in this case arose on the argument of exceptions to the Master's report, finding that an annuity granted at the time when the annuity act of the 17th Geo. 3, c. 26 was in force, was void on account of the following errors in the memorial.

First: The memorial, after setting forth the deed and the receipt indorsed on it, in which the consideration for the annuity was mentioned to be 455*l.*, averred that the true and *bona fide* consideration advanced and paid for the annuity was 450*l.*, and that the said sum of 450*l.* was paid to the grantor, by the agent of the grantee, in notes of the Governor and Company of the Bank of England.

Secondly: The memorial mentioned the names of Cox and two other persons as witnesses to the execution of the deed by the grantee; whereas Cox was the only attesting witness to the grantee's execution.

Mr. Jacob, and Mr. Sharpe, for the exceptants:—Both the recitals and the operative part of the deed, as set forth in the memorial, mention the consideration for the annuity to be 455*l.* In *Cousins v. Thompson*,^(a) the memorial contained nothing about the consideration, except the recital in the deed; and yet it was held to be sufficiently stated. *Hodges v. Money*,^(b) *Sowerby v. Harris*,^(c) *Ranger v. The Earl of Chesterfield*,^(d) are cases to the same effect. Those cases decide also *that it is sufficient if the [*90] consideration is set forth once in the memorial. Here it is four times correctly set forth as being 455*l.*—[The Vice-Chancellor: The memorial sets forth the consideration as expressed in the recitals and operative part of the deed: and that, if it had stood alone, would have been a sufficient compliance with what the act requires: but, in the subsequent part of the memorial, there is a different statement as to the amount of the consideration.]—The act does

(a) 5 T. R. 335.

● (b) 4 T. R. 500.

(c) Ibid. 494.

(d) 5 M. & S. 2.

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not say that the memorial shall contain a specific allegation as to the consideration, but merely requires it to be set forth; and when the memorial states the recitals in the deed, that is a sufficient setting forth within the act: therefore, the allegation that the consideration was 450*l.*, may be considered as surplusage or as a clerical mistake. *Ince v. Everard*.(a) [The Vice-Chancellor: In that case, the memorial, after declaring that the 280*l.* mentioned in the grant of the annuity, was the whole of the purchase money paid for it, proceeded thus: "and that the *said* sum of 250*l.* was really and *bona fide* paid" by the grantee. It was evident, therefore, that the 250*l.* was inserted, by mistake, for the 280*l.*]

With respect to the objection that the names of two of the persons whom the memorial represents to have been present when the grantee executed the deed, do not appear on the back of it: the case of *Ex parte Mackreth*(b) was relied on, before the Master, in support of that objection. But that case is totally different from the present: for, there, the memorial stated that all the securities were attested by four persons; whereas, it was admitted [*91] that three of the instruments were witnessed by only two of those *persons: the memorial, therefore, stated what was untrue. Here the memorial states what is perfectly true, namely, that the deed was executed in the presence of Cox; and it may be taken to have been executed in the presence of the two other persons, although their names do not appear on the back of the deed. *Browne v. Rose*,(c) *Orton v. Knight*,(d) *Wyatt v. Barwell*.(e) Besides, it is perfectly immaterial whether the grantee executed the deed or not. The errors complained of are of the most trivial nature: and the memorial gives all the information that the legislature intended it to give.

At all events the memorial is good as to the warrant of attorney: and the case of *Browne v. Rose* is an authority for holding that some of the securities for an annuity, may be bad, and others, good.

Mr. Knight Bruce, Mr. Russell, Mr. Pitman, Mr. Fisher and Mr. Gardner appeared for other parties in the cause; but

The Vice-Chancellor, without hearing them, said:—When the memorial of an annuity deed sets forth, by way of recital, what was the consideration for the annuity, it has been decided that that is a substantial setting forth of the consideration. But, here, the memorial first sets forth the whole contents of the deed (from which it appears that the consideration for the annuity was 455*l.*) and then it contains a substantive averment that the true and *bona fide* consideration paid for the purchase of the annuity, was the sum of [*92] 450*l.* If, after that averment, it had gone on to state that the **said* sum of 455*l.* was paid by the grantee, then you might have said that there was evidently a clerical error in the previous averment, because the memorial went on to say that the *said* sum of 455*l.* was paid by the grantee

(a) 6 T. R. 545.

(b) 2 East, 563.

(c) 6 Taunt. 124.

(d) 3 Bos. & Pull. 153.

(e) 19 Ves. 435.

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to the grantor. But, in this case, the memorial asserts, not only that the true and *bona fide* consideration paid for the purchase of the annuity, was the sum of 450*l.*, but also that the *said* sum of 450*l.* was paid by the grantee. Therefore, there is, in one part of the memorial, a statement, by way of recital, that the consideration for the annuity was 455*l.*; and, in the subsequent part of the memorial, there is a substantive averment that the consideration was a different sum; and consequently the memorial does not contain a true statement of what the consideration really was. That, in my opinion, is a good objection extending to the whole of the transaction, and, therefore, it vitiates the warrant of attorney as well as the grant of the annuity.

Next, with respect to the objection as to the witnesses. That objection also appears to me to be a fatal one. The object of the legislature in requiring the several particulars mentioned in the act to be set forth in the memorial, was to enable any person, who might be desirous of inquiring into the transaction, to ascertain what the *res gestæ* of it really were: and, in my opinion, that object is not complied with when, in addition to the names of the persons who did witness the execution of the deed, the names of other persons are introduced into the memorial. [1] Such a mis-statement would lead to endless trouble and confusion, by inducing a person desirous of inquiring into the transaction, to apply for information to persons who were entire strangers to it. Moreover, the memorial would contain an untrue representation of the *res gestæ* of the transaction; and the public would be deceived, [*93] if the parties were allowed to represent that the transaction had the sanction of two persons, both, perhaps, of the greatest respectability, but who were wholly ignorant that any such transaction had taken place.

On the first ground, however, I think that the annuity is clearly void.

GRAHAM v. COAPE.

1838: 20th and 22d January.—Defendant; Disclaimer.

A bill was filed by a person claiming to be entitled to a trust fund, against the trustees, and another party, who it alleged, claimed an interest in the fund; and it contained various allegations tending to show that he had rendered the suit necessary by his personal conduct; and it prayed that that party might pay the costs of the suit. Held that, as the bill did not state simply that the defendant claimed an interest in the fund, it was not sufficient for him to put in a mere disclaimer, but that he must answer the bill fully.

THE bill in this cause was a cross bill. It stated that on the 27th of February, 1837, the plaintiff married Jane Edmiston, his late wife, and that by their marriage settlement, certain sums of stock, the wife's property, were assigned by the defendants Graham and Forbes, in trust for the wife's

1. Here is an exception to the maxim, *utile per inutile non vitiatur*.

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separate use for life, and, after her death, for the plaintiff, his executors, &c.: that the plaintiff's wife died in March, 1837, and thereupon the plaintiff became entitled to have the stock transferred to him: that, if she had died unmarried, the defendants Henry Coape and Susanna his wife and Henry Coe Coape and Sidney his wife in right of their wives respectively, as her next of kin, or under some other right or title unknown to the plaintiff, and which those defendants refused to discover, would have been entitled to the stock: that the same defendants alleged that the plaintiff's wife was of unsound mind at the time of her marriage, and, consequently, that the settlement and [*94] *marriage were invalid, and that they, the defendants, under such right or title, as aforesaid, were entitled to the stock, and had required the trustees to transfer it to them: that the plaintiff's wife was of perfectly sound mind at the execution of the settlement and solemnization of the marriage; but the trustees, in consequence of the before mentioned claims, refused to transfer the stock to the plaintiff: that he had frequently requested the defendants to relinquish their alleged claim to the stock, and to permit the trustees to transfer it to him, but they had refused so to do: that, in April, 1837, H. Coape and Susanna his wife exhibited their bill in this court against the plaintiff and the trustees, alleging that the plaintiff's wife was of unsound mind at and for some time before her marriage, and that the plaintiff and his father and mother formed a plan for procuring a marriage between her and the plaintiff, in order that the plaintiff might become possessed of her property, and that they procured the settlement to be executed by her at a time when her intellects were impaired by paralysis; and praying that the settlement might be delivered up to be cancelled, and that the trustees might be decreed to transfer the stock to the plaintiffs in the original suit. The cross bill then contained charges contradicting the allegations in the original bill, and tending to show the sanity of the plaintiff's wife, and that the marriage was her free act, and that it had been admitted to be so by the defendants, the Coapes, and that it was known to her relations, and particularly to those defendants for nearly a year before it took place, and that they endeavored to dissuade her from it in hopes of succeeding to her property, and that they had tampered with her servants and medical attendants for the purpose of obtaining information as to the state of her health. The cross bill [*95] then charged that the several acts and *proceedings before mentioned on the part of the defendants, were evidence that they had or claimed some interest in the stock on the supposition that the plaintiff's wife died unmarried: that she had requested H. C. Coape to be one of the trustees of her settlement, to which he consented, but afterwards retracted his consent: that the defendants never pretended that the plaintiff's wife was of unsound mind until after her death, but always treated and considered her as sane; that, on the 7th of February, 1837, H. C. Coape had an interview with her, and had much conversation with her respecting her intended marriage, and endeavored so dissuade her from it, and, on that occasion, retracted his consent to be one

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of the trustees of her settlement; and that he ought to set forth all that passed at that interview: that the plaintiff's wife frequently wrote letters to the defendants, the Coapes, which were then in their possession, and which proved that she was perfectly sane, and that those defendants had written letters to each other, which proved the same fact: that they had executed some deed by which they had assigned their shares of the stock upon certain trusts for their own benefit, but the particulars of such deed were wholly unknown to the plaintiff, and they ought to discover the same: that Henry C. Coape and his wife claimed to be interested in the stock under such deed: that they sometimes pretended that they did not claim any interest in the stock; whereas the plaintiff charged the contrary, and that they claimed such interest therein as before mentioned, and as part evidence thereof, that they took an active part in endeavoring to prevent the marriage, and in preventing the trustees from transferring the stock to the plaintiff: that the trustees were willing to transfer the stock to the plaintiff, but they had been advised that they could not safely do so by reason of the defendants' claims to it, and of the suit instituted by them: *that the defendants, the Coapes, ought to pay to the plaintiff, the costs of this suit,* and the other costs occasioned by their claims: and that they had, in their possession, various letters; &c., relating to the plaintiff's wife, and her state and condition, and their own title to the stock and the other matters in the bill.

The bill prayed that the plaintiff might be declared to be entitled to the stock under the settlement, and that the trustees might be decreed to transfer it to him; *and that the Coapes might pay him his costs of the suit.*

H. C. Coape and his wife put in an answer and disclaimer (as they intitled it) to the bill. It was as follows: "These defendants say that they or either of them never had, nor did they or either of them claim or pretend to have, nor do they or either of them now claim any right, title, or interest of, in, or to the estate, funds, stocks and premises in the said bill mentioned of Jane Edmiston deceased in the said bill named, or in any part of such estate, funds, stocks, and premises: and these defendants do disclaim all right, title, and interest to the same estate, funds, stocks and premises and every part thereof."

To this answer and disclaimer the plaintiff took exceptions which comprised all the interrogatories in the bill. The Master reported that the answer and disclaimer were sufficient, and that the plaintiff ought to pay the costs of the reference. The plaintiff excepted to the report; and those exceptions now came on to be argued.

Mr. Jacob and Mr. James Parker, in support of the exceptions:—The document which the defendants Henry Coe Coape and his wife call an answer and disclaimer, is, in *fact a partial answer; for they say [*97] that they never had or claimed to have nor do they now claim any interest in the property in question. If a bill seeks no relief or discovery against a defendant, but alleges merely, that he claims some interest in the property in dispute, the defendant, by putting in a simple disclaimer, removes

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the only ground on which he was made a party to the suit. But, here, the defendants have put in an answer as well as a disclaimer; and, by the general rules of this court, independently of what appears in this bill, they cannot, if they adopt such a course, avoid answering the bill fully. The bill is a cross bill, praying relief as well as discovery, and with respect to the defendants who have put in this answer and disclaimer, it prays that they may pay the plaintiff his costs of the suit. All the allegations in the bill tend, either directly or indirectly, to fix those defendants with the costs; and, consequently, they ought to have put in a full answer. At all events, they ought to have answered the allegations that they had required the trustees to transfer the funds to them; that they had refused to relinquish their claim to the funds, and that they took an active part in preventing the marriage, and in preventing the trustees, since the death of the plaintiff's wife, from transferring the funds to the plaintiff: no answer, however, is given to any of those allegations: nor is there any answer to the charge that they have executed some deed or instrument whereby they have assigned, or agreed to assign, their alleged shares or interests in the stocks and funds upon certain trusts for their own benefit. Where, as in this case, the bill seeks to fix a party with a liability, he cannot get rid of the liability, by putting in a disclaimer. *Deacon v. Deacon*,^(a) *Glassington v. Thwaites*,^(b) *Cookson v. Ellison*,^(c) *Bulkeley v. Dunbar*,^(d) *Oxenham v. Esdaile*.^(e) The defendants might have put in a plea stating facts which exempted them from answering the bill; but then the plaintiff would have been at liberty to enter into evidence to disprove those facts; and, if he succeeded, the defendants would have been compelled to answer interrogatories embracing all the allegations in the bill.

The Vice-Chancellor:—If the defendants did claim the funds from the trustees, as they are alleged to have done, it would be a ground for making them pay the costs of the suit, provided the plaintiff ultimately establishes his title to the funds; and, therefore, all the allegations that go to show that the defendants have acted as if they claimed the funds, are material, as they tend to show that they did make the claim, and, consequently, my present impression is that all those allegations, as well as the statements relative to the plaintiff's title, ought to have been answered.

Mr. Knight Bruce and Mr. G. Richards, in support of the report:—The defendants who have put in the answer and disclaimer, are not parties to the original bill. A suit is now pending, in the Ecclesiastical Court, as to the right of the plaintiff to be administrator to his wife: and the validity of their marriage is the question in contest in that suit. The filing of this cross bill, is a mere device to ascertain what the defendants who have disclaimed, may have to say, as witnesses, relative to the alleged marriage. It is not necessary to ask for costs except against a person who is made a party to a

^(a) Ante, vol. 7, p. 378.^(b) 2 Russ. 458.^(c) 2 Bro. C. C. 252.^(d) 1 Anst. 37^(e) Maclel. & Youn. 540.

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suit, as having been guilty of a fraud. Where, as in the present case, a [99] person is made a party because he has made a claim to the property in litigation, the court may order him to pay costs, although they are not prayed against him. We admit that a party cannot disclaim a liability; but he may disclaim an interest. Lord Redesdale says: "It has been already observed that, if a claim of interest is alleged by a bill against a person who has no interest in the subject, he cannot, by demurrer, protect himself from a discovery and must resort either to a plea or disclaimer: by either of which means, it should seem, he may protect himself from making, by answer, that discovery which he may properly be required to make, if called upon as a witness. In some cases, however, the court has allowed a defendant to protect himself, by answer denying the charge of interest, from answering to matters to which he may be afterwards called upon to answer in the character of a witness; and, perhaps, in justice to those against whom he may afterwards be called upon to give evidence as a witness, he ought not to be previously examined to the same matters upon a bill under the pretence of an interest which he has not."^(a) It is obvious that these defendants are witnesses; and, if the court compels them to put in a full answer, it will enable the plaintiff, by means of a fictitious allegation, to ascertain all that they have to say upon the subject of the suit. Moreover, if what is now insisted on, be the law of the court, there never could be a disclaimer; for there is no case in which a claim of interest has been made, in which the court might not have given costs at the hearing. But it was never before attempted to be said that the possibility of the court's giving costs against a party, was a reason for not [100] allowing that party to disclaim. It has been always competent to a party who has made a claim before the suit was instituted, to disclaim, even where the claim may have rendered the suit necessary.—[The Vice-Chancellor: If a bill alleges, simply, that a certain person who is a party to it claims to be interested in the subject matter of the suit, then that party may disclaim. But if a person has called upon the trustees of a fund, to transfer the fund to him, and another person tells the trustees that he is entitled to the fund and that an assignment of it has been made to him, in consequence of which the trustees refuse to part with the fund except under the direction of the court; would it be enough for the party who made the adverse claim, to say that he does not claim any interest in the fund? In my opinion the plaintiff, in such a case, would have a right to know whether he had or not made the claim in such a form as to render the suit necessary.]—This bill alleges, throughout, that the defendants *now* claim an interest in the fund.

In *Deacon v. Deacon* the defendant had originally made a claim, and he persisted in asserting the truth of the facts on which his claim was founded: so that it was impossible to know whether he disclaimed or not. The decision in *Bulkeley v. Dunbar*, was founded on this, namely, that the defendant was implicated in a fraud. Here no case of fraud is alleged against

(a) Treat. Plead. 283, 284, 4th edit: see also *ibid.* 188, 319.

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these defendants. In *Glaslington v. Thwaites*, the party was accountable to the plaintiff; and it was on that ground that the Lord Chancellor held that he could not protect himself from answering the bill by disclaiming all benefit and interest in the suit. (a)

[*101] **THE VICE-CHANCELLOR:**—I cannot get over the difficulty which I adverted to in the course of the argument.

The plaintiff has filed a bill, in which he represents in effect that, in February, 1837, a marriage took place between him and a lady of the name of Jane Edmiston; that she died shortly afterwards, and that, in consequence of the death of his wife, he has become entitled to certain funded property, to which, if his wife had died unmarried, the defendants would have been entitled as her next of kin or under some other right or title: and that they hold out that the marriage was not valid, in consequence of the lady being of unsound mind, and that, under such right or title as before mentioned, they are entitled to the property, and had required the trustees to transfer it to them. The bill then alleges that, in consequence of the claims of the defendants, the trustees had refused to transfer the funds to the plaintiff; and that the plaintiff had requested the defendants to relinquish their claims, but that they had refused so to do. The bill then states the original bill, which was filed by Henry Coape and his wife against the trustees and the plaintiff in the present suit, and which prayed that the plaintiff's marriage settlement might be declared to be void, and that the trustees might be decreed to transfer the funds to Henry Coape and his wife. The bill then states various circumstances of conduct with regard to the defendants; and it charges that the said several acts and proceedings are evidence that the defendants claim some share or interest in the funds, on the supposition that the plaintiff's wife died unmarried. The bill then charges that the plaintiff's wife requested the defendant Henry Coe Coape to be one of the trustees of her settlement, and

[*102] that he first gave his consent, "but afterwards retracted it; that he endeavored to induce the physician and apothecary who attended the lady in an illness which she had not long before her marriage, to dissuade her from marrying the plaintiff; and that, on the 7th of February, 1837, he had an interview with her, and endeavored to dissuade her from the marriage: and the bill requires him to set forth all that passed at that interview. It then alleges that various letters had been written by the defendants touching the lady's state of mind and bodily health and the validity of her marriage: that the defendants had executed some deed or instrument, by which they had assigned or agreed to assign their alleged shares or interests in the funds, upon certain trusts for their benefit, and that the defendants H. C. Coape and his wife claimed to be interested in the funds under such deed or instrument. The bill then alleges that those defendants sometimes pretend that they do not claim any interest in the funds; whereas the plaintiff charges the contrary, and that they claim such interest therein as before mentioned;

(a) See 2 Russ. 462.

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and, as part evidence thereof, that they took a very active part in the measures adopted to prevent the marriage, and in the proceedings which had been adopted, since the lady's death, to prevent the trustees from transferring the funds to the plaintiff, and that the trustees were willing to make the transfer, but that they had been advised that they could not safely do so by reason of the claims made by the other defendants and that those defendants ought to pay, to the plaintiff, his costs of the suit.

Now, although it may be true that the defendants H. C. Coape and his wife do not now claim any interest in the funds; yet, if all the allegations which I have adverted to, are true, and the trustees had no objection to transfer the funds to the plaintiff, except that which was created [*103] by those defendants, the plaintiff, on establishing his title to the funds, would have a right to say that the suit was rendered necessary by the conduct of those defendants, and that they ought to pay him the costs of the suit.

I admit that it would be an abuse of the power of the court, if, on a bill so framed, a party who, in fact, had nothing whatever to do with the transaction, were compelled to disclose circumstances as to which he might be examined as a witness. I must, however, deal with the record as I find it.

Generally speaking, a disclaimer has been thought sufficient; because the bill has alleged, simply, that the defendant claims an interest in the property in dispute; and, if he says that he claims no interest, *that* is an answer to the allegation. But where, as in the present case, defendants have mixed themselves up with the whole of the transaction, and, by their personal conduct, have made it necessary that the bill should be filed, I think that it would be contrary to justice if I were to allow them to put in a mere disclaimer.

My opinion therefore is that the Master's report is wrong on both points; and that the defendants ought to have answered all the interrogatories in the bill except that which requires them to set forth under what right or title they claim to be interested in the funds in question; and that they ought to pay to the plaintiffs the costs of the exceptions to the answer and disclaimer, and of the reference to the Master.(a)

*LOWRY v. FULTON.

[*104]

1838; 26th January.—Pleading; Parties; Costs.

A testator in India, bequeathed his residuary estate to A., B. and C., in trust for his children L., M. and N., and appointed A., B. and C. his executors. A. proved in India, and C. in England. B. died without proving; but he was alleged to have acted and committed a breach of trust in conjunction with A. L. died, and C. proved his will in Ireland. M. and N. filed a bill against B.'s executrix and A. and C., (alleging that the two last were out of the jurisdiction, and praying process against them accordingly,) for a general administration of the testator's estate, and asking to make A. and B.'s estate responsible for the breach of trust, and to have A. and C.

(a) Affirmed by the Lord Chancellor; see 3 Myl. & Cr. 638; [644, n. 1. 2 Russ. 463, n. 2.]

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removed from being trustees. Held, that the cause could not proceed, because no personal representative of the testator, or of L. was before the court.

A cause was ordered to stand over for want of parties: and the court gave the defendants the costs of the day, although the objection was not taken by their answers.

THOMAS LOWRY, a major in the East India Company's service, by his will, dated the 2d of October, 1817, gave the whole of the property of which he should die possessed or to which he should be entitled, to his brother James Lowry, William Casement, a lieutenant-colonel in the East India Company's service, and John Williamson Fulton, upon trust, after payment of his debts and funeral expenses, to convert the residue of his property into cash, and to discharge thereout certain pecuniary legacies in his will mentioned; and upon further trust to invest the residue of the said cash *in government or other good securities*: and he bequeathed all that remained of his property, after such annuities and legacies deducted as in his will mentioned, to his children, George Lowry, John Lowry and Jane Lowry, (all of whom were infants,) and also to such child as a woman named Rajbibbie was, at the date of his will, supposed to be pregnant with, share and share alike, to his said two sons, when they should have attained the age [*105] of twenty-one years, and to his daughter, Jane Lowry on her marriage or her attaining the age of twenty years, as might seem best in the judgment of his trustees, and to the child of which the said Rajbibbie was then supposed to be pregnant, in like manner according to its sex: and he directed that, until his said children should have attained the ages and times before specified, the education and other necessary charges attending their maintenance, should be defrayed from the interest, dividends and annual produce accruing on their respective shares; and that, in the event of the death of one or more of his children and also of the one then supposed to be in embryo, before they should have attained the ages or times aforesaid, the share or shares given to such deceased child, should devolve to the survivor or survivors, in equal shares; and, in the event of the death of all his children, he gave the residue of his property to his brother, James Lowry; and he appointed William Casement, James Lowry and John Williamson Fulton the executors and trustees of his will.

The testator afterwards made a codicil dated the 3d of March, 1819, and, after taking notice that the child alluded to in his will as being then expected to be born of the said Rajbibbie, had since been born a girl, he declared it to be still his will that such child should share the residue of his property [*106] as mentioned in his will.*

The testator died in India in the beginning of December, 1819; and, on the 22d of that month, Colonel Casement, who was at that time and still continued to be resident in India, proved the will in Calcutta.

* The above statement of the will and codicil, was taken from the brief with which alone the Reporter was furnished. The will is more fully set forth in the judgment on the hearing of the cause. See post, page 118.

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At the testator's death, James Lowry was, and ever since had been resident in Ireland; and, in July, 1824, he proved the will in the Prerogative Court of the Archbishop of Canterbury.

At the testator's death, J. W. Fulton was a partner in the house of Mackintosh & Co. of Calcutta, who were the testator's bankers and money agents. In May, 1820, he retired from the partnership; and, in September or November following, he left India for England, and, shortly after his arrival, he entered into partnership with Richards, Mackintosh & Co. of London, who were the correspondents and agents of Mackintosh & Co. He died in January, 1830, without having proved the will either in India, England or elsewhere. His widow, Anne Fulton, was his executrix.

The testator's residuary estate consisted of 113,473 sicca rupees, two shares in the Calcutta bank, and three six per cent. notes of the Indian government. The bank shares and government notes were sold after J. W. Fulton had retired from the firm of Mackintosh & Company, and the proceeds, together with the 113,473 sicca rupees, or a considerable part thereof, were allowed by Colonel Casement, with the full knowledge and acquiescence, as it was alleged, of J. W. Fulton, to remain in the hands of Mackintosh & Co., and to be used by them as part of the assets of their business, until January, 1833, when the house stopped payment.

John Lowry one of the testator's sons, died an infant in 1825.

George Lowry, the other son, attained twenty-one, and died in [107] Ireland in June, 1831. Letters of administration with his will annexed, were granted to James Lowry, by the Consistory Court of the Bishop of Down and Connor.

The bill was filed by the testator's two daughters, the younger of whom was still an infant, against Anne Fulton, Colonel Casement and James Lowry; and, after stating, amongst other things, that those two gentlemen were out of the jurisdiction of the court, and charging that J. W. Fulton, as well as Colonel Casement, had acted in the trusts of the will and had been guilty of a breach of trust in suffering the testator's property to remain in the hands of Mackintosh & Co., instead of remitting it to England and investing it in the funds, it prayed that an account might be taken of the testator's estate come to the hands of those two defendants, or either of them, or to the hands of any other person or persons by their order or for their use, and also of the testator's debts, funeral expenses and legacies; and that the testator's estate might be applied in payment thereof; and that the residue might be ascertained; and, if it should appear that any part of the estate remained unapplied and uninvested in the hands of Casement and Fulton, or either of them, with the knowledge or consent of the other, at the end of twelve months from the testator's death, then that those defendants might be charged with interest on the balances from time to time in their hands; and, if it should appear that any of the securities in which the testator's estate was invested, were sold and converted into cash, and that, in consequence thereof, any part of it had been

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lost, then that Colonel Casement and Fulton's estate, and Anne Fulton, as his personal representative, to the extent of that estate, might be [*108] declared to be jointly *and severally responsible to the plaintiffs for such loss, and might be decreed to replace the amount thereof, and that Colonel Casement and James Lowry might be discharged from the trusts of the will, and that new trustees might be appointed thereof.

The bill prayed process against Colonel Casement and James Lowry when they should come within the jurisdiction.

On the cause coming on to be heard,

Mr. *K. Bruce* and Mr. *Lloyd*, for the defendant, Anne Fulton, said that the suit, being for the general administration of the testator's estate, could not proceed, first, because there was no personal representative of the testator before the court: that, supposing J. W. Fulton to have acted in the trusts, which was a disputed fact, his executrix, who was the only defendant that was brought before the court, sustained no other character than that of a debtor to the testator's estate, and would be liable to account over again to his executors: that, before the cause could be heard, the plaintiffs must either procure Colonel Casement or James Lowry to come within the jurisdiction, or prevail on some one to take out administration to the testator for the purposes of the suit, if that would be sufficient, which was doubtful. *Fell v. Brown*, (a) *Browne v. Blount*, (b) *Reveray v. Grayson*, (c) *Lowe v. Farlie*, (d) *Logan v. Fairlie*, (e) *Wilson v. Moore*, (f) *Tyler v. Bell*, (g) *Munch v. Cockerell*. (h)

[*109] *Secondly: that the personal representative of George Lowry, one of the testator's sons, was a necessary party; inasmuch as, although George Lowry was alleged to have received some part of his share of the residue, in his lifetime, it did not appear that he had received the whole of it.

Mr. *Jacob*, Mr. *Wigram* and Mr. *Coleridge*, for the plaintiffs:—The bill states that both Colonel Casement and James Lowry (who is the representative of George Lowry, as well as one of the executors of the original testator) are out of the jurisdiction of the court, and it prays process against them when they shall come within the jurisdiction. It is laid down, by Lord Redesdale, that, when a person who is a necessary party, is out of the jurisdiction, that fact is, in most cases, a sufficient reason, for not bringing him before the court, and the court will proceed against the other parties as far as circumstances will permit. (i) The court, therefore, will proceed against Mrs. Fulton. James Lowry is not alleged to have acted, and, therefore, he is not a necessary party for any other purpose than to protect the testator's estate.

(a) 2 Bro. C. C. 276.

(d) 2 Madd. 101.

(f) 1 Myl. & Keen, 126.

(A) Ante, vol. 8, p. 219.

(b) 2 Russ. & Myl. 83.

(e) 2 Sim. & Stu. 284. See 1 Myl. & Craig, 59.

(g) 2 Myl. & Craig, 89, See 109.

(i) Treat. on Plead 164, 165, 172 and 173, 4th edition.

(c) 3 Swanst. 145, n.

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The defendants' counsel have cited several cases which they consider to be applicable to the present case. The first is *Fell v. Brown*. If that case be right, the cases subsequently decided by Lord Eldon, must be wrong. It cannot be the law of this court that, in the absence of the mortgagor, the court cannot decide the rights as between the first and second mortgagee. In *Browne v. Blunt*, the bill was filed by a judgment creditor [*110] of Sir Charles Blount, for the purpose of getting equitable execution against certain freehold estates which were vested in trustees upon certain trusts under which Sir C. Blunt was entitled to the rents during his life. When the cause came on to be heard, Sir Charles Blount, who was abroad, had not appeared; but the trustees and the other parties who were interested in the estates, were before the court: and Sir J. Leach, M. R., decided that the cause could not proceed in the absence of Sir C. Blount. But the court will find that, in another case, *Tanfield v. Irvine*, (a) in which Sir John Leach decided on a similar ground, his decision was appealed from, and Lord Eldon differed in opinion from him. In *Lowe v. Fairlie*, the will had never been proved in this country; and the only defendant to the suit was an agent, to whom one of the executors, who was resident in India, had remitted a sum of money; and it is evident, from the reasons assigned by Sir T. Plumer, V. C., in his judgment, that the bill could not be sustained. In *Tyler v. Bell*, no personal representative of Margaret Maria Moscrop, appointed by any ecclesiastical court in this country, was made a party to the suit, as being either within or out of the jurisdiction; and, moreover, the Lord Chancellor did not decide that the personal representative must be actually present. In *Wilson v. Moore*, Sir John Leach seems to have departed, in some measure, from what he had decided in *Browne v. Blount*; for his Honor held that, as Bennett, the person in whom the real estate was vested, was made a defendant, the cause ought to proceed, notwithstanding he was out of the jurisdiction. Here we have a personal representative of the testator, constituted by the Prerogative Court, a "party to the record." [*111] In *Logan v. Fairlie*, the testator was not represented, at all, in this country; and it was held that administration must be taken out to him, on account of legacy duty being payable. Here the will has been proved in this country; and neither legacy nor probate duty is payable. *Arnold v. Arnold*. (b)

With respect to George Lowry, it appears, from the correspondence in the cause, that he was paid the whole of his share. But, supposing that not to be so, the case, with respect to his personal representative, is totally different. It is not the object of the present suit to administer his property. The only reason for his personal representative being a party to the suit, is that his interest may be protected; and James Lowry, who is his representative accord-

(a) 1 Russ. 249.

(b) 2 Myl. & Craig, 256.

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ing to the place of his domicil, is quite sufficient for that purpose. *Ander-son v. Caunter.*(a)

THE VICE-CHANCELLOR :—It is not necessary for me to give an opinion on a case which is not before me : but I can conceive that it might be possible so to frame a case with regard to transactions in which Mr. Fulton was concerned, as to have relief against his representative without making some of those persons parties whose presence is said to be necessary on the present record. That, however, is not the case which this record presents to me. I judge of what the case is, in a great degree, by what is prayed by the bill.

Now the prayer of the bill is that an account may be taken of the personal estate of the testator possessed by or come to the hands of Colonel Casement and Mr. Fulton or either of them, or by any person or persons [112] "by their or either of their order, or for their or either of their use ; and also that an account may be taken of the testator's debts, funeral expenses and legacies. Then it asks that the personal estate of the testator may be applied in payment of his debts, funeral expenses and legacies (so that I cannot take it for granted that all the debts are paid ;) and that the residue may be ascertained, and that Colonel Casement and Mr. Fulton may be charged with interest on the balances from time to time in their hands ; and, if it should appear that any of the securities in which the testator's personal estate was invested, were sold and converted into cash, and that, in consequence of such sale and conversion, any part of the estate has been lost, then that Colonel Casement and the estate of Mr. Fulton and the defendant Anne Fulton, as his personal representative, to the extent of that estate, may be declared to be jointly and severally responsible to the plaintiffs for such loss, and that they may be decreed to replace the amount of the loss. Then it asks that (if necessary) an account may be taken of Fulton's estate, and that Colonel Casement and James Lowry may be discharged from acting any longer in the execution of the trusts of the will.

The case, as I understand it, is this : the testator made a will by which he appointed Colonel Casement, James Lowry and John W. Fulton his executors. Casement proved the will in India, and Lowry proved the will in England : and it is observable that the bill asks for a general administration of the personal estate. Fulton never proved, but it is alleged that he did, in some manner, act ; and, in respect of his so acting, which is alleged to have had the concurrence or connivance of Colonel Casement, the particular relief is sought by the prayer of this bill.

[113] "Now, how can I administer the estate generally, without having the personal representative of the testator here ? Fulton never proved ; and, though he might, in some sense, be said to have been an executor ; yet, he having died, the representation of the testator is not in his executrix ; because Colonel Casement, who proved in India, and James Lowry,

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who proved in England, are both of them alive. But Colonel Casement is said to be now in India; and James Lowry is said to be in Ireland; nevertheless, it is absolutely necessary, for the general administration of the estate which is asked by this bill, that there should be before the court, with more or less of substance of character, a person who does represent the personal estate of the testator: and, though it may be true that the person who may be appointed for that purpose, will be a mere nominee of the plaintiffs; yet it should be observed that that person, by taking out administration, will incur all the responsibility of an administrator: and, though he may voluntarily clothe himself with that character, yet what the court looks at is to see that the estate of which he is administrator is properly protected by his superintendence. It seems to me, therefore, that the mere fact that Colonel Casement is in India, and James Lowry in Ireland, is not an answer to the objection that there is no personal representative of the testator before the court.[1]

Then the next objection made by the defendants is that the suit cannot go on unless Colonel Casement is here. Now, as I said before, I can conceive that the record might have been so framed, suggesting certain circumstances, as that relief might have been given in the absence of Colonel Casement. But observe what is asked by this bill. It asks first, specifically, that Colonel Casement may be charged with interest on the balances "from [*114] time to time in his hands and with the loss occasioned by the conversion of the testator's securities into cash, and, in the next place, that he may be discharged from acting any longer in the execution of the trusts of the will. How is it possible to give that relief against a person who is not present? It appears to me, therefore, that that objection must be sustained.

The last objection relates to George Lowry, the residuary legatee, who is stated to be dead. It is impossible for me to assume that that letter which was written by Mackintosh & Co., and which the plaintiffs' counsel have re-

[1] To a suit in respect of an unadministered part of a testator's estate, which has been remitted from India, and remains in the hands of an executor residing in England, but who was only constituted executor of the testator in India,—against such executor, a personal representative constituted in England is a necessary party. Wigram, V. C., observes: "I have no doubt on the point as a question of regular practice, that a personal representative of the testator, constituted in this country, ought to be a party to the suit. If an executor or administrator has so dealt with a fund, that by reason of such dealing it has ceased to bear the character of a legacy or share of a residue, and has assumed the character of a trust fund, in a sense different from that in which the executor or administrator held it,—if it has been taken out of the estate of the testator, and appropriated to, or made the property of the *cestui que trust*, it may not be necessary that the *cestui que trust* should bring before the court the personal representative of the testator, in a suit to recover that part of the estate. But if the character of the property is unaltered, and it still remains part of the testator's estate, I have always understood the rule of the court to be, that the will which the court is required to recognize as the act of the testator, should be authenticated in a particular manner—namely, by probate in the ecclesiastical courts of this country." *Bond v. Graham*, 1 Hare, 482, 484. And see *Tyler v. Bell*, 2 Myl. & Cr. 89. S. C. 1 Keen, 826. *Twysford v. Trasil*, 7 Sim. 92. 2 Sim. & Sta. 292, n. 3.

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lied upon, is equivalent to proof that George Lowry did receive the whole of his share of the personal estate: it amounts merely to this; that he may have received something in respect of his share. Then, he is dead, and it is stated that James Lowry, who was the executor of the testator who proved in England, has proved the will of George Lowry in the diocese of Down and Connor in Ireland. But this court knows nothing of that: and I apprehend that it is quite a matter of course, where a bill is filed for the purpose of having the residue of a testator's estate ascertained, and for the payment of it among the parties entitled, that you must either have all the parties who are entitled to it before the court, or give some good, substantial reason why some of them are not before the court.[1] The mere fact that George Lowry is dead, and that some person has proved his will in a diocesan court not in England, is no reason why you should not have his representative here: and my opinion, therefore, is that that objection also must be sustained.

The cause was ordered to stand over, with liberty to the plaintiffs [*115] to amend by adding parties and otherwise, as *they should be advised: and His Honor gave the defendants the costs of the day, notwithstanding the objections for want of parties, were not taken by the answers.

[1] Vide *Hawley v. Cramer*, 4 Cow. 728. *Wendell v. Van Rensselaer*, 1 Johns. Ch. Rep. 349. Where property is bequeathed to A. for life, and after his decease, to such persons as shall then be the testator's next of kin, upon a bill filed for the protection of the property, the next of kin of the testator, living at the time of filing the bill must be made parties to the suit. *Wardell v. Claxton*, 1 Yo. & Coll. C. C. 265. In a late case, *Wigram, V. C.*, says: "The general rule of this court is, that all persons interested in the subject of a suit must be parties, except where their numbers are so great, as to render the application of the rule highly inconvenient or impracticable. And, therefore, where the interests of a class, as of the children, or next of kin of a particular person is concerned, the whole of those who constitute the class must be parties, and the court must be satisfied by evidence of some kind, that they are so. It is admitted that in the case of the distribution of a fund, all the parties entitled to it must be present; and that, at least as a general rule, the mode of proving that they are present, is by inquiry before the Master. Whether the same mode of proof is invariably required, when the question is between the class, and one claiming adversely to the class, I am not called upon now to decide. It is sufficient, for the present case, to say that some proof of the fact that the parties interested are before the court is necessary. In respect of the practical necessity of the rule, I cannot see that there is any difference between a case calling for a declaration of right to a fund,—which is not made unless it is to have some effect, or the distribution of a fund, which is sought to be made adversely to a class,—and the case of members of that class seeking distribution among themselves. A reason that the court requires more than the mere statement of the parties themselves, that all the members of the class are before the court, is, that, if that statement were deemed sufficient, a fraudulent agreement might be made between some parties to the exclusion or injury of others." *Hawkins v. Hawkins*, 1 Hare, 546.

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1839 ; 27th, 29th and 30th April, and 1st and 29th May.—Will ; Construction ; Executor ; Trustee ; Acceptance of Trust.

A testator resident in India, directed his trustees and executors to invest his residue in *government or other good securities*, and then declared trusts of it for the benefit of his children and other persons, all of whom were resident either in England or Ireland, and were mentioned so to be in the will. The residue was allowed to remain in the hands of the testator's bankers and agents in India, who ultimately failed. Held, that the acting executor and trustee was responsible for the loss thereby occasioned to the estate.

A testator resident in India, appointed A. B. and C. his executors and trustees. A. and B. were resident in India, and C. in Ireland. A. proved the will in India, and C. in England : but B. did not prove at all. The assets were suffered to remain, for several years, in the hands of M. & Co. of Calcutta, the testator's bankers and agents. B. was a partner in that firm at the testator's death, but shortly afterwards, he retired and came to England. He then entered into partnership with R. & Co. of London the agents and correspondents of M. & Co., and paid some of the testator's legacies to persons in England ; and, in order to satisfy a legacy given by the testator upon certain trusts, he invested the amount in stock, in the names of A. and himself as trustees ; but the payments and the investment were made by the direction of A., and out of remittances sent by him to R. & Co. M. & Co. ultimately failed. Held, that the above mentioned acts were done by B. as agent to A. and not as an executor or trustee of the will, and, consequently, that he was not responsible for the loss occasioned to the estate by the failure of M. & Co. As an executor who does not prove, but acts, is answerable only for what he actually receives.

In consequence of the above decision, William Handley obtained, from the Prerogative Court of the Archbishop of Canterbury, letters of administration to the testator, and also to George Lowry ; and he was made a defendant to the bill as their sole legal, personal representative in England. The letters of administration to the testator, were stated to be limited for the purpose to become and be made a party to a bill or bills to be exhibited against Handley in any of her Majesty's courts of equity, and to carry [*116] the decree or decrees of the said court into effect : and the letters of administration to George Lowry, were stated to be limited to the purpose *only to attend, supply, substantiate and confirm the proceedings already had or that might, thereafter, be had in this cause, or in any other suit which might, hereafter, be commenced in this or any other court, touching the premises, and, until a final decree should be made therein and the said decree carried into execution and the execution thereof fully completed.* No other amendment was made in the bill.

It appeared, from the evidence for the plaintiffs, that Mr. Fulton, some time after his return to England, paid two legacies given by the will, one to Mrs. Stewart, the testator's aunt, and the other to Mr. Gowdey ; and that, for the purpose of satisfying a legacy of 2000*l.* given by the testator to his mother, Eleanor Lowry, for life, with remainder to his brother, Casement William Lowry, for life, with remainder to the children of the latter, Mr. Fulton invested that sum in the purchase of stock in the names of himself and Colonel Casement as trustees thereof. It appeared, also, that Mr. Fulton had regulated the expenses of the testator's children, and had given, from time to time, directions as to their maintenance and education ; and that, the plaintiffs having been placed, first, under the care of Mrs. Stewart, and, upon her death,

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under the care of a lady named Spitter, he had paid those ladies for their maintenance and education. The plaintiffs also gave in evidence several letters from Mr. Fulton to Mrs. Stewart and Jane Lowry, the elder plaintiff, containing expressions, which showed, as they contended, that Mr. Fulton considered and held himself forth as the guardian of the plaintiffs and the trustee of their property.

[*117] "On the part of the defendant, Mrs. Fulton, evidence was entered into which tended to show that all the above mentioned acts were done by Mr. Fulton, in compliance with directions sent, from time to time, either by Colonel Casement or by Mackintosh & Co. as his agents; and that remittances had been made by them to Richards, Mackintosh & Co., for the purpose of paying the legacies and the expenses of the plaintiff's maintenance and education. It further appeared that Mr. Fulton, in his answer to a bill which, in the year 1824, was filed against him, in the Court of Chancery of Ireland, by James Lowry, Casement William Lowry and the testator's children, denied that he had ever acted or meant to act as an executor of the testator, or that, independently of his partners, Richards, Mackintosh & Co., he had ever received any money from out of the testator's estate or effects.

The cause now came on to be heard.(a)

Mr. Jacob, Mr. Bethell and Mr. Colridge for the plaintiffs, contended that the payments made by Mr. Fulton, and the other acts done by him, as before mentioned, showed that he had accepted the trusts and acted as a trustee and executor of the testator's will; and, consequently, that he was responsible to the plaintiffs for the breach of trust that had been committed by suffering the testator's property to remain in the hands of Mackintosh & Co. *Urch v.*

Walker,(b) *Boardman v. Mosman*,(c) *French v. Hobson*,(d) *Conyngham v. Conyngham*,(e) *Walker v. Symonds*,(f) *Stacey v. Elph*.(g)

Mr. Knight Bruce and Mr. Lloyd, for the defendant, Mrs. Fulton, said that Mr. Fulton had never accepted or acted in the trusts of the will; and that the acts relied upon by the plaintiffs' counsel, were done by him merely as the agent of Colonel Casement.

Mr. White appeared for the defendant Handley.

THE VICE-CHANCELLOR :—In this case the facts appear to be that the testator, Thomas Lowry, made his will on the second of October, 1817; and, by that will, after giving certain small legacies and a sum of 2000*l.* to his mother, for life, with remainders over; and a sum of 8000 sicca rupees for the benefit of a Hindostanee woman, called Rajbibbie, for life, with remainder over, he gave, in effect, the residue of his personal estate among the three

(a) The Reporter was unavoidably absent from court on some of the days on which the cause was argued.

(b) 3 Myl. & Craig, 702.

(c) 1 Bro. C. C. 68.

(d) 9 Ves. 103.

(e) Ves. 522.

(f) 3 Swanst. 1. See *Munch v. Cockerell*, ante, vol. 8, p. 219.

(g) 1 Myl. & Keen, 195.

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children that woman then had, and a child of whom she was at that time *enceinte*. That child was born and christened by the name of Mary Ellen; and she and her eldest sister are the plaintiffs in the cause. The testator made a codicil on the 3d of March, 1819; and he died in the month of December, 1819. He appointed three executors, James Lowry, who then was and now is a resident in Ireland, Colonel Casement, who then was and now is resident in India, and Mr. John Williamson Fulton, who was then in Calcutta, but who never proved the will either in England, India, or elsewhere. The will was *proved in Bengal on the 22d of De- [*119] cember, 1819, by Colonel Casement; and it was proved in the province of Canterbury on the 20th of July, 1824, by James Lowry.

Upon the construction of this will I think that the general residue ought to have been invested in government or other securities in England. The expression is, "government or other good securities" generally. The expression as to Rajbinnie's legacy of 8000 sicca rupees is "government or other good security in Calcutta," and she is described as of Hindostan. But the children who are named in the will, the residuary legatees, are all said to be now in Ireland; and James Lowry, who was the ultimate residuary legatee, is said to be now in the north of Ireland.

The testator had dealings with Mackintosh & Co. of Calcutta, who, long before and up to the time of his death, were his money agents and bankers; and he had large sums of money in their hands. The account current, dated the 1st of May, 1827, which has been proved as an exhibit, shows how his assets were dealt with by them; and the account was kept as between the estate of the testator and Colonel Casement as his executor, but, in reality, it was an account between Mackintosh & Co. and Colonel Casement. The bill states the different sales of the government notes and bank shares to have been made by the direction of Colonel Casement, but with the knowledge of Mr. Fulton. There however is no evidence that that sale, or that any sale was effected with Fulton's knowledge: and, if it were so, he could not be responsible as executor for the sale. There could not have been a remittance to England without a sale: the sale was right; but the keeping of the produce uninvested in the hands of Mackintosh & Co., was wrong; *but with that Mr. Fulton had nothing to do; for, though [*120] he was a partner in the house of Mackintosh & Co., yet the plaintiffs have proved that he ceased to be a partner in the house on the 1st of May, 1820. He left Calcutta for England, as the bill says, in September, 1820, but, as the answer states, on the 19th of November, 1820, and he brought with him the plaintiff, Mary Ellen, and, on reaching England, he sent her to Mrs. Stewart, in Ireland, with whom the plaintiff, Jane, who was then eight or nine years old, resided. In September, 1819, Mr. Fulton took some steps towards disposing of his share and interest in the house of Mackintosh & Co.; and it is distinctly proved by one of the plaintiffs' witnesses, who, in August, 1820, became himself a partner in that house, that Mr. Fulton ceased to be a

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partner in it on the 1st of May, 1820, that is, several months before the sale of the government notes in August, 1820. Richards, Mackintosh & Co., of London, were the general factors and agents of Mackintosh & Co., and Mackintosh & Co. were the general factors and agents of Richards, Mackintosh & Co.; but Richards, Mackintosh & Co. were not partners with Mackintosh & Co. In, or not long after, the year 1823, Mr. Fulton became a partner in the house of Richards, Mackintosh & Co., and continued a partner in it till he died. When Mr. Fulton quitted India he had a large sum of money due to him in the hands of Mackintosh & Co. Of that sum he gradually drew out about five-sixths; and, at the time of the failure of Mackintosh & Co., the balance due to him was 102,517 sicca rupees according to the evidence of one of the plaintiffs' witnesses. He dealt with his former partners just as other customers might have done. From 1821 to 1827 Richards & Co. were indebted to Mackintosh & Co., but, in 1827, they became creditors; [*121] and, in 1829, they had a demand upon Mackintosh & Co. to the amount of upwards of a million sicca rupees. Yet Mr. Fulton still left part of his money in the house of Mackintosh & Co. About January, 1823, Colonel Casement, through Mackintosh & Co., remitted 2000*l.* to Richards, Mackintosh & Co., who, according to their instructions, invested it in 2511*l.* 15*s.* 6*d.* reduced annuities in the names of Colonel Casement and Mr. Fulton, to answer the legacy of 2000*l.* given to the testator's mother for her life, with remainder to his brother, Casement William Lowry, for his life, with remainder to the children of C. W. Lowry. In July, 1824, James Lowry, C. W. Lowry and the four children of the testator, the three youngest being infants, by George Lowry their next friend, filed a bill in Chancery in Ireland, against Mr. Fulton, for an account of the assets of the testator. In November, 1824, Mr. Fulton put in his answer and denied that he had ever acted as executor of the testator, or that he ever meant to act in that capacity. The schedules to that answer contained the early part of the account appearing in the account current, up to the 22d of December, 1820. Mrs. Stewart, with whom the children resided, in Ireland, was the sister of Eleanor Lowry, the testator's mother. She took care of the infant children till she died in 1828; and they were then placed with Mrs. Spitter. The expenses of their maintenance and education were defrayed by remittances made by Colonel Casement, through Mackintosh & Co., to Richards, Mackintosh & Co., which were applied by Mr. Fulton and his widow, and it is not suggested that the remittances were not duly applied. On the 22d of January, 1830, Mr. Fulton died. By his will he appointed the defendant, Anne Fulton, his executrix, and she proved it in the Prerogative Court of Canterbury on the 6th of March, 1830. On the 4th of January, 1833, Mackintosh & Co. [*122] stopped payment. At that time, a large portion of the testator's assets was in their hands as the agents of Colonel William Casement, and the testator's estate suffered a considerable loss. The substantial question in the cause is whether Mr. Fulton's estate is liable for that loss; for no

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question is made about the payment of the small legacies or the application, for maintenance of the children, of the funds remitted for that purpose.

It is said that Mr. Fulton held himself out to be an executor; and that, therefore, he is liable; and the case of *Conyngham v. Conyngham* was relied upon. The facts of that case do not clearly appear, but it does appear that the defendant had actually received the produce of the trust estate, and, on that foundation, he was directed to account. Those are the very words of Lord Hardwicke, according to the report; and Lord Hardwicke said that the defendant had acted as he had done merely to put the plaintiff to difficulty in coming at his right. In *Urch v. Walker*,^(a) there was a clear acceptance of the trust; [1] for Blackburnow joined with Wood in conveying the leasehold trust estate. In *Boardman v. Mosman*, Kyme, the trustee, not merely knew that the trust stock was sold, but the proceeds of the sale were paid to him and his partner. He, therefore, was responsible. *French v. Hobson*, has no resemblance to the present case. There all the executors joined in selling the trust stock, and of course all were liable.

What was laid down, by Lord Camden, at the privy council, in *Orr v. Newton*^(b) is very important. He held that Newton, who had not proved, but had, in some manner, acted, was, by the strictest rule, not chargeable except for his own acts personally, and was *not charge- [*123] able for the acts of his colleagues. Lord Camden also, in page 277 of the report, notices that the want of a probate in Newton would have been a bar to his recovering in any suit whatever.

Now the object of this bill is not to make Mr. Fulton's estate liable for what he received, but liable for what he not only did not receive, but for what he had no means of receiving. If he never proved either in England or in India, it was not possible for him to recover the assets of the testator in the hands of Mackintosh & Co. While he was partner in that house, for a short time after the testator's death, he was answerable, as a debtor jointly with his copartners, for the debt due from their partnership to the estate of the testator. But, as executor, he was not answerable for the debt, either while he was a partner or after he had ceased to be a partner. No one is bound, by law, to prove a will. No case has been cited to show that an executor not proving, is liable for the default of an executor who does prove. As long as he does not prove, he is merely liable for what he receives. There is a loose and general charge in the bill that Mr. Fulton colluded with Col. Casement, but there is no evidence to support it: nor is there any evidence of concealment. A letter from Mackintosh & Co. to James Lowry, which has been proved in the cause, stated the plan upon which Col. Casement meant to act with respect to the small legacies of 100*l.* to Mrs. Stewart and Mr. Gowdey, the legacy of 2000*l.*, the maintenance and education of the

^(a) 3 Myl. & Craig, 702.^(b) 2 Cox, 274.^[1] Vide *Macklow v. Fuller*, Jac. 198, 201, n. 1. 3 Myl. & Cr. 716, n. 1.

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testator's children, and the management of their funds; and that plan was acted upon. Out of the great number of letters in the admissions, eleven are all that were written by Mr. Fulton: ten of those are referable to his [*124] character of agent. The expressions in the remaining *letter, dated the 3d of July, 1823, from Mr. Fulton to Mrs. Stewart, are extremely inconclusive. In one sense, Mr. Fulton was an executor, and they may refer to that. But, if written declarations that he made, are to be relied upon, they must all be taken together; and then the answer in the Irish cause becomes most material; because it contains a declaration upon oath, when the attention of Mr. Fulton was distinctly called to the circumstances of which he was speaking. Upon the whole evidence of Mr. Fulton's declarations taken together, I consider him to have represented no otherwise than that he was an agent of Col. Casement; and that he did not mean to be taken as an acting executor.

Evidence has been given that Colonel Casement holds a high office in Bengal; and, without doubt, he is a man of integrity: and it is therefore to be assumed that, if the case is merely what the plaintiffs represent, when they apply to him he will, at once, indemnify them for the loss occasioned by his leaving the testator's assets in the hands of Mackintosh & Co. But they have not chosen to make him substantially a party to this suit; and my opinion is that, upon the case which the plaintiffs bring forward against Mrs. Fulton, they are not entitled to relief against her; for, in my opinion, there is no evidence whatever that Mr. *Fulton received any thing, except as an agent of Colonel Casement, to whom alone he could be responsible.

Upon the whole, my opinion is that, as against Mrs. Fulton, the bill must be dismissed with costs. But, as to Mr. Handley, the cause must stand over till Colonel Casement and Mr. Lowry come within the jurisdiction or appear if the plaintiffs wish it. If not, the bill must be dismissed with costs altogether.

[*125]

*SMITH v. DUDLEY.

1838: 26th and 27th Jan.—Construction; Settlement; Executors and Administrators.

In a marriage settlement, the ultimate trust of the wife's chattels was for the executors or administrators of the wife of *her own family*, and the ultimate trust of the husband's chattels, was for his executors or administrators of *his own family*. Held that, though, the same words were used, *mutatis mutandis*, in both limitations, yet the court was justified in holding that, with respect to the wife's chattels, they meant her next of kin at her death, and, with respect to the husband's chattels, his executors or administrators simply.

By the settlement on the marriage of Benjamin Pountney with Mary Wheeler, bearing date the 26th of May, 1801, and made between Henry Barnsley and Elizabeth his wife of the first part, Mary Wheeler (who was described as the daughter and only child of Elizabeth Barnsley by her

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former husband Thomas Wheeler, deceased,) of the second part, Benjamin Pountney of the third part, and Thomas Dudley and George Briscoe, of the fourth part; Henry Barnsley and Elizabeth his wife conveyed and assigned certain freehold and leasehold hereditaments to Dudley and Briscoe, their heirs, executors, administrators and assigns, in trust for Barnsley and wife, according to their several and respective estates and interests in the premises at the execution of the settlement, until the solemnization of the marriage, and, after the solemnization thereof, to the use of Barnsley and wife, for their lives and the life of the longer liver of them, and, after their deceases and the decease of the survivor of them, then upon trust that Dudley and Briscoe and the survivor of them, his heirs, executors, &c., should permit Benjamin Pountney to receive the rents of the freehold and leasehold premises, according to the nature and tenure of such estates respectively, for his life, provided he so long remained in good and solvent circumstances, and, after his decease, failure, insolvency or bankruptcy, then upon trust that Dudley and Briscoe, and the survivor of them, his heirs, executors, &c., should receive the rents and pay the same to Mary Wheeler for her life, for her separate use, independent of Benjamin Pountney, and, after the decease, failure or bankruptcy of Pountney and the decease of Mary Wheeler, then upon trust that Dudley and Briscoe, and the survivor of *them, his heirs, [*126] executors, &c., should convey and assign the freehold and leasehold premises to such child or children of the marriage, and in such shares, &c., as Pountney and Mary Wheeler during their joint lives, or as the survivor of them after the death of one of them, should by deed or will appoint, and, in default of such appointment, then in trust for all the children of the marriage, their heirs, executors, &c., according to the nature and tenure of such estates respectively, equally as tenants in common, and, if but one child, then to such only child and his or her heirs, executors, &c.; and, in default of such issue, then, as to the freeholds, to the use of the right heirs of Mary Wheeler and, as to the leaseholds, "in trust for the executors and administrators of the said Mary Wheeler's own family, and to and for none other use, intent or purpose whatsoever."

And Barnsley, for himself and his wife, and for his and her heirs, executors and administrators, and Mary Wheeler, for herself and her heirs, executors and administrators, covenanted with Dudley and Briscoe, that they, Barnsley and wife and Mary Wheeler, would, as soon as conveniently might be after the solemnization of the marriage, surrender certain copyhold hereditaments mentioned in the settlement, to the use of Dudley and Briscoe and their heirs, upon such and the same trusts, intents and purposes as were thereinbefore limited of and concerning the freehold and leasehold hereditaments and premises.

And Barnsley and wife assigned to Dudley and Briscoe, their executors, &c., all their household goods and furniture which were contained in a schedule bearing even date with the settlement, upon such and the

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[*127] same trusts, and for such and the same uses, intents and *purposes as therein declared and hereinafter mentioned of and concerning the property of Mary Wheeler under the will of Sarah Pitt deceased, and to or for no other use, trust, intent or purpose whatsoever : and, after reciting that, under the will of Sarah Pitt, Mary Wheeler was entitled, subject to the life estates of her mother and Mary Horton and Anne Bissett, to a third part of the moneys to arise by sale of the freehold estates of Sarah Pitt, and, also, to a third part of the personal estate of Sarah Pitt : Mary Wheeler assigned to Dudley and Briscoe, their executors, &c., all her share and interest of and in all the sums of money to arise by sale of the freehold hereditaments and real estate of which Sarah Pitt died possessed, and of and in all the personal estate and effects directed to be sold, called in and received, by the will of Sarah Pitt, after the several deceases of her mother and Mary Horton and Ann Bissett, in trust for Mary Wheeler, her executors, administrators and assigns, until the solemnization of the marriage, and, after the solemnization thereof, upon trust, as soon as the thereby assigned moneys and premises should be received by Dudley and Briscoe, to place out the same either in some public stock, bank or fund, or else upon one or more good and sufficient real or personal security or securities, and to pay the interest, dividends and produce arising therefrom to Benjamin Pountney, for his life, provided he should so long remain in good and solvent circumstances, and, after his death, failure, insolvency or bankruptcy, upon trust to pay the interest, dividends and produce aforesaid to Mary Wheeler and her assigns, for her life, and, in case the same should accrue to her during the lifetime of B. Pountney by his failure, bankruptcy or insolvency, then the same to be for her separate use,

[*128] and, after the decease, failure or bankruptcy of B. *Pountney, and the decease of Mary Wheeler, then, upon trust to pay the trust moneys to the children of the marriage, equally to be divided amongst them, the portions of sons to be paid to them at twenty-one, and the portions of daughters at that age or on their marriage, and, in case there should be no child of the marriage, or, there being such, all of them should die before their portions should become vested, then upon trust to assign the trust moneys "unto and for the executors and administrators of the said Mary Wheeler's own family and to and for no other trust, intent or purpose whatsoever."

And B. Pountney, for himself, his heirs, executors, &c., covenanted with Dudley and Briscoe, their executors, &c., that in case Mary Wheeler should survive him, or in case there should be any issue of the marriage living at his decease or born in due time after, his heirs, executors or administrators, should, within three calendar months after his decease, (after first paying all his debts,) pay to Dudley and Briscoe, or the survivor of them, his executors, &c., the sum of 800*l.*, upon trust to place the same out on real or government securities, or in the purchase of stock in any of the public companies or funds, and to pay the interest and dividends thereof to Mary Wheeler and her assigns, for her life, for her and their own proper use and benefit, and, after the

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decease of Mary Wheeler, upon trust to pay the 800*l.* unto and amongst all and every or any the child or children of the marriage, at such time or times, and in such shares, &c., as B. Pountney and Mary Wheeler should by deed appoint, and, in default thereof, as the survivor of them should, by deed or will, appoint, and, in default thereof, then upon trust to pay the last mentioned trust moneys to all the children of the marriage, equally, as tenants in 'common, the portions of sons to be paid to them at twenty-one, and the [*129] portions of daughters, at that age or on their marriage; and, in case there should be no child of the marriage, or, there being such, all of them should die before their portions should become vested, then upon trust to pay the 800*l.*, "unto and for the executors, or administrators of the said Benjamin Pountney of his own family, and to and for none other trust, or purpose whatsoever." The settlement then contained provisos for the maintenance and education of the children of the marriage during their minorities, and for the indemnity and reimbursement of the trustees.

Henry Barnsley died in August, 1808; and his wife died in April, 1821. Mary Pountney died on the 23d of August, 1825, intestate, and without having had any issue. Benjamin Pountney died on the 9th of January, 1832, having made his will, dated the 22d of August, 1827, and three codicils, the last of which was dated the 29th of January, 1830, and thereby he appointed the defendant, Slater, his executor.

The plaintiff, Deborah Smith, the wife of the other plaintiff, John Smith, was one of the next of kin of Mary Pountney; and, on the 16th of November, 1832, letters of administration to Mary Pountney were granted to Deborah Smith.

The bill which was filed against the other next of kin of Mary Pountney, living at her death, Slater, the executor of Benjamin Pountney and the personal representatives of the trustees of the settlement, alleged that, under the letters of administration, the plaintiff, Deborah Smith, or the plaintiff, John Smith, in her right, became, and then was beneficially entitled to the '*leasehold estates, household goods, furniture and effects, moneys, [*130] securities for money, and chattels* comprised in the settlement: and it prayed, that the plaintiff Deborah Smith, as the administratrix of Mary Pountney, or the plaintiff, John Smith, in her right, might be declared to be entitled to the leasehold estates and premises, moneys, securities for money and effects comprised in the settlement, for his and her own use and benefit, and that the same might be paid, assigned, and conveyed to her or him accordingly.

Such of the next of kin of Henry Pountney as were defendants, insisted that the plaintiff, Deborah Smith, was not, under the settlement or as administratrix of Mary Pountney or otherwise, entitled to the trust estate, effects moneys and premises, for her own absolute use and benefit, or otherwise than as a trustee for the next of kin of Mary Pountney living at her decease.

The question in the cause, was, who was entitled to the chattels real and

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personal comprised in the settlement, under the words: "the executors or administrators of Mary Wheeler's own family."

The *Solicitor General* and Mr. K. Parker, for the plaintiffs, contended that, under the above mentioned words, either the administrator or the next of kin of Mary Wheeler, to the exclusion of her husband, were entitled, and that the words, "of Mary Wheeler's own family" were added for the purpose of excluding him: that the ultimate trust of the property settled by the husband was declared in the same words, *mutatis mutandis*; and it was the intention of the parties to the settlement, that, if there should be no issue of the marriage, the property settled by the wife and her parents should [*131] *return to her family, and the property settled by the husband, to his family; that it was clear that the words, "the executors or administrators, &c.," were not meant to be words of limitation; for, where they were intended so to be, the expression was in the following form, namely, "to A. B., his executors, administrators, and assigns." *Evans v. Charles*; (a) *Jennings v. Gallimore*; (b) *Stevens v. Bagwell*; (c) *Bulmer v. Jay*; (d) *Collier v. Squire*. (e)

Mr. Collyer, for some of the defendants, the next of kin of Mrs. Pountney, contended that her executors or administrators were intended to take the property as trustees for her next of kin. *Palin v. Hills*. (f)

Mr. Cooper and Mr. Hall appeared for the rest of the next of kin.

Mr. Jacob and Mr. G. Richards, for the representatives of the trustees of the settlement, said that the limitation in question was void for uncertainty; or, at all events, no person who should be living at the death of Mrs. Pountney, could be intended to take in his own character; but that the parties to the settlement intended to designate the executors or administrators of some person whom, they expected, would be dead at the time when the limitation took effect. *Doe v. Joinville*. (g) *Harland v. Trigg*. (h) *Holloway v. Holloway*. (i)

Mr. Knight Bruce and Mr. Stinton for the defendant Slater, the [*132] executor of Benjamin Pountney, said that, "the ultimate limitation of the freeholds to the right heirs of Mrs. Pountney, united with her previous estate for life and gave her the absolute interest, and that the ultimate limitation of the leaseholds and other chattels was intended to have the like effect. *Genery v. Fitzgerald*. (k) *Sanders v. Franks*. (l)

THE VICE-CHANCELLOR:—I apprehend that, where the court has to put a construction upon expressions in an instrument the meaning of which is doubtful, it is justified in departing from the literal meaning of the words where it is obvious, taking the whole of the instrument together, what the intention of the parties was: and that, for that purpose, the court is at liberty

(a) 1 Anstr. 128.

(b) 3 Ves. 146.

(c) 15 Ves. 139.

(d) Ante, vol. 4, p. 48; 3 Myl. & Keen, 197.

(e) 3 Russ. 467.

(f) 1 Myl. & Keen, 470.

(g) 3 East, 172.

(h) 1 Bro. C. C. 142.

(i) 5 Ves. 399.

(k) Jac. 468.

(l) 2 Madd. 147.

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to consider the same general words as having one meaning in one part of the instrument, and a different meaning in another part of it. Thus the same words have been held to have one meaning in limitations of freeholds, and a different meaning in limitations of chattels.

On looking into the settlement in this case, it appears to me not only that there was a very small exercise of understanding in the use of words, but a gross ignorance of law, in all respects, on the part of the person who prepared the settlement. There are no covenants for title, and, therefore we cannot resort to them in order to make out who is entitled to the property comprised in the settlement. With respect to the freeholds and leaseholds, which are taken together, it does not appear that Mrs. Pountney had any interest in either; nor does it appear whether Barnsley and wife were seised of the freeholds *jure uxoris*; but, by the first witnessing *part, they are made to [*133] grant and release as if the wife were *sui juris*: and nothing whatever is said about a fine or recovery. The leaseholds appear, on the face of the instrument, to have belonged to Barnsley and wife; and though Mr. Barnsley might have assigned the whole chattel interest, yet his wife is made to join with him.—[His Honor here read the limitations of the freeholds and leaseholds.]—It is obvious, with respect to the freeholds, that Barnsley and wife intended to make such a limitation of them as would have the effect of giving the fee to Mary Pountney on failure of issue of the marriage. With respect to the copyholds it may be fairly inferred, from the language of the covenant, that Mary Pountney had an interest in them—[his Honor here read the covenant]—and, when we come to the ultimate limitation of the copyholds, we find that it is to such and the same trusts, intents and purposes as had been before declared concerning the freehold and leasehold hereditaments and premises. Here is another instance of ignorance; for the ultimate limitation of the freeholds must, anyhow, be taken to be different from the ultimate limitation of the leaseholds. If the court were called upon to put a construction upon this part of the settlement, I think it would be bound to hold that the copyholds were intended to go according to the same course of limitation as the freeholds.

The next subjects of the settlement are the household furniture, and Mary Pountney's interest under Mrs. Pitt's will; and, with respect to them, the ultimate limitation is the same as the corresponding limitation of the leaseholds. Now, as the leaseholds and the household furniture were the property of Barnsley and wife, and the share of Mrs. Pitt's estate was the property of Mary Pountney herself, it is fair to put such *a construction [*134] upon the foolish words which are found in the ultimate limitations of trust as to them, as will have the effect of restoring them to Mary Pountney's own family.

Then we come to the husband's covenant. Now it would be absurd to say that he intended, in case there should be a failure of issue of the marriage to give away from himself his own property, which was only intended to be

 1838.—Penny v. Pretor.

a provision for his wife and children, and to make a provision for those unascertained persons who might be his next of kin at the time of his death. The consequence is that I must hold that the words "the executors or administrators of Mary Pountney's own family" mean, with respect to the property of herself and her father and mother, her next of kin at the time of her death; and that the words "the executors or administrators of the said Benjamin Pountney of his own family" mean, with respect to his property, his executors or administrators; in other words, my opinion is that it was the intention of the parties to the settlement that, on failure of the issue of the marriage, the property of the wife should be restored to her family, and that the property of the husband should revert to him or to his estate.[1]

[*135]

*PENNY v. PRETOR.

1838; 26th January.—11 Geo. 4, and 1 W. 4, c. 47; Infant.

An infant devisee in tail may be ordered to convey under 11 Geo. 4, and 1 W. 4, c. 47, s. 11.

THE testator in this cause devised his real estates to J. P. Barrow for life, with remainder to J. P. Barrow's first and other sons successively, in tail male, with remainder to J. P. Barrow's daughters as tenants in common in tail, with remainder to his own right heirs.

The suit was a creditors' suit. The original bill was filed in May, 1832, at which time J. P. Barrow was a bachelor. In the progress of the cause he married and had issue two daughters, Mary and Catharine; and, on their births, supplemental bills were filed in order to bring them before the court.

The testator's real estates having been sold under the decree, a petition intituled in the original and supplemental suits and also in the matter of the act of Parliament for consolidating and amending the laws for facilitating the payment of debts out of real estate (11 Geo. 4, & 1 Will. 4, cap. 47,) was presented by the plaintiff praying that the infant defendants, Mary and Catharine Barrow, might be directed to convey the estates, to the purchaser, by lease and release to be duly enrolled in the court, pursuant to the above mentioned act and the act for the abolition of fines and recoveries and for the substitution of more simple modes of conveyance (3 & 4 Will. 4, cap. 74,) or by such other assurance as the court should deem proper.

Mr. *Chandless* appeared in support of the petition.

[*136] *Mr. *Paynter* appeared for the purchaser and said that it was doubtful whether the 11th or the 12th section of the 11 Geo. 4, and 1 Will. 4, cap. 47, applied to the present case: that, as the estates were "devised in settlement," there was ground for contending that the case was within the 12th section; and, if so, the court had no jurisdiction to make the

[1] Vide *Daniel v. Dudley*, 11 Sim. 163. S. C. 1 Phillips, 1. 1 Russ. & M. 589, n. 2.

1838.—Hutchings v. Smith.

order, as that section applied to cases where the persons who had limited interests in the estate directed to be sold, were adult, and not to a case like the present, where the parties having such interest were infants.

The Vice-Chancellor said that the 12th section of the act applied to tenants for life and persons having smaller interests; and that the 11th section applied to tenants in tail: and his Honor made an order according to the prayer of the petition.(a)

*HUTCHINGS v. SMITH.

[*137]

1838: 14th February and 26th March.—Husband and Wife; Chose in Action.

A married woman, being entitled to one-fifth of a residue, joined with her husband, and the four other residuary legatees, in filing a bill to have the testator's estate administered, and the residue ascertained and distributed amongst the parties entitled. Pending the suit, but before the rights of the parties had been declared, the husband and wife joined in assigning the wife's share to A., as a security for a debt due to him from the husband. The husband died; and, afterwards, a decree was made directing one-fifth of the residue to be paid to the wife. A. never presented a petition in the suit or took any other step to enforce his security, until after the decree was made. Held that, by the decree, the wife became entitled to her share free from her husband's debt.

Whether an assignment, by a husband and wife, of the wife's chose in action, to a particular assignee, for value, is binding on the wife surviving: *Qu.*

UNDER the will of Watkins Herbert, the residue of his real and personal estates became vested in his nephew and four nieces. Some time prior to the year 1828, a suit, the name of which was, *Conden v. Lord*, was instituted, in the Court of Chancery, by the nephew and nieces, and the husbands of the latter, against the trustees and executors of the will, for the usual accounts of the testator's personal estate, debts and legacies, and to have the residue of the personal estate ascertained and divided amongst the parties entitled under the will. On the 1st of February, 1828, a decree was made, in that suit, which directed the usual accounts to be taken, and the debts and legacies to be paid; but it did not declare any rights.

Ann Hutchings, the plaintiff in the present suit, was one of the testator's nieces; and she and her late husband, Joseph Hutchings, were two of the plaintiffs in the suit of *Conden v. Lord*. Pending that suit, the testator's nephew died intestate, leaving his two sisters, Ann Hutchings and Mary Englefield, his co-heirs at law; and Ann Hutchings took out administration on him.

Joseph Hutchings, being indebted to Messrs. Langton, brewers and co-partners, in the sum of 414*l.*, by an indenture, dated the 17th of November, 1830, and made between himself and his wife of the one [*138]

(a) See *Radcliffe v. Eccles*, 1 Keen, 130.

1838.—*Hutchings v. Smith.*

part, after reciting that Hutchings, in right of his wife, was entitled, under the will of Watkins Herbert, to one equal fourth(a) part or share of the produce of the estate and effects of Watkins Herbert, and which would shortly be paid into the hands of the Accountant General of the Court of Chancery, under an order or decree in the cause of *Conden v. Lord*; and that Hutchins was indebted to the Langtons in the sum of 414*l.*; and, for the better securing the payment thereof with interest at five per cent., he and his wife had agreed to assign their said fourth part or share under the will of Watkins Herbert, or under or by virtue of the decree or order made, or about to be made, in the suit of *Conden v. Lord*: Hutchings and wife assigned the said fourth part or share and every or any other part or share, vested, accruing, surviving or contingent, of him, Hutchings, in right of his wife, of and in the produce arising under or by virtue of Herbert's will, or under or by virtue of an order or orders, decree or decrees, either then made or to be thereafter made, in the suit of *Conden v. Lord*, upon certain trusts for securing to the Langtons the payment of their debt and interest, and, subject thereto, in trust for Hutchings, his executors, administrators and assigns; and Hutchings appointed the Langtons to be his attorneys for receiving the assigned premises and to give receipts for the same.

[*139] This deed was prepared by the defendant Smith, *who was the solicitor of the Langtons, and the execution of it by Hutchings and wife was attested by him.

After the execution of the deed, the four nieces and their husbands instituted another suit, which also was called *Condon v. Lord*, against the trustees and executors of Herbert's will, praying for the usual accounts of the testator's real estates, and that those estates might be sold and the proceeds divided amongst the parties entitled.

In November, 1831, Hutchings died insolvent and intestate, and no person took out administration to him. On the 17th of that month a decree was made in the second suit, directing the usual accounts to be taken of the testator's real estates, and referring it to the Master to inquire who were his nephews and nieces or the persons entitled to the produce of his real estates under his will. In July, 1834, the Master reported that Mrs. Hutchings was one of the parties so entitled; and, on the 9th of August, following, the decree on further directions was made, in both causes, by which it was ordered that one-fifth of the bank annuities therein mentioned, being the produce of the testator's residuary real and personal estates, should be transferred to Mrs. Hutchings in her own right, and that another fifth should be transferred to her as administratrix of her late brother; and, on the 21st of the same month, those shares were transferred to her accordingly. On the 18th of that month, the defendant Smith was informed that the decree on fur-

(a) This was a mistake. Mrs. Hutchings was beneficially entitled to one-fifth in her own right and to a half of another fifth, as one of her brother's next of kin, subject to the payment of his debts.

1838.—*Hutchings v. Smith.*

ther directions had been made: upon which he sent for Mrs. Hutchings to his office, and, after telling her that her cause had been heard, and that she would receive her money in a few days, he prevailed on her to sign a memorandum which he had prepared, and which was as follows: "Whereas by a certain deed of assignment bearing date the 17th of November, 1830, and made "between my late husband, Joseph Hutchings deceased, [*140] ed. and myself of the one part, and Messrs. Langton of the other part, certain funds payable to me under the will of Watkins Herbert, were assigned to the said Messrs. Langton in trust to secure payment of the sum of 414*l.* and interest thereon: Now, in consideration of the said Messrs. Langton having agreed to waive presenting a petition to the Court of Chancery, I do hereby agree to ratify and confirm the said deed of assignment and the several trusts therein mentioned, and do hereby promise and agree, to and with the said Messrs. Langton, to pay unto them the said sum of 414*l.* and interest secured by the said deed of assignment, within five days from the date thereof." Messrs. Langton knew nothing of this memorandum until after it was signed; and they never had agreed to waive presenting a petition to the Court of Chancery, as recited in the memorandum, but that recital was introduced into it by the defendant Smith of his own accord. In September, 1834, Messrs. Langton brought an action, on the memorandum, against Mrs. Hutchings; and, in November, following, she filed the bill in the present suit, against them and Smith, alleging that Smith obtained the memorandum from her by intimidation, and that she signed it without the advice of any friend or professional adviser and without having received any consideration and when she was ignorant that the deed of assignment was wholly inoperative and void as against her. The bill prayed that the memorandum might be declared void and delivered up, to the plaintiff, to be cancelled, and that the Langtons might be restrained from proceeding with their action.

The cause now came on to be heard. The main question was whether the assignment was not void as against the plaintiff, in consequence of her having survived her husband.

*Mr. *Knight Bruce* and Mr. *Moore* for the plaintiff:—It cannot [*141] be disputed that Mrs. Hutchings is entitled, at the least, to a settlement out of the funds comprised in the assignment; but we contend that the assignment is wholly void as against her. There is no case in which the question, whether an assignment, by the husband, of the wife's *chose in action*, to a particular assignee for value, is good against the surviving wife, has been argued and decided; but there are the strongest expressions, in the recent cases, against the affirmative of the proposition. In *Lord Cartaret v. Paschal*,^(a) the subject in dispute was an *elegit*, which is considered as a chattel real; and, on that account, it was held that the husband's assignment

(a) 3 P. W. 197.

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bound the wife. The next case that is usually cited against the right of the wife, is *Bates v. Dandy*.^(a) There Lord Hardwicke went so far as to hold that the wife had no right even to a settlement. That, undoubtedly, is not now the law of the court. In *Lord Salisbury v. Newton*^(b) it was expressly decided that the wife was entitled to a settlement as against the husband's particular assignee for value: that case, however, did not touch the present question; as the point was not brought before Lord Henley. In *Mitford v. Mitford*,^(c) it was decided, and for the first time, that the general assignment in bankruptcy, did not defeat the right of the surviving wife. Sir W. Grant, M. R., in his judgment in that case, discusses the question now before the court, at considerable length: and, in page 99 of the [*142] "report, his Honor says: "It may seem strange that a man should, in any way, be able to transfer, to another, a larger or better interest than he has in himself. The interest that he has in her chose in action or equitable interest, is only a right or power to reduce it into possession. But what is supposed to pass to an assignee for valuable consideration, is the absolute right to the property, wholly freed from her contingent right by survivorship." In *Hornsby v. Lee*,^(d) the wife's interest in the stock was reversionary at the time of the assignment, but it came into possession in the lifetime of the husband; and yet the wife was held to be entitled to the stock in consequence of her having survived her husband. *Hornsby v. Lee*, therefore, decides the very point. Sir T. Plumer, V. C., in his judgment in that case, says: "The assignment puts the assignee of the husband in the same situation as the husband; and, if the husband survives the wife, the assignee is entitled to the property; but here the husband died before the wife; and the assignee, therefore, is not entitled to the property. According to *Mitford v. Mitford*, it is clear that the general assignment in bankruptcy, does not pass a reversionary interest in the wife, she surviving her husband. It must be the same as to the assignment under the insolvent debtor's act: nor do I see what answer can be given to the observation of Mr. Cooke, that a particular assignee cannot be in a better situation than an assignee under the general assignment in bankruptcy. The case cited of *Woollands v. Crowcher* is strong to show the insufficiency of the assignment to bar the wife's claim in case she survives her husband." There is another case, [*143] which is not reported in any "regular book of reports, but which is also an authority in our favor. *Chapman v. Curtis*.^(e)

(a) 2 Atk. 207; but see a much fuller report of the case in 1 Russ. 33, note, and 3 Russ. 72, note.

(b) 1 Eden, 370.

(c) 9 Ves. 87; see 97 *et seq.*

(d) 2 Madd. 16.

(e) 5 Bythewood's Precedents in Conveyancing, Jarman's edit. p. 572, note. Reg. Lib. A. 1827, fol. 1658. On referring to Reg. Lib. the statement of the case in Mr. Bythewood's note, appeared to be accurate, except that the sum which was ordered to be paid to Mrs. Chapman, was not the whole of her fifth share of the funds in the cause, but the residue of it after deducting certain sums which had been applied in satisfaction of incumbrances on the share. The whole amount of the share, was 770*l.*: the sum which the court ordered to be paid to Mrs. Chapman, was 155*l.*: and, as she had presented a petition praying to have the last mentioned sum settled upon herself and

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In *Pearce v. Thornely*,^(a) the question arose between the assignee, in bankruptcy, of a deceased husband and the widow : but your Honor's judgment contains observations applicable to the present question. Every body must be aware that there can be no distinction, in principle, between the assignment in bankruptcy, and an assignment, by the husband, to a particular assignee for valuable consideration. *Purdew v. Jackson*,^(b) *Honner v. Morton*.^(c)

Mr. Jacob and Mr. Koe, for the defendants, the Langtons ;—Mrs. Hutchings is not entitled to come for relief against our clients, unless she replaces them in *statu quo*, that is, unless she re-transfers to the Accountant General, in trust in the cause of *Condon v. Lord*, the funds that were standing in his name on the 18th of August, 1834. [*144]

It is true that the question now in discussion, never has been decided after argument, for it has been always taken as too clear for argument. *Bates v. Dandy*, as reported by Mr. Russell, is a conclusive authority upon the point. In *Bash v. Dalway*,^(d) Lord Hardwicke said, that the assignment by the husband of the wife's reversion, would have been valid if the reversion had fallen into possession in his lifetime, although he died before he received the money : and, in *Medcalfe v. Ives*,^(e) the same learned judge expresses himself to the same effect. The plaintiff's counsel have admitted, that the case of *Lord Salisbury v. Newton*, is an authority against them ; and they have not been able to find any case in their favor except *Purdew v. Jackson*, in which, they say there is a *dictum* which supports their case. But that *dictum* was not adopted, but was expressly repudiated by Lord Lyndhurst, L. C., in his judgment in *Honner v. Morton*. His Lordship says : "When the husband assigns the *chose in action* of his wife, one would suppose, on the first impression, that the assignee would not be in a better situation than the assignor ; and that he too must take some steps to reduce the subject into possession, in order to make his title good against the wife surviving. But equity considers the assignment, by the husband as amounting to an agreement that he will reduce the property into possession ; it likewise considers what a party agrees to do, as actually done : and, therefore, where the husband has the power of reducing the property into possession, his assignment of the *chose in action* of the wife, will be regarded as a reduction of it in possession." This is consistent with the opinion of every other judge before whom the question has arisen ; and, it is impossible for the court to decide the contrary, without overruling what has been considered to be the law, for the last 100 years. *Johnson v. Johnson*.^(f) [*145]

Mr. Wakefield and Mr. Bethell, for the defendant Smith, cited *Steed v.*

her children, the court may have ordered it to be paid to her, as being the provision to which she was entitled out of her share. The case, therefore, does not appear to be an authority in the plaintiff's favor.

(a) Ante, vol. 2, p. 167 ; see 177 *et seq.*

(c) 3 Russ. 65 ; see pages 68 and 85.

(f) 1 Jac. & Walk. 472.

(b) 1 Russ. 1 ; see particularly, pages 19 and 20.

(d) 3 Atk. 530 ; see 533.

(e) 1 Atk. 63.

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Cragh,^(a) *Honner v. Morton*, *Bates v. Dandy*, and *Lord Salisbury v. Newton*.

Mr. *Knight Bruce*, in reply, referred to *Burnett v. Kinaston*,^(b) and to Mr. Jacob's edition of *Roper on Husband and Wife*, pp. 226, 227.

The Vice-Chancellor, after stating the case, proceeded as follows:—The assignment of November, 1830, was prepared by Mr. Smith, who was the attorney of Messrs. Langton; and it is evident, on the face of that instrument, that the parties did not know what was the share of Watkins Herbert's estate which Mrs. Hutchings was entitled to. She was, in fact, entitled to one-fifth in her own right, and to another fifth as the personal representative of her late brother; and, after payment of his debts, that fifth would be divisible between her and her sister; so that the utmost that she was entitled to beneficially, was one-fifth, and the half of another fifth, subject to her brother's debts.

In the progress of the two suits of *Conden v. Lord*, Mr. Hutchings died, and it does not appear that any *bill of revivor was filed, or that any notice whatever was taken of his death. On the 9th of August, 1834, the decree on further directions was made in both causes; from which it appears that a considerable sum, in the whole, was forthcoming to Mrs. Hutchings in respect of her shares; and, on the same month, the amount of those shares was transferred to her. But on the 18th of that month, Mr. Smith obtained from her the memorandum which is the subject of the present suit.

It is plain, from the evidence in the cause and from the answer of the Messrs. Langton, that the situation in which Mrs. Hutchings stood with respect to her shares, could not be explained to her: and that Messrs. Langton knew nothing at all about the memorandum, and that they never had any intention of presenting a petition to this court, and, consequently, the statement that they had agreed to waive presenting a petition, was merely the invention of Mr. Smith, for the purpose of making it appear that Mrs. Hutchings had received some consideration for signing the instrument.

In the course of the argument a great deal was said upon this question, namely, whether an assignment by a husband and wife of the wife's *chose in action* to a particular assignee for valuable consideration, is binding on the wife, where the husband dies in her lifetime and before he has reduced the *chose in action* into possession: and the cases of *Bates v. Dandy*, *Lord Salisbury v. Newton*, and a great many other cases were cited. It is not, however, necessary for me to enter into the general question in order to decide the case now before me. But, when it becomes necessary to decide [*147] that question, the court will have to consider whether the *cases of *Bates v. Dandy* and *Lord Salisbury v. Newton*, which the defendant's counsel mainly relied upon, can be considered as authorities which ab-

(a) 9 Mod. 43.

(b) Prec. Ch. 118.

1838.—*Hutchings v. Smith*.

solutely and conclusively establish the position that, where the wife has survived her husband, the assignee for value of the wife's *chose in action*, can be entitled to any portion of it. In *Bates v. Dandy* Lord Hardwicke seems to have felt that the question was one of some difficulty; but, on the authority of a case which he cites, he comes to the conclusion that the assignment ought to be established; and he directs that the claim of the assignee should be first satisfied out of the *chose in action*, and that the residue should go to the wife.^(a) In *Lord Salisbury v. Newton*, it seems to have been taken for granted that the assignment was binding on the wife; for the only question that was discussed, was whether the wife was entitled to a provision out of her *chose in action* as against the assignee.

Now, in this case there is this peculiarity: nothing was done by the assignee in order to reduce the chose in action into possession, and, before the memorandum was signed, there had been a decree directing Mrs. Hutchings's chose in action to be transferred into her name: and it appears to me that there is an important difference between the case where the chose in action is fluctuating, and the case where there has been a decree directing that it shall be paid to the wife who has survived her husband. In *Forbes v. Phipps*, which was decided by Lord Henley subsequently to the case of *Lord Salisbury v. Newton*, a decree had been made which directed that the wife's chose in action should be *paid to the husband; and, [*148] after that decree, the wife died leaving her husband surviving; and the question was whether the effect of the decree combined with the fact that the husband had survived the wife, was to give the chose in action to the husband as against the creditors of the wife. It was contended, on behalf of the creditors, that the effect of the decree and survivorship was not to give the chose in action to the husband, but that it still remained the property of the wife. Lord Henley gave judgment on the point, and said that a decree was equal to a judgment at law, which operates to vest the property: and his Lordship held that the husband, under the decree, and by having survived his wife, became entitled to the property not subject to the debts of his wife. If then a decree of this court will have the effect of vesting the chose in action of the wife in the surviving husband, what effect ought a decree to have which directs the chose in action of the wife to be paid to the wife who has survived her husband? It seems to me that, in the latter case, the decree must, *a fortiori*, have the effect of vesting in the wife, her own chose in action. It is very extraordinary that no petition was ever presented to the court by Messrs. Langton. But, whatever may be the right of the husband's assignee for value, of the wife's chose in action, before decree, it is difficult to see how a petition presented by the assignee after a decree has been made which directs the chose in action to be paid to the wife, can be of any avail: and, in my opinion, if Messrs. Langton, after allowing the decree to be made

(a) See 3 Russ. 72, note.

1838.—Tench v. Cheese.

which directed Mrs. Hutchings' chose in action to be transferred to her, had presented a petition praying that their debt might be satisfied out of it, the court would have paid no attention to the application. The ma-
 [*149] nœuvre of taking the memorandum *was intended to have the effect of placing Mrs. Hutchings in a worse situation with respect to her property than she would have been in if she had not signed the memorandum. Mr. Smith never explained to her the effect of the act which she was doing when she signed the memorandum; and there is great reason to think that, if the real position in which she stood with respect to her property and the difficulties which had occurred in the case, had been stated to her, she never would have signed the memorandum. The Messrs. Langton were no parties to it, nor had they ever thought of presenting any petition to the court: and, consequently, the statement that they had consented to abstain from taking that step, was merely colorable.

My opinion, upon the whole of the case, is that the memorandum cannot stand, but that it must be delivered up to be cancelled. The money in court must be paid to the plaintiff, and Mr. Smith and Messrs. Langton must pay the costs of the suit.(a)

[*150]

*TENCH V. CHEESE AND STEVENS.(b)

1838; Feb.—New Orders of 1837.

The last order upon merits previous to the orders of 1837 coming into operation, had been made at the Rolls, against one of the defendants alone. The other defendant afterwards moved to dismiss before the Vice-Chancellor. The motion was refused with costs, as the defendant was bound to see that the application was made in the proper court.

MR. BAYLEY, on behalf of the defendant Stephens, moved to dismiss the bill for want of prosecution.

Mr. Beavan objected that this motion, under the 12th order of 1837, sect. 3, ought to have been made at the Rolls, inasmuch as the last order upon merits, namely, an order for the defendant Cheese to produce papers, &c., admitted by his answer to be in his possession, had been made at the Rolls. He claimed the costs of the motion.

Mr. Bayley, in reply, insisted that, as the order at the Rolls had been made against Cheese, and not against his client Stephens, who was not aware of it, no costs ought to be given; but,

(a) Immediately after the plaintiff had signed the memorandum mentioned above, Mr. Smith prevailed on her to sign another, by which, in consideration of his not presenting a petition to prevent her from receiving the funds payable to her in *Conden v. Lord*, she undertook to pay to him a debt which was partly due from her late husband, and partly from herself. The suit related to the latter memorandum as well as the former; and, (no objection having been made on the ground of multifariousness,) the decree directed them both to be delivered up: but it was thought advisable not to incur the report with any statement relative to the latter memorandum.

(b) *Ex relatione*, Mr. Beavan.

1836.—*Colburn v. Duncombe.*

The Vice-Chancellor said he knew it to be the opinion of the Lord Chancellor that those who made applications after the orders of 1837 had come into operation, were bound to see that they were made in the proper court; and he, therefore, refused the application with costs.

**COLBURN v. DUNCOMBE.*

[*151]

1836; 19th February.—Copyright; Pleading; Parties.

The publisher of a book, filed a bill for the usual relief on an invasion of copyright; but, though he had purchased the work of the author and paid for it, it did not appear that the copyright had been assigned to him. Held that the bill was demurrable because the author was not a party to it.

THE bill alleged that, on the 1st of July, 1836, an agreement in writing was made and signed between the author of the work thereafter mentioned, of the one part, and the plaintiff, who was a bookseller and publisher, of the other part, whereby the author, in consideration of a large sum of money mentioned to be paid to him by the plaintiff, agreed to dispose of, to the plaintiff, the entire copyright, in perpetuity, of an original work consisting of extracts from a private journal of occurrences, conversations and anecdotes, kept during the years 1813 and 1814, and comprising particulars relative to the late King George the Fourth, the Princess of Wales, the Princess Charlotte and other persons; and that it was thereby agreed that the work was to consist of not less than two volumes of at least 400 pages each, printed in the type therein mentioned: that, in pursuance of the agreement, the author wrote and composed an original work, which had since been published, by the plaintiff, under the title of "Diary illustrative of the Times of George the Fourth;" and that, on the 1st of November, 1836, the author delivered the manuscript of the work to the plaintiff, and thereupon the plaintiff paid the author the sum agreed to be paid for the copyright of the work by the agreement of July, 1836; and the author, thereupon, signed a memorandum in writing, bearing date the 1st of November, 1836, whereby he acknowledged to have received, of the plaintiff, the before mentioned sum of money, as the consideration for the entire copyright, in perpetuity, of the work in the said memorandum or receipt called, "Memoirs of the latter Times of George the Fourth," and agreed to *deliver a regular assignment to [*152] the plaintiff whenever called upon so to do: that, after the plaintiff had purchased the copyright of the work as aforesaid, he caused the work to be printed and published under the title of "A Diary illustrative of the Times of George the Fourth, interspersed with original Letters from the late Queen Caroline and from various other distinguished persons;" and that the work so printed and published and the copyright thereof, was then the sole and exclusive property of the plaintiff. The bill then alleged that the defendant

1838.—*Colburn v. Dancombe.*

had printed, published and sold several copies of a pirated edition of the work: and it prayed that he might be restrained from selling or disposing of any more of such copies, and might account, to the plaintiff, for the profits made by the sale of the copies that had been sold.

The defendant demurred for want of equity, and because the author was not a party to the suit.

Mr. *Jacob* and Mr. *Torriano*, in support of the demurrer;—The plaintiff if he has any title at all, has, at the utmost, an equitable title to the copyright in question.

There was no such thing as copyright at common law. It is a new species of property created by 8 Anne, c. 19; and it has been decided, repeatedly, that copyright cannot be assigned except in writing. *Power v. Walker*,^(a) *Morris v. Kelly*,^(b) *Latour v. Bland*,^(c) *Moore v. Walker*.^(d) The documents referred to in the bill, are not assignments, but mere executory agreements to assign the copyright, at some future time. At the time [*153] *when the first document was signed, there was no existing copyright; for the work was not then written. The work mentioned in the second document does not appear to be identical with that mentioned in the first; and, therefore, it is not clear that the work mentioned in the second instrument was a performance of the previous agreement. Those two instruments, therefore, throw considerable doubt upon the plaintiff's title. At the utmost, they are merely agreements for a future assignment.

A bill of this description, is in aid of the legal title; therefore, the first question to be considered is whether the plaintiff has that legal title. If he has not, he is bound to bring before the court the person having the legal title; and, if he does not do so, the bill is demurrable for want of parties. *Cathcart v. Lewis*,^(e) *Ray v. Fenwick*,^(f) *Harrington v. Long*.^(g)

Mr. *Knight Bruce* and Mr. *Sharpe*, for the bill:—We are dealing here, not with land, but with a mere chattel interest; and all that is required is that the intention to pass the copyright, should appear in writing. No particular form is necessary. Where the title depends wholly upon contract, there is no difference between a legal and an equitable title; all that is requisite is that there should be a writing which evidences the intention of the parties. *Poole v. Bentley*.^(h) In *Rundell v. Murray*,⁽ⁱ⁾ Lord Eldon seems to assume that a mere gift by parol, unsupported by value, would be sufficient to pass a copyright.

[*154] *Besides, this court will always presume against the wrong doer; and, in *Morris v. Kelly*, Lord Eldon acted upon that principle. His Lordship there says: "I shall assume that your title is regular until they

(a) 3 M. & S. 7.

(d) 4 Camp. N. P. C. 9, note.

(g) 2 Myl. & Keen, 590.

(b) 1 Jac. & Walk. 481.

(e) 1 Ves. Jun. 463.

(h) 12 East, 168.

(c) 2 Stark. N. P. C. 382.

(f) 3 Bro. C. C. 25.

(i) Jac. 311; see 316.

1838.—*Colburn v. Duncombe.*

show the contrary :” and, in *Barnett v. Gloseop*,^(a) the Court of Common Pleas acted upon the same principle.

The instrument of November, 1836, is a receipt for the consideration for the entire copyright of the work, in perpetuity; and the agreement at the end of it, is not to deliver an assignment, but a regular assignment, that is a more formal one. A declaration of an intention to do some further act does not prevent the legal title from passing. *Doe v. Ries*.^(b)

Moreover the bill contains an allegation that the copyright has become the sole and exclusive property of the plaintiff. That is a distinct averment that every thing has been done to complete the legal title. But we are not compelled to rely on that allegation; as we have a writing stated in the bill which is a complete exhibition of intention that the copyright should pass.

THE VICE-CHANCELLOR :—This suit is manifestly defective in not having the author of the work a party to it.

I am clearly of opinion that the first instrument set forth in the bill, cannot be held to have had the effect of assigning the copyright; for it was not then in existence: and it is distinctly laid down, by Littleton, that a release of all the right which a party may have at any future time, is clearly void in law.

“If then the first instrument did not operate as an assignment, the [*155] question is whether the second instrument had that operation. Now it is observable that that instrument contains no words of assignment at all, but merely an acknowledgment, on the part of the author, that he had received the consideration for the copyright of the work therein called, “Memoirs of the latter Times of George the Fourth,” and had agreed to deliver a regular assignment to the plaintiff whenever called upon so to do. The word “regular” I consider to be purely superfluous: and, in my opinion, this second instrument is nothing more than an agreement to assign the copyright when called upon to do so; which is widely different from an actual, present assignment. It seems to me, therefore, that this second instrument did not operate as an assignment at law.

The bill next alleges that, after the plaintiff had purchased the copyright of the work as aforesaid, he caused the work to be printed and published under the title of, “Diary illustrative of the Times of George the Fourth, interspersed with original Letters from the late Queen Caroline and from various other distinguished Persons;” and that the work so printed and published and the copyright thereof, was then the sole and exclusive property of the plaintiff. Now that allegation, in the way in which it is found in the bill, cannot be taken as a substantive, independent allegation of right; but it must be read in connection with the allegation which immediately precedes it; and, that being so, I am not at liberty to hold that it is tantamount to an averment that an assignment has been made which would pass the copyright

(a) 1 Bing. N. C. 633.

(b) 8 Bing. 178.

 1838.—*Slater v. Wheeler*.

at law. The consequence is that the party who has the legal copyright, is not before the court; and the demurrer for want of parties must be [*156] allowed. *But, as the bill contains sufficient to show that the plaintiff has a good title in equity, I shall give him leave to amend his bill without prejudice to the injunction.(a)

 SLATER v. WHEELER.(b)

1838: 27 February.—Pleading; Parties.

A. and B., the executors of C., employed D. to act as their agent in the business of the executorship. A. died, and afterwards B. filed a bill against D. for an account of his dealings and transactions as such agent as aforesaid. Held that A.'s personal representatives were not necessary parties to the suit.

THE bill was filed for an account of the transactions and bills of costs of Messrs. Nash & Rumsey, solicitors, who had been employed by Slater and Lansdale, executors of a testator.

After Lansdale's death, the suit was commenced by Slater alone, and the representatives of Lansdale were not parties to the record.

Mr. *Knight Bruce* and Mr. *Shadwell* for the plaintiff.

Mr. *Jacob* and Mr. *Bethell* for the defendants, objected, at the opening, that the legal personal representatives of Lansdale ought to be made parties.

The plaintiff seems not to have contemplated that the accounts sought for, may turn out in two different ways. If there should be a balance due to the executors, there may be the proper party before the court to receive it; but, if there should be a balance due from the executors, then we have not the security we are entitled to for the payment of it. The contract of [*157] *employment binds the deceased executor's estate, as well as the surviving executor; and his assets are liable to make good the balance, if any should be found due to the defendants. There are several transactions stated in the answer which render it necessary to go into evidence; but if such evidence were taken in the absence of the personal representatives of the deceased executor, it would not be binding on them, though it may materially affect them; and, therefore, the court cannot, on this record, finally settle the rights of the parties. It has been said that this doctrine applies only to trade transactions; but that is not correct. In *Therpe v. Jackson*,(c) a case recently before Mr. Baron Alderson in the exchequer, the same doctrine was applied: and, in that case, most of the authorities were referred to. The account is sought on the footing of there having been a joint contract; and Slater is bound to account over, for the assets of which an account is sought from Messrs. Nash & Rumsey. On the other hand, the defendants will

(a) An injunction had been granted to restrain the defendant from selling the pirated work.

(b) *Ex relations*.

(c) 2 Young & Coll. 553.

1838.—Turner v. Capel.

have a right to have any balance that may be found due to them, paid out, of the trust estate of the executors, or by Lansdale's representatives, or by Slater, and they ought not to be deprived of the security of any of them.

THE VICE-CHANCELLOR :—Where two persons representing a joint estate, employ certain attorneys, and one dies, I never heard that, because you want an account against those agents, you must make the legal personal representatives of the deceased, parties to the suit. I cannot allow this objection. I think that the language of Mr. Baron Alderson is too large ; and, moreover, it was not necessary for his decision.

*TURNER v. CAPEL.

[*158]

1838: 2d March.—Will ; Construction ; Survivorship.

Testator bequeathed his residuary estate to his wife for life, and, after her death, to his son and daughter, share and share alike, and their respective issue, with benefit of survivorship between his said children or their issue respectively. Held that the survivorship was to take place only in the event of the issue of a child failing in the lifetime of the testator's widow.

JAMES TURNER, by his will dated the 21st of December, 1805, gave the residue of his estate and effects, after payment of his funeral expenses, debts and legacies, to his executors, in trust to sell the same and lay out the proceeds in government securities in their names, and to pay the interest or dividends thereof to his wife, for her separate use for her life, she releasing the testator's estates and effects from all dower or thirds which she might be entitled to : but, in case she should refuse to execute such release, then he revoked his said bequest to her ; and from and after the death of his wife or her refusing to execute such release, he gave all the residue of his estate and effects unto and between his son John Turner and his daughter Clarissa Turner, share and share alike, and their respective issue, with benefit of survivorship unto and between his said children or their issue respectively.

The testator died shortly after the date of his will, leaving his widow and his son and daughter surviving. The widow executed the required release, and died in June, 1837.

John Turner had had eight children, of whom five were still living : two died before the testator's widow, and one after her. Clarissa Turner married Thomas Fordham, and had had two children ; one of them died before the widow, and the other was still living.

The plaintiff in the cause was John Turner, the testator's son : the defendants were the executors and trustees of the will, the plaintiff's [*159] surviving children, the representative of his child who died after the widow, and Mr. and Mrs. Fordham and their surviving child. The bill prayed that the rights and interests of the plaintiff and the defendants in and to the testator's residuary estate under his will, might be declared, and that the

1838.—*Turner v. Capel.*

residue might be distributed amongst the several parties entitled thereto according to their interests therein.

Mr. and Mrs. Fordham, by their answer, submitted that, on the death of the testator's widow, Mrs. Fordham, or her husband in her right, became entitled, absolutely, to a moiety of the residue.

Two of the plaintiff's children, who were adult, submitted that, according to the true construction of the will, the plaintiff became entitled, upon the testator's decease, subject to the life interest of the widow, to one moiety of the residue for his life, with remainder to all his issue born in his lifetime, subject to survivorship between or among such issue in the event of the death of any one or more of them during the life of the plaintiff, with similar limitations to Mrs. Fordham and her issue in the event of the plaintiff dying without leaving issue living at his decease: and that Mrs. Fordham became entitled, upon the decease of the testator, subject to the life interest of the widow, to the other moiety of the residue for her life, with remainder to all her issue born in her lifetime, subject to survivorship between or among such issue in the event of the death of any one or more of them during her lifetime, with similar limitations to the plaintiff and his issue in the event of Mrs. Fordham dying without leaving issue living at her decease. The plaintiff's other children [*160] and the child of Mr. and Mrs. Fordham, who were infants, submitted their rights and interests to the care and protection of the court: and the representative of the plaintiff's child who died after the widow claimed such interest as that child would have been entitled to if living.

The cause was heard as a short cause.

Mr. *Knight Bruce* and Mr. *Romilly* for the plaintiff, contended that the plaintiff was entitled to a moiety of the residue, absolutely. *Montagu v. Nuccella*, (a) *Pearson v. Stephen*. (b)

Sir *W. Horne* and Mr. *Stratton*, for the defendants, Fordham and wife, cited *Lyon v. Mitchell*. (c)

Mr. *Jacob*, Mr. *Bailey* and Mr. *C. C. Barber* appeared for the children of the plaintiff and Mr. and Mrs. Fordham.

The Vice-Chancellor said that, in this case, the survivorship was to take place in the event of there being a failure of issue of either of the testator's children in the lifetime of the widow; and that *Pearson v. Stephen* was a stronger case in favor of the issue of the children than the present; for, in that case, there was a gift to the sons and their issue, followed by a direction that the issue should take *per capita* and not *per stirpes*: and His Honor declared that, in the events that had happened, the plaintiff and Mrs. Fordham were each entitled to a moiety of the residue, absolutely. [1]

(a) 1 Rus. 165.

(b) 2 Dow. & Clark, 328.

(c) 1 Madd. 467.

[1] Vide *Peel v. Catlow*, post, 372. *Jervis v. Pond*, post, 549.

1838.—Archibald v. Wright.

*ARCHIBALD v. WRIGHT.(a)

[*161]

1838: 2d and 30th March.—Will; Construction; Interest or Power.

Testator directed that, after his wife's death, part of his stock should be transferred to Johanna G. for her sole and entire use during her life; that she should not alienate it, but enjoy the interest during her life; and that, at her decease, she might dispose of it, as she thought fit. Held that J. G. took an interest for life, with a power to dispose of the stock by her will.

HENRY WRIGHT, by his will, dated 12th September, 1824, after reciting that he had executed a deed of trust settling a certain portion of his property, proceeded thus: "I stand possessed of the remaining sums, viz., 1000*l.* in the old four per cents., 630*l.* in the late navy fives, and 100*l.* in the three per cent. consols, which I dispose of in the following manner: viz., I bequeath the 100*l.* in the three per cent. consols to Johanna Grant, of No. 7 Charlotte street, Pimlico; I give the interest of all the rest to my dear wife Eliza, to be enjoyed by her during her life; at her decease I give the same to my child Henrietta. I further will that, at the decease of my wife the sum of 1000*l.* in the old four per cents. be transferred to Johanna Grant, for her sole and entire use during her life; that she shall not alienate it, but enjoy the interest of it during her said life, and at her decease she may dispose of it as she thinks fit." I further will that, after the decease of my wife, and should Henrietta also die (without issue) and the above named Johanna Grant be living at the time of the decease of the said Henrietta, I, in that case, will and bequeath to Johanna Grant before named the further sum of 2800*l.* in the three per cent. reduced stock, which sum is referred to in the trust deed alluded to in the first part of this document. I further will and bequeath to my dear wife my house and furniture, and everything appertaining to Ham,(b) during her life; at her decease I give the same to my child, Henrietta; I also give to my wife the seven Lancaster Canal shares during her [*162] life, and at her decease, I give the same to Henrietta. Dated at Ham, the 12th of September, 1824. H. Wright. I appoint my brother sole executor of this my last will."

The testator afterwards made a codicil as follows: "Codicil made 19th October, 1824. In addition to the provision hereinbefore made for Johanna Grant, at the decease of my wife, I give and bequeath to her the further sum of 430*l.* in the late navy fives for her disposal. Henry Wright."

The testator died on 7th April, 1825, and his brother, John Wright, a defendant, proved the will and codicil on 21st July, 1825.

The 1000*l.* four per cent. annuities and 630*l.* navy five per cents. were reduced in the testator's lifetime to three and a half per cent. annuities, and, by reason of a deficiency of the general personal estate for payment of debts, &c., those sums were partly applied for that purpose, and abated in propor-

(a) *Ex relatione*, Mr. Greene.

(b) His residence.

1838.—Archibald v. Wright.

tion, 200*l.* and 126*l.*, leaving 800*l.* of the one, and 504*l.* of the other for the legatees.

On the 16th February, 1831, Johanna Grant married John Archibald, and died on the 9th September, 1832, and letters of administration of her effects were granted to her husband by attorney, he being then resident in the East Indies.

John Archibald, the husband, died in July, 1834, having made a will, dated the 20th of the same month, but did not appoint an executor; [*163] and John Archibald, the *plaintiff, obtained letters of administration both of the estate of John Archibald, and of Johanna, his wife, deceased.

Eliza Wright, the widow of Henry Wright, the testator, died on the 6th of November, 1835, and thereupon the plaintiff filed his bill against John Wright, the executor, and Henrietta Ann Wright Place, who was a natural daughter of the testator, claiming a transfer, not only of the 430*l.* bequeathed by the codicil, but also of the 800*l.* residue of the 1000*l.* bequeathed by the will.

The cause came on to be heard on bill and answer; and, owing to the parties differing on the minutes, was twice argued, first, on the 2d March, and again this day.

Mr. *Knight Bruce* and Mr. *Rudall*, for the plaintiff:—The question is, what were the rights of Johanna Grant in reference to the 1000*l.* bequest; whether she took an absolute interest, or had only a power coupled with an interest for her life. One construction of this will is to read the passage beginning, "I further will, that at the decease of my wife," and ending "Johanna Grant," as if it were in a parenthesis, and then there would be an absolute gift, which the subsequent declaration as to the enjoyment during life, and the power of disposal at her death, would not abridge. There is another construction, which refers the words "during her life," "she may dispose of it," not to Johanna Grant but to Henrietta, and this has been sug-

[*164] gested by an eminent counsel as the true reading of the will.—[*Mr.

Jacob: If the passage referred to be read as a parenthesis, you must make Johanna Grant a trustee for Henrietta.]—There is no authority for construing the word "dispose," or "disposal," to mean other than an *absolute interest*, unless a special class to take, or a special instrument or mode of executing the power be pointed out. *Tomlinson v. Dighton*,^(a) *Doe v. Thorley*.^(b) The codicil is very important in explaining the disposition intended by the will; there is no question as to Johanna Grant taking an absolute interest in the 430*l.*; and the words, "in addition," "the further sum," "for her disposal," clearly import that the additional provision is of the same nature as the former gift at his wife's decease.—[The Vice-Chancellor: There are two different gifts to Johanna Grant by the will; the testator does

(a) 1 P. Wms. 149.

(b) 10 East, 438.

1838.—Archibald v. Wright.

not in his codicil distinguish either, but refers to the provision he has made for her in general terms; the gift by the codicil, therefore, cannot be of the same nature as both.]—The testator has here said, "you shall not spend your income," that is, "you shall not anticipate it by alienation." Testators like the present, who seek not the aid of legal skill, never contemplate any distinction between power and property. In *Doe v. Thorley* the words were, "to leave," and all the Judges thought that word to signify *ex vi termini*, a disposition by will. *Reid v. Shergold*(a) also was decided on the same rule of construction, the appointment by will being specially limited.

The following cases were also cited: *Irwin v. Furrer*,(b) *Jennor and Hardie's case*,(c) *Robinson v. *Dusgale*,(d) *Goodtitle v. Otway*,(e) *Elton v. Shephard*,(f) *Hales v. Margerum*,(g) *Comber v. Graham*,(h) *Simmons v. Simmons*,(i) *Doe dem. Herbert v. Thomas*,(k) *Hixon v. Oliver*.(l)

Mr. Jacob and Mr. Roupell, for the defendant Henrietta Ann Wright Place, were not heard.(m)

Mr. Greene for the defendant John Wright.

THE VICE-CHANCELLOR:—The words in the present case, do not appear to me to give an *absolute interest* with a superadded power, as in most of the cases referred to, but a *life interest* and testamentary power; they seem to negative the possibility of Johanna Grant disposing of the fund during her life, and are very different from the words in *Doe v. Thomas*.

Mr. Knight Bruce:—With great deference, I think the restraint on alienation good for nothing.

THE VICE-CHANCELLOR:—That may be, so far as it is a limitation of the interest, but it appears to me available as indicative of an intention to prescribe the mode of executing the power, viz. by will and not by writing *inter vivos*. I think this lady was not to have a power to alienate during her life; *and if not, then she took a life interest, coupled with [*166] a testamentary power of appointment, and having died intestate, Henrietta Ann Wright Place is entitled to the 800*l.* bank three and a half per cent. annuities in the pleadings mentioned.

I should not object, if it were desired, to send a case to a court at law, but there would be a great difficulty in framing one that would be satisfactory.

Mr. Knight Bruce agreed as to the difficulty in framing a case and did not press it.

(e) 10 Vesey, 370.

(b) 19 Ves. 86.

(c) 1 Leon. 283.

(d) 2 Vern. 181

(e) 2 Wils. 6.

(f) 1 Bro. C. C. 532.

(g) 3 Ves. 299.

(h) 1 Russ. & M. 450.

(i) Ante, 8 vol. p. 22.

(k) 3 Adol. & Ellis, 123.

(l) 13 Ves. 108.

(m) See *Bradley v. Weecott*, 13 Ves. 445. *Reith v. Seymour*, 4 Russ. 263.

END OF PART I.

CASES IN CHANCERY

BEFORE

THE VICE-CHANCELLOR.

RUSSEL v. BUCHANAN.

1836; 2d March and 21st April.—Practice; Costs; Taxation; Exception.

A solicitor presented a petition, complaining that the Master, in taxing his bill, had taken into consideration matters not referred to him, and praying for leave to except to the certificate. It was objected that the solicitor ought to have filed exceptions to the certificate, but the court overruled the objection.

Under the common order for taxing a solicitor's bill, the Master is bound to take a general account of receipts and payments by the solicitor, as agent to the client.

THE plaintiff had employed the defendant, Buchanan, as her solicitor and attorney in this suit, and in divers other suits, matters and things. In September, 1836, the plaintiff having become dissatisfied with Buchanan's conduct, ceased to employ him, and obtained by petition at the Rolls, an order that he should deliver to her a bill of all such fees and disbursements as he claimed to be due to him in this suit and in all other causes, suits and matters in which he had been employed as her solicitor or attorney; and that it should be referred to the Master to whom this cause stood referred, to tax such bill. In obedience to this order, Buchanan delivered to the plaintiff four bills amounting together to 512*l.* 3*s.* 9*d.* The Master taxed them at 361*l.* 14*s.* 6*d.*, and thereupon made his certificate stating that he had done so, and that, on the 9th of January, 1836, 582*l.* 15*s.* 3*d.* had been paid to Buchanan, by the receiver of the rents and profits of the estates in question in this cause, to which the plaintiff was entitled, in discharge of certain costs in this cause, not included in the before mentioned bills, and which had been taxed at 421*l.* 5*s.* 9*d.*: that, by the order on further [*168] directions in this cause, dated the 20th of January, 1836, it was ordered that Buchanan should retain the sum of 42*l.* 2*s.* 7*d.*, found by a report in the cause to be due from him, towards payment of the plaintiff's costs; and, that it was submitted to the Master on the plaintiff's behalf, that the sum of 161*l.* 9*s.* 6*d.*, being the difference between the 582*l.* 15*s.* 3*d.*, and the 421*l.* 5*s.* 9*d.*, and also the 42*l.* 2*s.* 7*d.*, and the further sum of 113*l.* 11*s.*

1838.—*Russel v. Buchanan.*

5*d.*, alleged to be due from Buchanan upon an account between him and the plaintiff, (which sums amounted together to 317*l.* 3*s.* 6*d.*.) should be deemed and considered as payments on account of the 361*l.* 14*s.* 6*d.*, the amount at which the four bills had been taxed. But the Master was of opinion, for the reasons stated in his certificate, that Buchanan was not bound by the taxation of the costs not included in the four bills, and, therefore, could not be charged with the 582*l.* 15*s.* 3*d.* And, as to the 42*l.* 2*s.* 7*d.*, the Master found that the same was received, by Buchanan, on account of the personal estate of the testator in the cause, and for which he was accountable only as executor, and was not accountable to the plaintiff for the same; and, therefore, it appeared to the Master that the 42*l.* 2*s.* 7*d.* could not be charged against Buchanan as a payment to him on account of his demand against the plaintiff as her late solicitor. And, as to the 113*l.* 11*s.* 5*d.*, the Master found that the same was an assumed balance of an unsettled account^(a) between the plaintiff and Buchanan; and he conceived he was not authorized, by the order of September, 1836, to take a general account of Buchanan's receipts and payments as agent for the *plaintiff; and, that, until such an account had been [*169] rendered and settled, it could not be ascertained what sum, if any, was due from Buchanan in respect thereof. And, under the circumstances before stated, the Master certified that he was unable to ascertain how much, if any, of the 361*l.* 14*s.* 6*d.*, the taxed amount of the four bills, then remained unpaid.

Buchanan, being dissatisfied with the certificate, presented a petition in the cause, stating that the 113*l.* 11*s.* 5*d.* mentioned in the certificate as claimed from him, must depend upon the result of certain money dealings and transactions between the plaintiff and himself in the character of *cestui que trust* and trustee, and not in character of principal and agent, or solicitor and client; and that, in fact, no such sum was due from him to the plaintiff; that he was advised that the Master was not authorized, by the order of September, 1836, to enter into and ought not to have entered into the consideration of any questions touching the costs which had been taxed at 42*l.* 5*s.* 9*d.*, or of any retainer or payment in respect thereof, or touching the dealings and transactions between him and the plaintiff in respect of which the 113*l.* 11*s.* 5*d.* was alleged to be due to the plaintiff: and that the certificate was erroneous in stating any circumstances in respect to the last mentioned costs, or of the retainer of the 42*l.* 2*s.* 7*d.*, or the payment of the 582*l.* 15*s.* 3*d.*, or of the alleged sum of 113*l.* 11*s.* 5*d.*; and that he was advised that the Master, instead of certifying that he was unable to ascertain how much, if any, of the 361*l.* 14*s.* 6*d.*, the taxed amount of the four bills, remained unpaid, ought to have certified that the whole of that sum was unpaid and remained due to the petitioner: that the petitioner was aggrieved by the certificate, inasmuch as, by reason *thereof, he [*170]

(a) This account was an account of rents and dividends of stock received, by Buchanan, for the plaintiff, and payments made by him on her account.

1838.—*Russel v. Buchanan.*

could not proceed to enforce, from the plaintiff, the payment of the 361*l.* 14*s.* 6*d.* The petition prayed that it might be referred back to the Master to review his certificate by striking out, therefrom, what he had reported respecting the costs which had been taxed at 421*l.* 5*s.* 9*d.*, and in respect of the 42*l.* 2*s.* 7*d.* and 582*l.* 15*s.* 3*d.*, and in respect of the 113*l.* 11*s.* 5*d.*, and by certifying that the 361*l.* 14*s.* 6*d.*, the taxed amount of the four bills, was still unpaid and remained due to the petitioner.

On the petition being opened, Mr. *Knight Bruce* and Mr. *Bagshawe*, for the plaintiff, said that the mode of objection to the certificate which Mr. Buchanan had adopted, was irregular; and that, instead of presenting a petition, he ought to have taken exceptions to it in the usual manner. *Chennell v. Martin*,^(a) *Drever v. Maudesley*.^(b)

Mr. *Wakefield*, Mr. *Jacob* and Mr. *Hislop Clarke*, in support of the petition, cited *Holbecke v. Sylvester*,^(c) *Hunt v. Fownes*,^(d) *Lucas v. Temple*,^(e) *Purcell v. Macnamara*,^(f) *Fenton v. Crickett*,^(g) *Ex parte Leigh*,^(h) *Shewell v. Jones*,⁽ⁱ⁾ *Alsop v. Lord Oxford*,^(k) *Attorney General v. Brown*,^(l) *Brodie v. Barry*,^(m) *Bozon v. Williams*; ⁽ⁿ⁾ *Jenkins v. Briant*,^(o) and 2 Smith's Pract. 353, *et seq.*

[*171] *Mr. *Treslove*, *amicus curiæ*, mentioned *Ex parte Anthony*.^(p)

The Vice-Chancellor, in the course of the argument, said that the case of *Chennell v. Martin* was certainly not a decision with respect to the present question: and, at the conclusion of the argument, his Honor observed that this was not a case in which particular items were objected to, but the conduct of the Master in taxing the bills was quarrelled with; that he was disposed to think that the course which the petitioner had adopted, was the right one; but, as the question was an important one, he should look into the cases before he decided it.

21st April.—THE VICE-CHANCELLOR:—In this case a petition was presented by Mr. Buchanan, the late solicitor of the plaintiff and also a party in the cause, whose bills of costs have been taxed by the Master under the common order for that purpose: and he, by his petition, objects to certain things which were done, by the Master, in proceeding with the taxation. The petition, as I understand it, is a petition which objects, not to particular items, but to certain matters which were brought under the observation of the Master by the solicitor who attended the taxation on behalf of the plaintiff; and the question is, whether the propriety of bringing those matters under the consideration of the Master, can be examined into by means of a petition.

(a) Ante, vol. 4, p. 340.

(d) 9 Ves. 70.

(g) 3 Madd. 496.

(k) 1 Myl. & Keen, 564.

(n) 3 Youn. & Jer. 378.

(b) Ante, vol. 7, p. 240.

(e) Ibid. 299.

(h) 4 Madd. 394.

(l) Ibid. 567.

(o) Ante, vol. 6, p. 603.

(c) 6 Ves. 417.

(f) 12 Ves. 166.

(i) 2 Sim. & Stu. 170: and 3 Russ. 522.

(m) 1 Jac. & Walk. 470.

(p) 2 Glyn & Jam. 55.

1838.—*Russel v. Buchanan.*

Now : I must, first, observe that, although the order for taxation was headed in the cause, yet, in effect, the taxation had nothing to do with the cause, further than that some of the items in the bills, were for business 'done in the cause. The plaintiff had employed Mr. Buchanan [*172] as her solicitor in the cause and also in other matters, and although Buchanan made out four separate bills, yet, in fact, they all constituted but one bill; and it was a mere accidental circumstance that the order for taxation was headed in the cause. As there was a cause depending, and as some of the items in the bills were for business done in that cause, the order was, as a matter of course, headed in the cause. The question then that I have to decide is, simply, whether what the Master has done can be examined into on petition.

That a petition may be presented for such a purpose, is manifest from the order made by Lord Hardwicke in *Skip v. Harwood*,^(a) (His Honor here read the order.)[1]

Similar orders are made where creditors and other persons who are not parties to a cause, but who have gone in before the Master, present petitions complaining of what has been done by the Master respecting their rights. It is mentioned in Mr. Smith's book on Practice, that, where a petition is presented praying for leave to except to a Master's report, the court does not put the petitioner to the trouble and expense of filing exceptions, but determines the matter on the hearing of the petition, and, in that way, disposes of the objections, which, otherwise, would have been brought before the court in the form of exceptions.

The language which is used in the reports of subsequent cases, is, in some respects loose and inaccurate: but, in *Pitt v. Mackreth*, which came before Lord *Thurlow in 1791, his Lordship said that an ex- [*173] ception had never been admitted for costs only; that the regular method was to state the articles the party meant to object to, in a petition, and to pray leave to except. The facts of the case are not fully stated: and it does not appear whether what the Lord Chancellor said was meant to apply to items: though it shows that he thought that a petition, and not an exception, was the right method of objecting to the report: and in *Purcell v. Macnamara*, Sir W. Grant seems to have been of the same opinion. In *Holbeck v. Sylvester*, exceptions were taken to a Master's report on taxing costs, and the exceptions were allowed: but that case decided only that there might be an exception, and did not decide that there could not be a petition. In *Lucas v. Temple*, Lord Eldon said that his opinion was that exceptions would not lie for costs; his meaning being that, ordinarily, the court would not allow exceptions to be filed for *quantum* of items in bills of costs. In *Hunt v. Frownes*, a petition was presented against a disallowance of costs;

(a) See on Decrees, 335.

[1] Vide the *Attorney General v. Nethercoat*, 3 Beav. 297. 2 Myl. & Cr. 525, n. 1.

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and the court did interfere and supported the petition. In *Fenton v. Crickett*, a petition was presented for leave to file exceptions to a Master's report of his taxation of a solicitor's bill, in respect of items which the petitioner conceived had been improperly allowed by the Master: and Sir John Leach, Vice-Chancellor, said; "Upon a special case made by petition, either of irregularity in the proceedings or that the Master has acted upon a mistaken principle, the court will interfere." In *Ex parte Leigh*, a petition was presented for leave to except to the Master's report on taxation of costs; and the order was made. In *Shewell v. Jones*, Sir John Leach says: "In ordinary cases, the Master's report upon the subject of costs is final. But, if it is [*174] thought that the Master has, in the taxation, adopted some *general principle which cannot be supported, the party complaining is entitled to bring that point before the court; and petitions of this nature are not unfrequent in practice." The cases of *Alsop v. Lord Oxford* and the *Attorney General v. Brown*, are no otherwise of importance than as one shows that, where a petition was presented for a review of taxation of costs, no objection was made either by counsel or the court to the mode of objecting: and, in the other, the Lord Chancellor said that the way to object to taxation of costs was not by motion; by which his Lordship plainly implied that the mode was by petition.

When I call to mind that petitions are constantly presented praying for leave to except to the reports of the Masters on taxation of costs; and that, in the case of *The Skinners' Company v. The Irish Society*, which was recently before me, a petition was presented for that purpose; and, after Lord Hardwicke has made an order on petition and so much has been said by subsequent Judges asserting that a petition is necessary, it does appear to me that the objection which has been taken in this case ought not to be allowed.[1]

[1] The following remarks of Sir J. Wigram, V. C. appear to be apposite; and as far as they extend, throw light upon an important branch of practice. "Of the various duties, the execution of which the court is in the habit of committing to the Master, there are some the completion of which is wholly committed to the Master, so that his report or certificate requires no confirmation by the court to give it effect. With respect to others, the report of the Master has no operation without the subsequent confirmation, or further direction of the court. With respect to those certificates, or reports in the nature of certificates, which do not require confirmation, the Master issues no warrant on preparing them, and the only way of obtaining the opinion of the court upon such a proceeding, is by petition, praying either that the conclusion of the Master may be reviewed by the court, or for leave to except to the report as in *Russel v. Buchanan*, [the principal case.] With respect to those reports which require confirmation, there is a difference in practice as to the modes of confirming them, and of objecting to their confirmation; this difference depends upon the nature of the proceeding upon which the order of reference was made. If it was made by the decree or order of the court at the hearing of the cause, or upon further directions, the proceeding to confirm the report is by a motion *nisi*; but where the order of reference was made upon motion or petition, the regular mode of confirming the report appears to be by motion or petition absolutely. In the former case, the way to obtain the opinion of the court upon the report, if complained of, is by filing exceptions to it; but the only way of obtaining the same end in the latter case, is by presenting a petition in the nature of an exception to the report. The question whether the report of the Master is final without the subsequent confirmation of the court, or whether it requires such

 1838.—*Stamper v. Pickering*.

10th November.—The preliminary objection having been overruled, the petition was heard: and, at the conclusion of the argument,

The Vice-Chancellor said that it was not generally true that all matters pending between a solicitor and his client were to be investigated under the common order for taxation of the solicitor's bill: that he was clearly of opinion that the master, in this case, had nothing to do with either of the two sums of 421*l.* 5*s.* 9*d.* and 42*l.* 2*s.* 7*d.*: that, with respect to the [*175] account between the plaintiff and petitioner on which a balance of 113*l.* 11*s.* 5*d.* was alleged to be due to the plaintiff, he was inclined to think that the plaintiff ought to have had a special direction for taking that account inserted in the order; but that he would consult the Masters upon the point.

20th November.—On this day his Honor said that he had consulted the Masters on the point mentioned above, and that they were of opinion that, under the common order for taxing a solicitor's bill, the Master was bound to take a general account between the solicitor and client; and, therefore, he should refer it back to the Master to review his certificate so far as he had certified that he conceived that he was not authorized, by the order, to take a general account of the receipts and payments of the defendant as agent for the plaintiff, and that he was unable to ascertain how much (if any) of the sum of 361*l.* 14*s.* 6*d.* then remained unpaid.

*STAMPER V. PICKERING.

[*176]

1836; 12th March.—Annuity.

A testator charged his estates with payment of his debts and of an annuity to his wife in lieu of dower. The real estates having been sold to pay the debts and the income of the remaining proceeds being insufficient to pay the annuity: held that the widow was entitled to have her annuity paid out of the capital as well as the income of the remaining fund. Held also (the annuity being wholly in arrear) that the arrears were to be computed from the testator's death.

H. PICKERING devised his real estates to his six children as tenants in common in fee, subject to the payment of such part of his debts, funeral and testamentary expenses as his personal estate should be insufficient to pay, and subject also to an annuity of 50*l.* to his wife, for her life, in lieu of dower; and he appointed his wife his executrix.

confirmation to make it effective, necessarily depends upon the terms of the order, or the nature and subject matter of the reference, and not on the proceeding upon which the order of reference was made. So far, I believe, the practice of the court to be free from doubt or difficulty. It is equally clear that when the report is to be confirmed by order nisi, no party can except to the Master's report, who has not carried in objections to the draft report," &c. Here follow several valuable observations as to the necessity of making objections, *in limine*, to the Master, but which do not immediately relate to the present topic. *Ottey v. Pensam*, 1 Hare, 322. And see *Kemp v. Wade*, 2 Keen, 686. *Brower v. Brower*, 2 Edw. Ch. Rep. 621. 2 Hoff. Ch. Pract. 261. *Jones v. Powell*, 1 Sim. 387, and *n. 2*, ib. *Chennell v. Martin*, 4 Sim. 340.

 1838.—*Pope v. Lord Duncannon*.

The testator's personal estate being insufficient to pay his debts, his real estates were sold to supply the deficiency. The income of the fund produced by the sale of the real estates which remained after payment of the testator's debts, being insufficient to pay the annuity in full, one question, on the hearing of the cause for further directions, was whether the widow was entitled to have the deficiency made good out of the capital of the fund: and, the annuity being wholly in arrear, another question was whether the arrears ought to be computed from the testator's death or from the end of the year after.

Mr. *Knight Bruce*, and Mr. *Wilbraham* appeared for the plaintiffs, who were creditors of the testator.

Mr. *Purvis*, for the widow, cited *Cupit v. Jackson*.(a,

Mr. *Witham* for the testator's children.

The Vice-Chancellor declared that the widow was entitled to have her annuity paid out of the capital as well as the income of the fund, and that the arrears ought to be computed from the death of the testator.[1]

 [*177]

**POPE v. LORD DUNCANNON*.

1838; 14th March.—Arbitration; Injunction.

Where an award is made after the submission has been revoked by the plaintiff, equity will not restrain the defendants from acting on the award, unless the plaintiff had good grounds for revoking the submission.

THE plaintiffs were the owners of a wharf on the banks of the Thames. The defendants were the Commissioners of Woods and Forests; and being empowered by 1 & 2 Vict. c. 7, to purchase the wharf to complete the site for the new Houses of Parliament, they made an agreement, with the plaintiffs, for the purchase of the wharf at a price to be fixed by three referees or any two of them, one of whom was to be named by the plaintiffs, another, by the defendants, and the third, by the two so named; but the agreement did not provide that the submission to the reference should be made a rule of court.

The referees were nominated accordingly and proceeded to ascertain the value of the premises; but, before they had come to a decision, the plaintiffs revoked their authority and served the defendants with notice of the revoca-

(a) *Maclel. Rep.* 495, and 13 *Price*, 721.

[1] In a later case, the Vice-Chancellor (Sir L. Shadwell,) refused to order an estate charged with an annuity to the testator's widow, to be either mortgaged or sold, for payment of the annuity, notwithstanding the rents were very inadequate to pay it, and it had become greatly in arrear; the estate being settled on A. for life, with remainders over; the annuitant being still alive, and there being no necessity for the court to direct the estate to be either sold or mortgaged for payment of the testator's debts. *Graves v. Hicks*, 11 Sim. 551. But in that case, the annuity was not, as in the principal case, in lieu of dower.

1838.—*Pope v. Lord Duncannon.*

tion. The plaintiffs' nominee, thereupon, withdrew from the reference, but the other two proceeded with the valuation and made their award. Upon which the bill was filed, praying for an injunction to restrain the defendants from taking possession of the wharf and pulling down the buildings thereon.

The injunction was now moved for. According to the bill the ground on which the plaintiffs had revoked the authority of the arbitrators, was that the plaintiffs had discovered that the arbitrators were incompetent to pronounce as to the value of the premises, and, according "to the affidavit in support of the motion, that the plaintiffs, considered that they had just ground to be dissatisfied with the conduct of the arbitrators, and were desirous of having the value of the premises ascertained by jury, pursuant to the 11th section of the act of Parliament. [*178]

Mr. Jacob and Mr. Romilly, in support of the motion, cited *Cooth v. Jackson*,^(a) *Milnes v. Grey*,^(b) *Blundell v. Brettargh*,^(c) and *Agar v. Macklew*.^(d)

The Solicitor General, Mr. K. Bruce, and Mr. Reynolds, for the defendants, referred to *Morse v. Merest*,^(e) *Harcourt v. Ramsbottom*.^(f)

THE VICE-CHANCELLOR :—In my opinion, it was the intention of the parties that the contract should be binding on them from the time at which it was made: for it contains a stipulation that the commissioners shall have immediate possession of part of the premises, for the purpose of constructing a coffer-dam. But, as I understand, the commissioners have not, as yet, taken possession of any portion of the premises.

By the terms of the contract, the commissioners agreed to purchase and the Messrs. Pope agreed to sell the premises at such a price as any two of the referees should determine; and there can be no doubt that the authority thus given, to the referees, to fix the price, was an authority which the Messrs. Pope might revoke "at law; and, as they have revoked it, [*179] the power of the arbitrators is completely destroyed at law. The plaintiffs then apply to this court to restrain the commissioners from taking possession of the wharf, and pulling down the buildings upon it: but neither in the bill nor in the affidavit in support of the motion, is any sufficient reason stated for revoking the authority of the arbitrators. The affidavit alleges, not that the plaintiffs *had* just grounds, but, merely, *that they considered* that they had just grounds for being dissatisfied with the conduct of the arbitrators; and, in my opinion, that mode of allegation is not sufficient to induce this court to interfere; but the grounds ought to have been distinctly stated, in order to enable the court to judge whether the revocation was a wanton and capricious act, or a fair and reasonable exercise of authority; for, though there can be no doubt that the plaintiffs might revoke the power, which they

(a) 6 Ves. 12.

(b) 14 Ves. 400.

(c) 17 Ves. 232.

(d) 2 Sim. & Sta. 418.

(e) Madd. & Geld. 26.

(f) 1 Jac. & Walk. 505.

1838.—*Bent v. Young.*

gave to the arbitrators, at law ; yet, if they have revoked it without just and reasonable grounds, they have not a case on which a court of equity ought to relieve them.

According to the language of Lord Eldon in *Harcourt v. Ramsbottom*, although the authority of the arbitrators is gone at law, yet this court will consider the agreement as, in some measure, subsisting. In this case however, I am asked to interfere as if there were no agreement at all.

I observe that, in *Morse v. Merest*, Sir John Leach, Vice-Chancellor, states that, in equity, a defendant is not permitted to set up a legal defence which grows out of his own misconduct ; so, varying the terms of the proposition, I

say that a plaintiff is not at liberty to ask the aid of a court of equity [*180] in respect of an act *done by him against good faith. And as, in this case, there is nothing whatever to show that the power which the plaintiffs had giving to the arbitrators, was revoked upon any just or reasonable grounds, I am bound to conclude that the revocation was a wanton and capricious exercise of authority on their parts, and, consequently, the motion must be refused.[1]

BENT v. YOUNG.

1838 ; 19th March.—Discovery ; Foreign Court ; Demurrer.

Demurrer allowed to a bill of discovery in aid of the defence to a suit in a foreign court.

The case of *Crowe v. Del Rio* stated and observed upon.

THE bill stated that the plaintiff, who was described as of the colony of Surinam in South America, was the owner and was in the possession of a plantation in that colony which was subject to a mortgage some time ago made by him, for securing, originally, 10,000*l.* and interest, to Richards & Co. of London, who, for some time, acted as the agents and consignees of the plaintiff, of the produce of the plantation, and an account current subsisted between them and the plaintiff, the balance of which was secured by and formed the subject of the mortgage : that the account current was still an open and unliquidated account, and had never been adjusted or settled, and that disputes had been, for some time, depending in regard to the balance claimed by the firm to be due to them from the plaintiff upon the account, the plaintiff contending that the proceeds of shipments of produce of the plantation, had or ought, long since, to have liquidated the whole, or at all events, a considerable part of such balance, and that, at all events, only a small sum, and far less than the amount claimed to be due, was then due, from the plaintiff, upon the mortgage : that Richards & Co. some time since became [*181] insolvent, and an assignment of *their estate and effects, including their interest in the mortgage, was made, by them, to certain persons, of

[1] Vide 1 *Rum. & M.* 337, n. 1.

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whom the defendant was one, as trustees, upon certain trusts for the benefit of the creditors of the firm: that Surinam was part of the dominions of the King of Holland, and the laws of Holland prevailed there, and the courts were, in all things, governed and regulated by those laws: that, according to the laws of Holland and of the colony, the purchaser of any mortgage debt upon any plantation in Surinam could not lawfully set up or make available any greater demand under the mortgage than the amount which he actually paid upon the purchase of it, with interest from the time of such payment, and, that the owner of the plantation was entitled to redeem it upon payment of the amount so paid, together with interest: that the defendant, some time since, purchased the mortgage from Richards & Co. and their trustees, and had lately commenced a suit, or had taken measures and had given instructions to his agents in Surinam to commence a suit there, for the purpose of recovering, from the plaintiff and raising out of the plantation, the whole of the 10,000*l.*, together with a large arrear of interest, to an amount, in the whole, greatly exceeding the sum actually paid by him; the fact being, as the plaintiff had lately discovered, that the defendant purchased the mortgage debt for a much smaller sum than he sought to recover by his suit, without having regard to and in breach of the said laws in that behalf, to the benefit of which the plaintiff was advised he was entitled as against the defendant, and of which he intended to take advantage in the suit, and to make out and establish therein the fact of such purchase at an undervalue, in order to redeem his plantation by paying, to the defendant, such sum only as he actually paid for his purchase, together with interest; but the [182] plaintiff had not been able to obtain any sufficient evidence of the fact of such purchase at an undervalue; and, inasmuch as the defendant had never been resident in Surinam, but had been and was resident in this country, the plaintiff had no means of obtaining a personal discovery from him, touching the said matters for the purpose aforesaid, except by the aid of a court of equity in this country, to the process of which the defendant was personally amenable, and which discovery the plaintiff was advised he was entitled to receive from the defendant, and which the defendant refused otherwise to give. The bill charged that the defendant ought to discover at what time, and for what price he purchased the mortgage debt; and when and to whom and in what manner, and whether by cash, bills, notes, or other securities, and when, how, and to whom payable, he paid the purchase money; and by what deed, and of what date the mortgage debt was conveyed to him; and all the other material particulars relating to such purchase and the consideration for the same: that, before and at the time of the purchase, the defendant was well acquainted with the differences and disputes which existed, between the plaintiff and Richards & Co., respecting the amount of the balance claimed to be due upon their account and secured by the mortgage, and that the plaintiff insisted that a much smaller amount was actually due than was claimed by the firm; and that the defendant was well aware that the plaintiff

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had entered into a treaty with, and had made a proposal to the firm and their trustees, including the defendant, for a settlement of such differences and disputes by way of compromise; that the defendant was, before and at the time of his purchase, well, aware of the law of Holland and of the [*183] colony in the *particular, and had taken the opinion of some person skilled in the said law upon the subject, and such opinion was then in his possession; and that it would appear from the same, if produced, that the plaintiff, under the circumstances before set forth, was, by the law of Holland and the colony, entitled to such relief as before set forth: that the defendant had in his custody or power divers deeds, conveyances, &c., relating to the matters therein before contained, and which, if produced, would tend to the discovery of the truth of the premises. The bill prayed that the defendant might make a full discovery touching the matters aforesaid and might be restrained, in the mean time, from prosecuting his suit in the court at Surinam, and from, in any manner, prosecuting or enforcing a claim, upon the plantation, for any greater sum than he actually paid for the purchase of the mortgage debt, together with interest thereon; so that the plaintiff might have the benefit of the laws of Holland and of the colony, and might be enabled effectually to defend himself in the suit as to the defendant's claim, so far as the same exceeded the amount actually paid by him, with interest.

The defendant demurred, because the plaintiff had not made such a case as entitled him to any discovery, from the defendant, touching the matters contained in the bill.

Mr. *K. Bruce*, Mr. *Jacob* and Mr. *Blunt*, in support of the demurrer:—The plaintiff is described, in the bill, as being resident at Surinam: therefore, *prima facie*, he must be taken, for all purposes, to be a Dutch [*184] subject. If the *defendant should require any discovery from the plaintiff, he will not be able to obtain it; for he could not compel the plaintiff to answer a cross bill; there is, therefore, no mutuality between the parties. Besides, this court never compels discovery in aid of the proceedings in a foreign court, especially, in respect of land abroad. The discovery, if given in this case, might work a forfeiture of all the defendant's property in Surinam: at all events, it would be productive of great injustice to him, for nothing can be more repugnant to justice than the law of Holland, according to the statements in this bill. Is then this court to aid a foreign law which is not only unjust, but which is contrary to the English law, and takes away, from the defendant, those rights which the English law gives him? At all events, this court ought to have been informed what is the style and species of the court at Surinam: what are its powers; on what evidence it proceeds.* The bill, however, seems to take it for granted that, in every case, in every foreign court, this court is to give discovery without regard to the details of facts and circumstances; for all that it states with respect to the court and the intended proceedings, is that the defendant has lately com-

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menced a certain suit and is prosecuting proceedings, or has taken measures and has given instructions to his agents in Surinam, to commence or institute a suit or proceedings in the competent court there, for the purpose of enforcing and making available the mortgage debt against the plantation. Unless a party requires the discovery for the purpose of showing him what form of action he ought to bring, it is necessary that some proceeding should be actually commenced before the bill of discovery is filed: but it does not clearly appear, from the above statement, that any proceeding has been, in fact, commenced, or that the discovery is wanted "before any proceeding can be instituted. *Angell v. Angell*,^(a) *Cardle v. Watkins*,^(b) *Stewart v. Lord Nugent*,^(c) *Few v. Guppy*,^(d) Wigram on Discovery, 212, 213. [*185]

Lord Redesdale nowhere states, in the text of his Treatise on Pleading, that this court will compel discovery in aid of proceedings in a foreign court. All that he says upon the subject is inserted in a note to the following effect: "A discovery *has been* compelled to aid the jurisdiction of a foreign court,"^(e) and his Lordship cites an unreported case of *Crowe v. Del Rio and Vallejo*, the proper name of which is *Crowe v. Del Rio and Vallejo*:^(f) but

^(a) 1 Sim. & Sta. 83.^(b) 5 Madd. 18.^(c) 1 Keen, 201. See 205.^(d) 1 Myl & Craig, 487.^(e) Treat. on Plead. 3d edit. 151.

^(f) The following is the substance of the case, as entered in Reg. Lib.:—The plaintiffs were W. Crowe, W. Taylor, B. Hancock, J. Tuthill the elder, and J. Tuthill the younger: and the defendants were F. A. Del Rio and A. Vallejo. The plaintiffs were either manufacturers or tradesmen at Norwich, and the two first of them were co-partners together, as were also the two last. The defendants were merchants and co-partners in London. In 1767, the plaintiffs had furnished one Villalobos, a merchant residing at Seville in Spain, with goods in their respective ways of business, to different amounts, and had drawn bills of exchange upon him for those amounts, which he had accepted, but, having become insolvent, was unable to pay. The plaintiffs having inquired as to the cause of the bills being unpaid, discovered that Villalobos had purchased goods of the defendants, and paid them for such as had become payable for; and that, on or about the 3d of November, 1767, although no money was then due from him to them nor would any become due for some time, the defendants, or Rodriguez and De la Vega, merchants at Seville and agents there for the defendants, by some undue practices or influence, prevailed upon Villalobos to deliver to Rodriguez and De la Vega, divers parcels of goods, amongst which was a bale of Norwich stuffs, which had been sent him by the plaintiffs, Crowe and Taylor, and divers bills of exchange and sums of money, to the amount in the whole of 2182*l.* 9*s.* 10*d.*, (being all the moneys and effects which Villalobos then had in his custody,) in discharge of the accruing demands of the defendants on him. The goods, effects and moneys having been obtained from Villalobos in such undue manner, to the prejudice of the plaintiffs and several other creditors who then had demands on him, immediately on the discovery thereof, a suit was properly instituted at Seville, on behalf of the plaintiffs, against Rodriguez and De la Vega, in order to attach the goods, effects and money or the amount thereof, in the hands, and to compel them to refund or pay the same, so that the same might be applied in discharge of such demands as the plaintiffs then actually had upon Villalobos: but Rodriguez and De la Vega, upon an examination before a magistrate, on or about the 16th of November, 1768, denied that they had then, in their hands, any effects whatsoever belonging to Del Rio and Vallejo, or that they were indebted to them in any sum of money whatever; in consequence of which, it became necessary for the plaintiffs to prove the contrary. The bill then charged that the defendants had, in their custody or power, accounts, letters, &c., from which

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[*186] he does not mean to approve of it. *It is true that the demurrer in that case was overruled: but it is no authority for the position that this court [*187] will aid the proceedings of a foreign court, especially with respect to land abroad. The grounds on which the demurrer was overruled nowhere appear. It was clearly a speaking demurrer, and it may have been overruled on that ground. Besides, the parties to that suit were, all of them, resident in this country: the proceedings in the foreign court had been actually instituted; and the persons against whom the bill was filed were not parties to the foreign suit.

Mr. *Wigram*, in support of the bill:—Sir Wm. Young is the suitor in the court at Surinam; and his counsel suggest that that court is one in which justice will not be done. But does it lie in the mouth of the party who is suing in that court, to make that suggestion? If the party who is sued there had made the suggestion, it might be a reason for this court not giving the discovery. The courts of this country assume that the proceedings of foreign courts are just; otherwise, foreign judgments would not be allowed to be given in evidence here.

It is next said that this court will not give the discovery, because the defendant is resident out of the jurisdiction; and, consequently, there is no mutuality. The court, however, does not refuse to give relief because [*188] the plaintiff is out of the jurisdiction and the *defendant is in this country: all that it does is to require the plaintiff to give security for costs.

Lord Redesdale states, in general terms, that a court of equity will exercise its jurisdiction to compel discovery in aid of the administration of justice in the prosecution or defence of some other suit, either in the court itself, or in some other court: and he specifies only three cases of exception. First, that the court has, in some instances, refused to give this aid to the jurisdiction of inferior courts; secondly, that it will not interfere to aid the prosecution or defence of any proceeding, not merely civil, in any other court; and, thirdly, that it will not interfere in the case of suits merely civil, in a court of ordinary jurisdiction, if that court can, itself, compel the discovery required.^(a)

it would appear that, on the 10th of November, 1768, Rodriguez and De la Vega had, in their hands, goods, effects or moneys belonging to the defendants to a considerable value or amount, or were then indebted, to the defendants, in some considerable sum. The bill prayed that the defendants might make discovery of all the matters thereinbefore stated and charged. The defendants put in a demurrer, stating that they were advised that the substance of the bill was to compel a discovery from them, of certain accounts, letters, papers and writings, which related to the matter of a certain suit commenced, by the plaintiffs, against Rodriguez and De la Vega, and still depending in a foreign country, to wit, at Seville in the kingdom of Spain and out of the jurisdiction of this court, and to which suit the defendants were no parties; and also for that the bill (in case the allegations contained therein were true, which the defendants in no wise admitted,) did not contain any matter of equity whereon this court could ground any decree, or give the plaintiffs any relief or assistance as against the defendants.

(a) Treat. on Plead. 3d edit. 42, 150, 151.

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His Lordship, therefore, means to lay it down, as a general proposition, that this court will, in all cases except those which he excepts, compel discovery in aid of the proceedings of another court.

If the bill in this case had prayed relief, the court would have given the relief as well as the discovery. Consequently, if the bill had prayed to redeem the mortgage, and had alleged the law of Surinam to be as stated, the court would have directed an inquiry as to the *lex loci rei sitæ*, and, when it was ascertained, it would have governed the decision of the court as to the amount to be paid by the plaintiff to redeem the mortgage. If, then, this court would have given the discovery as incidental to the relief, why should it not give the discovery which the plaintiff requires in order to ascertain what is justly due to Sir William Young on *his mortgage, [*189] and which the plaintiff is willing to pay to him: for the demurrer admits the law of Surinam to be correctly stated and all the other allegations in the bill to be true. The object of the plaintiff is not to deprive Sir W. Young of anything that he is justly entitled to, but to give him all that he actually purchased or contracted for.

THE VICE-CHANCELLOR:—[What authority is there to show that this court has interfered to give discovery in aid of a proceeding in a foreign court?]

Crowe v. Del Rio, and *Earl of Derby v. Duke of Athol*,^(a) are authorities in favor of giving the discovery. In the former of those cases, the plaintiffs in equity had selected the foreign court, and yet Lord Camden, C., overruled the demurrer. In the present case, Sir W. Young, who is the demurring party, has selected the foreign court.

THE VICE-CHANCELLOR:—Lord Redesdale lays it down, generally, that this court will give discovery in aid of proceedings in the courts of this country; and he puts, in a note, that discovery has been compelled to aid the jurisdiction of a foreign court; and he cites *Crowe v. Del Rio* as an instance in which it has been done. But Lord Redesdale did not mean that what is in the note should be considered as equivalent to what is stated in the text of his work. In the bill, you allege that, inasmuch as the defendant has never been resident in Surinam, but has been and is resident in this country, the *plaintiff has no means of obtaining a personal discovery [*190] from him touching the matters and for the purposes aforesaid, except by the aid and interference of a court of equity in this country. That is not a positive averment that the discovery required can not be had in Surinam; for you do not say, positively, that a suit has been commenced in Surinam, but only that a suit has been, or will be commenced there: *non constat*, therefore, that Sir William Young may not be in Surinam when the suit there is commenced; and, in that case, the grounds on which you allege that you are unable to obtain the discovery, will cease to exist. It is material, therefore, according to my view of the case, that it should have been averred

(a) 1 Vez. 202.

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that the court in Surinam can not, under any circumstances, enforce the discovery.

Mr. *Anderdon*, who was with Mr. *Wigram*, referred to *Cooke v. Marsh*;(a) *Glyn v. Soares*;(b) and *Rondeau v. Wyatt*.(c)

THE VICE-CHANCELLOR:—I am of opinion that if the plaintiff really required that which he insists he is entitled to by the law of Surinam, he might have it, at once, by filing a bill, in this court, for relief, praying that an account might be taken of what is justly due on the mortgage, and that, on payment, by him, to Sir William Young, of what should be found due, Sir W. Young might re-assign the mortgage to him: for I am quite willing to admit that the *lex loci rei sitæ* must prevail in the present case.[1] [*191] It does not, however, follow that, because this court, "in administering relief in the case of a Surinam security, will follow the law of that country, therefore it will make itself auxiliary for the purpose of compelling a discovery in aid of an action not yet commenced, but which may be brought in the colony of Surinam.

It seems to me to be singular, considering the vast number of appeals that British subjects as well as foreigners have made, to the Privy Council, in respect of foreign plantations, that no instance can be produced of this jurisdiction having been exercised, except the solitary one in the note in Lord Redesdale's book: and it is equally singular, if, in his opinion, the case was good law, that he should not have cited it with greater confidence than he has done.

In the case of the *Earl of Derby v. Duke of Athol*, Lord Hardwicke seems to think it clear that this court will not compel discovery in favor either of an inferior court, or of a court which has power, in itself, to compel a discovery. Those two propositions are plainly deducible from the language which his Lordship uses towards the conclusion of his judgment; and I consider that, in the contemplation of the Court of Chancery, every foreign court is an inferior court.

In the case of *Crowe v. Del Rio* (which is the only authority to be found on the point now before me,) the defendants were compelled to answer by the overruling of the demurrer; and, it seems to me that, without entering into the merits of the case, the demurrer was defective in point of mere form, and therefore, it might have been overruled on that ground. In that case, two grounds of demurrer were assigned. One was the general want of [*192] equity; but, as the bill was not filed for "relief but for discovery only,

(a) 18 Ves. 209.

(b) 1 Youn. & Coll. 644. See the observations on this case in *Irving v. Thompson*, ante, p. 17.

(c) 3 Bro. C. C. 154.

[1] That the *lex loci rei sitæ* must prevail as to the disposition of real property, see *McCormick v. Sullivan*, 10 Wheat. 202; *Chapman v. Robertson*, 6 Paige 630; *Hawley v. James*, 7 Paige, 213; *Forbes v. Adams*, post, 462; *Bonneau v. Poydras*, 2 Robinson's (La.) Rep. 1; *Bunbury v. Bunbury*, 1 Beav. 328, 329.

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that would be no objection. The other ground was that the defendants were not parties to the suit in the foreign court. That, therefore, was a speaking demurrer: for there was no allegation, on the face of the bill, that they were parties to the suit; and, the Lord Chancellor may, very probably, have overruled the demurrer on that ground, without at all entering into the consideration of the question, whether this court will enforce discovery in aid of proceedings in a foreign court.

I also think that there is not, in the present case, a sufficient averment that the discovery cannot be obtained in the court at Surinam. The allegation, in my opinion, does not amount to any thing more than a sort of argumentative statement that Sir W. Young has been, and now is resident in this country, and, *therefore*, the plaintiff cannot have the discovery abroad. But *non constat*, that he may not change his residence, and, when the suit is commenced, be in a place where the discovery may be enforced.

It appears to me that the observations of Lord Hardwicke, in *The Earl of Derby v. Duke of Athol*, apply to the present case; and I should be extremely sorry to be the first judge to decide that this court is, in all cases, to give its aid in compelling discovery in aid of the prosecution or the defence of an action in a foreign court. And my opinion is, that this demurrer must be allowed.[1]

[1] A contrary doctrine to that in the case *supra*, had been maintained by Mr. Ch. Walworth, about ten years before (1828) in *Mitchell v. Smith*, 1 Paige, 287, in which case a bill of discovery was filed to aid the defence to an action at law, brought against the plaintiffs in the Superior Court of Fairfield county, in the state of Connecticut, at the suit of the defendant, a resident of the state of New York. To this bill, the defendant interposed a plea to the jurisdiction of the court, alleging that by the laws of Connecticut, the Superior Court, on a bill in equity, brought and presented there, can compel and enforce from a plaintiff in a suit at law, a discovery and disclosure on oath, of the matters charged in such bill, to be used as evidence in the suit at law. The plea was overruled. Mr. J. Story, whose observation the case of *Bent v. Young* appears to have escaped, says, 2 *Equity Jurisp.*, § 1495, "But it constitutes no objection to a bill of discovery, that it is to assist proceedings in a court, which sits in a foreign country, if in amity with that, where the bill is filed; for it is but a just exercise of that comity, which the mutual necessities and mutual convenience of all nations prescribe in their intercourse with each other. Neither does it constitute any objection to a bill of discovery, that the suit which it is to aid, has not yet been commenced; [a consideration however, which appears to have had some weight in *Bent v. Young*,] for it may be indispensable to enable the party rightly to frame his action and declaration." The rule as laid down by Walworth, Ch., and Story J., is recognized by McCoun, V. C., who declined to apply it, in the particular instance, as the discovery sought would, under the established rules of evidence, be of no avail. *Dibers v. Wilder*, 3 Edw. Ch. Rep. 496.

1838.—Wheeler v. Van Wart.

[*193]

*WHEELER v. VAN WART.

1833; 21st March.—Joint Stock Company Partnership; Dissolution.

Three members of a company, which was unlimited as to its duration, executed a deed dissolving the company, and left a notice of it at the company's office. They then filed a bill, on behalf of themselves and all other members except the defendants, against the officers of the company, alleging that the company consisted of upwards of 400 members, and that the plaintiffs were ignorant of and had no means of learning their names and residences, and praying that the company might be declared to be dissolved. Held that all the members ought to have been served with notice of the deed, and a demurrer to the bill, for want of equity, was allowed.

THE plaintiffs were three of the members of The Birmingham Equitable Gas Light Company. By the deed by which the company was formed, one-fourth of the profits of the concern was to be divided amongst the customers, by way of *bonus*, at the end of every five years; but no time was fixed for the duration of the company. On the 3d of March, 1838, the plaintiffs executed a deed poll, by which, after reciting that the objects and purposes of the company had not been carried into effect and that it was expedient to dissolve it, they took upon themselves to declare the company dissolved, and left a notice of the deed at the company's house of business, where the directors held monthly meetings. Shortly afterwards they filed a bill on behalf of themselves and all the other members of the company except the defendants, against the directors and trustees and the solicitor of the company, alleging, amongst other things, that the original shareholders in the company were 400 in number; that many of them had since sold and transferred their shares to other persons; that many others had died and their shares had become vested in their representatives or legatees, and many others had become bankrupt or insolvent, and their shares had passed to their assignees, and the plaintiffs were ignorant of and had no means of learning the names, descriptions and places of abode of the persons who constituted the company at the date and execution of the deed poll, but they amounted to 400 and upwards.

[*194] *One of the defendants demurred to the bill for want of equity, and because all the shareholders ought to have been made parties to it.

Mr. *Jacob* and Mr. *G. Richards*, in support of the demurrer, contended, amongst other things, that every member of the company, including the customers, (who, by the provisions of the deed were made partners,) ought to have been served with notice of the alleged dissolution.

Mr. *Knight Bruce* and Mr. *Parry*, in support of the bill, said that the plaintiffs had no means of ascertaining either the name or place of residence of every individual member of so numerous a body, and consequently, that notice of the dissolution had been given in the only way that was practicable.

 1838.—Wood v. Lambirth.

THE VICE-CHANCELLOR:—The notice which was given of the intended dissolution was clearly insufficient.[1]

This company, like an ordinary partnership, could not be dissolved without notice being served upon every individual member of it.

By the deed by which the company was constituted, every consumer of gas was to share in the profits of the business, and, consequently, became a partner. The plaintiffs have chosen to enter into a partnership consisting of an unlimited number of members, and, therefore, they have themselves created the difficulty they complain of.[2]

All the relief prayed by the bill, is incidental to the "alleged dissolution; and, as I am of opinion that there has been no dissolution, the demurrer for want of equity must be allowed. [*195]

WOOD v. LAMBIRTH.(a)

1838; 29th March.—Practice; Exception; Report.

Leave given, under the circumstances, to except to a report, although the party had not carried in objections to it.

THE defendant having objected to the title to an estate which he had agreed to purchase of the plaintiff, it was referred to the Master to inquire whether a good title could be made to it. The Master, after the objections had been argued before him, expressed an opinion in favor of the title; but said that he would consider the matter more fully, and would apprise the defendant's solicitor when he had made up his mind, and that counsel should afterwards attend him if the solicitor wished it. The Master, however, reported in favor of the title, without making any further communication to the defendant's solicitor; and the order *nisi* to confirm the report was afterwards made and served. Whereupon

Mr. Jacob and Mr. Lee, for the defendants, moved for liberty to file an ex-

(a) *Ex relatione*.

[1] As to dissolution of partnership by notice, see *Miles v. Thomas*, post, 608. *Hale v. Hale*, 4 Beav. 376. *Bishop v. Breckles*, 1 Hoff. Ch. Rep. 534. *Alcock v. Taylor*, Tam. 506.

[2] The editor cannot refrain from inviting the attention of the reader to the admirable precision with which the Vice-Chancellor has stated and solved one of those innumerable questions, as to who are proper parties to a bill in equity. He merely turns the plaintiffs around, and tells them that it does not lie in their mouth to say "*non hæc in fœdera venimus*." The numerous decisions of Sir L. Shadwell, in cases of obscure and complicated wills evince an extraordinary power of ascertaining, in the first place, what was the intention of the testator—and next—the apt application of the rules of law to the intention, when it has been discovered. The Editor's remark, however, should not be confined to cases of wills merely—it extends to the construction of marriage settlements, and other written documents. It requires less attention, from the reader, to observe the astuteness with which embarrassed questions of pleading and practice are disposed of. The case of *Hammend v. Messenger*, post, 327, is an instance in point to show the ability of the Vice-Chancellor in dissecting a bill, discarding extraneous matter, and reducing the case to a simple issue to be decided upon demurrer.

1838.—*Whatman v. Gibson.*

ception to the report, notwithstanding no objection had been carried in to the draft of it. They cited *Vallence v. Weldon*(a) and *Pennington v. Lord Muncaster*.(b)

The Vice-Chancellor granted the motion.[1]

[*196]

*WHATMAN v. GIBSON.

1838; 5th and 6th April.—Covenant; Notice.

A., the owner of a piece of land, divided it into lots for building a row of houses, and a deed was made between him of the one part and X. and Y. (who had purchased some of the lots from him) and the several persons who should at any time execute the deed, of the other part; by which, after reciting that A. had determined and proposed and thereby expressly declared that it should be a general and indispensable condition of the sale of all or any of the lots, that the proprietors thereof for the time being should observe and abide by the several stipulations and restrictions thereafter contained; it was mutually covenanted between A., X., and Y., and the several other persons who should at any time execute the deed, and each of them A., X., and Y., and the several persons, &c., for himself, his heirs, executors and administrators, thereby covenanted with all and every the other and others of them, and with the heirs, executors, administrators or assigns of all and every the other and others of them, mutually and reciprocally, that none of the proprietors of any of the lots for the time being should at any time carry on thereon the business of an innkeeper: A. sold and conveyed one of the lots to B., and another to C. both of whom executed the deed of covenant. The plaintiff afterwards purchased B.'s lot, and the defendant purchased C.'s lot with notice of the deed of covenant. The defendant intending to use the house on his lot as a family hotel [and inn and tavern]; an injunction was granted to restrain him from so doing.

By an indenture bearing date the 28th of February, 1799, and made between John Fleming of the one part, and William Petman and George Gibson and the several other persons who should, at any time, execute the indenture, of the other part, after reciting that Fleming was seised, in fee simple in possession, of a piece or parcel of land containing two acres and a half, situate in Ramsgate on the south cliff there, part of which he had laid out in separate lots or divisions for the erection of a row of houses thereon, intended to be called Nelson's Crescent, the form of the front building line of which intended row of houses was delineated in a ground plan thereof in the margin of the indenture, and did contain, including the curve, in length, 400 feet in front towards the south-east; and, in order to preserve some degree of similarity and uniformity of appearance in such intended row of houses,

(a) 1 Dick. 291.

(b) 1 Madd. 555.

[1] The conduct of the Master, in the above case, so far as appears from the report, escaped without animadversion; but the necessity of filing objections with the Master, to the draft of his report, is urged and explained in *Ottey v. Penson*, 1 Hare, 322, (cited ante, 174, n.) by Wigram, V. C., who says: "The objections are in the nature of a pleading. They inform the Master of the point in respect of which his draft report is objected to, and they insure the same question only being brought before the court when the report is received. Without this safeguard, there would be constant confusion and uncertainty."

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Fleming had determined and proposed, and thereby expressly declared that it *"should be a general and indispensable condition of the sale of all or any part of the land intended to form such row, that the several proprietors of such land respectively for the time being, should observe and abide by the several stipulations and restrictions thereafter contained or expressed in regard to the several houses to be erected thereon, and in all other particulars, and that Fleming and his heirs should and would, at all times, observe the like stipulations and restrictions, as to such of the lots or divisions of the same land as, for the time being, should remain unsold by him or them; and, after further reciting that William Petman and George Gibson had severally agreed to purchase, of Fleming, certain lots in the intended row, subject to the proposed stipulations and restrictions; it was witnessed that, in consideration of the premises and in pursuance of and in conformity to the conditions thereinbefore expressed of and for the sale of the several lots of land in the row, and for effectuating, establishing and rendering perpetual the plan, design and purposes aforesaid, it was thereby mutually covenanted, concluded and agreed upon, by and between the said J. Fleming, W. Petman, George Gibson and the several other persons who should, at any time or times, execute the same indenture (the respective times of the execution of the indenture by the several parties being expressed in the several attestations thereof,) and each and every of them the said J. Fleming, W. Petman, George Gibson and the several other person or persons who should, at any time or times, execute the indenture, for himself and herself, for his or her heirs, executors and administrators, and for every of them, did thereby covenant, promise and agree to and with all and every the other and others of them, and to and with the several heirs, executors, administrators, or assigns of all and every the other and others of them, mutually and reciprocally, in manner following, [*198]* that is to say; that the front wall of every house in the intended row should be brought immediately up to, but should not, on any account, project beyond the building line: that none of the houses should have bow windows of any sort: the area in front of the houses should be of the width of five feet in the clear, and should extend the whole length thereof: the fore court in front of each house should be surrounded by a uniform railing of iron or wood, which should not extend the height of four feet from the surface of the ground there: the wall of partition between the several houses and the areas in front and the yard and garden behind such houses respectively, should be placed, equally, on the ground of the two proprietors of adjoining houses or ground, and should, at all times, be considered as party walls, and should be built at the joint and equal expense of the two proprietors of adjoining houses or ground: but, if any of them should be first and originally built at the sole expense of either of the proprietors of adjoining houses or ground, then the proprietor who should so first and originally build such walls, should build a brick party wall nine inches thick, and at

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the height of seven feet from the surface of the ground from the front building ground throughout, and one-half part of the expense thereof should be paid to the proprietor who should have so built the same, his or her heirs, executors or administrators, by the proprietor of the adjoining house or ground, his or her heirs, executors, administrators, or assigns, within three months after the proprietor of the adjoining house or ground should begin to erect his or her house in the principal front; and the proprietor of such adjoining house or ground, his or her heirs, executors, administrators and assigns, should also

pay one-half part of the expense of so much of the residue of the party [*199] wall as he should make use of and build to, within one month after

he should make use of and build to the same; and the expense, in both cases, if any difference should arise thereon, should be determined by admeasurement and value; that none of the proprietors of houses or ground in the intended row, should lay any chalk or mould, which should be dug out of any of the lots of land, on the foot, horse or carriage ways in front of the row, or on the land lying between the said way and the edge of the sea-cliff there: that the piece or slip of land of the breadth of twenty-nine feet intended to be mentioned in the conveyances to the several purchasers beyond the area, steps of entrance and fore court, should, at all times thereafter, remain open and unencumbered, as and for a free foot, horse and carriage way in front of the intended row, and should be formed, made, maintained and kept repaired at the expense of the several proprietors of the houses in the row, in proportion to the extent of front, towards the south-east, of each respective house: *none of the proprietors of any of the lots for the time being, should, at any time or times, or on any account or pretence whatsoever, erect or suffer to be erected, on any of the several lots which should be to them respectively belonging for the time being, or on any part of them or any of them, any public livery stables, or public coach house, or use, exercise or carry on, or suffer to be used, exercised or carried on, through or on any part thereof, the trade or business of a melting founder, tobacco pipe maker, common brewer, tallow chandler, soap boiler, distiller, innkeeper, tavern keeper, common ale house keeper, brazier, working smith of any kind, butcher or slaughterman, or any other noxious or offensive trade or business whereby the neighborhood might be, in any respect, endangered*

or annoyed, or burn or make, or suffer to be burnt or made, on any [*200] of the lots, or on any part of any of them, any bricks or lime: and that no other building or buildings than good dwelling houses or lodging houses should be erected in front of any of the said lots.

By lease and release of the 5th and 6th of December, 1800, made between Fleming of the one part, and Henry Cull of the other part, in consideration of 115*l.* 10*s.* paid to Fleming by Cull, and *in consideration that Cull had, before the execution of the release, executed the indenture of the 28th February, 1799, Fleming conveyed to Cull and his heirs, one of the lots on which the house No. 6 in Nelson's Crescent, was afterwards built.*

1838.—Whatman v. Smith.

By lease and release of the 4th and 5th of March, 1818, Cull, in consideration of 1200*l.* paid to him by the plaintiff, conveyed to the plaintiff and his heirs, the piece of ground on which the house No. 6 was erected, "*Subject nevertheless to the stipulations and restrictions relative to the said place called Nelson's Crescent, contained in a certain indenture bearing date the 25th of February, 1799.*"

All the other lots were, from time to time, sold by Fleming, to different persons; and a row of houses was built on a piece of land, in conformity to the covenants, stipulations and agreements in the deed of February, 1799. All the houses, except No. 7, which was in the occupation of the defendant Gomm, and which he had recently opened as an inn or tavern, had been occupied, ever since they had been built, as private dwelling houses or respectable lodging houses.

The bill, after stating as above, alleged that the defendant *John [*201] Holmes Gibson, was the proprietor of the house No. 7, which was in the occupation of the other defendant Gomm, and that Gibson claimed and derived his title to it by, from, through and under Fleming, and that he had agreed to grant a lease of it to Gomm for seven years, for the express purpose of its being used as an inn, or tavern: that if the defendants did not execute the deed of February, 1799, they, at the times when they purchased their respective interests in the house No. 7, had notice of that deed, and of the declarations, covenants, agreements, stipulations and restrictions therein contained, and, particularly that the proprietors of houses in the Crescent, were restricted, by that deed, from opening or using any of the houses as an inn or tavern: that, whether John Holmes Gibson and Henry Cull executed the deed of February, 1799, or not, the defendants John Holmes Gibson and Gomm, having had notice of that deed, were bound, in conscience, to keep and observe the stipulations and restrictions therein contained. The bill prayed that the defendants might be restrained from using or permitting or suffering the house No. 7, to be used as an inn or tavern, or in any other manner contrary to the covenants, provisions, stipulations and restrictions contained in the deed of February, 1799: and that the defendant J. Holmes Gibson might be restrained from executing a lease, to the defendant Gomm, authorizing him to carry on the business of the inn-keeper or tavern-keeper in that house, or to use it in any manner contrary to the covenants, stipulations and restrictions in the deed of February, 1799.

John Holmes Gibson, in his answer, said he believed that an indenture of the 25th of February, 1799, was made between the parties and to the purport or effect *mentioned in the bill, and that it was executed by [*202] J. Fleming, William Petman and George Gibson; but he denied that he ever executed it: he admitted that he was seised in fee of the house No. 7, and that he claimed and derived his title to it by, from, under and through Fleming, and that the other defendant, Gomm, occupied it under an agreement for a lease from him, and had recently opened it, with his consent,

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as The Royal Victoria Hotel, previously to which, it and all the other houses in the Crescent had been used and occupied as private dwelling houses or lodging houses, and for no other purpose: that, in December, 1823, he purchased the house No. 7, from one Sawyer, for 2500*l.*, and, thereupon, an abstract of the title to the house was delivered to him, and the same contained an abstract of indentures of lease and release of the 5th and 6th of May, 1802, by which, in consideration of 138*l.* 12*s.* paid to Fleming by one Austin, and in consideration *that Austin did*, before the execution of the release, *execute the deed of February, 1799*, Fleming conveyed the house, No. 7, to Austin in fee: (a) that, in fact, Austin never executed the deed of February, 1799: that, although he, Gibson, had, *in legal construction, notice of the deed of February, 1799*, yet he had not, at the time when he entered into the agreement with Gomm, any personal knowledge of any covenants, restrictions or stipulations contained in that deed. He submitted that he had power, to deal with his interest in the house in any manner he might choose, notwithstanding the deed of February, 1799, and that the covenants and restrictions [*203] therein contained were not, in law, binding upon him; for that *such covenants were not only void, as being in restraint of trade and without consideration or mutuality and against the policy of the law, but where collateral or personal covenants, and not covenants running with the land: that there did not exist any privity of estate between the plaintiff and himself, and that the plaintiff had no reversion, interest or title in or to the house No. 7, or the land upon which it was built, and that no privity in respect of reversion or other unity of title existed, upon or in relation to which the plaintiff had or could set up, in law or equity, any right to enforce, as against him and his tenant, Gomm, any of the covenants, stipulations or restrictions contained in the deed of February, 1799: that he did not, and he believed that Gomm did not pretend to be a purchaser of any estate or interest in the house for a valuable consideration without notice of the last mentioned deed, or of the declarations, covenants, agreements, stipulations or restrictions therein contained; but he insisted that he ought not to be affected thereby.*

Gomm, in his answer, said that he intended to use the house, not as a common inn or tavern, but as a private or family hotel, and, particularly, if he could obtain the proper licenses for selling in it wine and spirits by retail which he had applied to the magistrates to grant him, but which they had refused, owing to the rates and taxes for the house being paid by J. H. Gibson. He admitted that, about two months after he entered into agreement with J. H. Gibson, he received from the plaintiff a notice of the deed of February, 1799; and he denied that he pretended to be a purchaser of his interest in the house for a valuable consideration, without notice of that deed or of the declarations, covenants, agreements, stipulations or restrictions

(a) It appeared from the schedule to the answer, that, in 1805, Austin conveyed the house to Hunter, and that, in 1810, Hunter conveyed it to Sawyer.

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contained in it; 'but he insisted that he ought not to be affected [*204] thereby.

Mr. *Wigram* and Mr. *Bosanquet*, for the plaintiff, now moved for the injunction against the defendant *Gomm*:—It is laid down by Sir John Leach Vice-Chancellor, in *The Duke of Bedford v. The Trustees of the British Museum*,^(a) that a person who is possessed of a particular property of which he has the personal enjoyment, has a right so to deal with contiguous land which belonged to him, if he thought fit to alienate it, as to restrain any use of it which may tend to diminish either the pleasure or the profit of the land which he retains; and that a covenant entered into by the alienee with the alienor, for the purpose of preventing such a use of the land aliened, will be enforced both at law and in equity.

THE VICE-CHANCELLOR:—[Fleming contained, in himself, both the future covenantors and the future covenantees. I do not see how a party can covenant with himself.[1] Besides, the plaintiff never executed this deed of February, 1799; how then can he claim relief under it?]

It is recited, in the conveyance to Austin who purchased from Fleming the lot which now belongs to the defendant Gibson, that Austin executed the deed of February, 1799: it appears also that Cull, under whom the plaintiff claims, executed that deed; they, therefore, became parties covenanting mutually with each other; and, in that way, the difficulty in regard to 'Fleming being both covenantor and covenantee, is removed. It is [*205] true that it does not appear that the plaintiff executed the deed; but the defendants admit that they had notice of it, and, therefore, they are bound, in conscience, to observe the covenants contained in it.

It is, however, immaterial, whether the defendants had or had not notice of the deed; for the covenant, which is now sought to be enforced, is one which, of necessity and from the very nature of it, runs with the land. *Holmes v. Buckley*; ^(b) *City of London v. Nash*; ^(c) Fonbl. on Eq. 353, *et seq.*

The Solicitor General and Mr. *Harwood*, for the defendant *Gomm*:—The covenant in question does not run with the land; but, so far as Fleming was concerned, it was a mere personal covenant.[2] The defendant Gibson does not claim under the plaintiff; but both of them claim, as absolute alienees in fee, under Fleming. There is no reversion existing, nor any privity of estate between them. The object of the covenant is to restrain for ever an absolute owner of land from using it in a particular manner. It is exceedingly doubtful, at the least, whether any such restriction can be imposed. *Keppell Bailey*.^(d) The authority of *The Duke of Bedford v. The Trustees of the British Museum* is considerably diminished by that case. The

^(a) *Sugden on Vendors*, App. 57; 10th ed., reported on appeal in 2 Myl. & Keene, 552.

^(b) *Free. in Ch.* 39.

^(c) 3 Atk. 512.

^(d) 2 Myl. & Keene, 517. See 2 Sugd. Vend. 10th edit. 500, where this case is observed upon.

[1] The same difficulty met the V. C. in *Schreiber v. Creed*, 10 Sim. 32, 33.

[2] As to covenants running with the land, see 1 Sim. & Stu. 455, n. 2. 10 Sim. 33, n. Am. Ed. Vol. IX.

 1838.—*Whatman v. Gibson*.

Mayor of Congleton v. Pattison.(a) Although Austin's purchase [*206] deed recites that he executed the deed of February, 1799, the answer expressly denies that he did execute it.

THE VICE-CHANCELLOR :—The defendant Gomm admits, by his answer, that he does threaten and intend to use the house numbered seven, as a family hotel and inn and tavern : there can be no doubt, therefore, that he has brought himself within the words of the covenant in the deed of February, 1799.

Now, though neither the conveyance to Cull, nor the conveyance to Austin (under which the parties severally claim,) has been produced, yet, I must take it as a fact, that those deeds recited that Cull and Austin had executed the deed of February, 1799 : and, with respect to that deed, it seems to me that the matter is to be considered, in this court, not merely with reference to the form in which the covenants are expressed, but also with reference to what is contained in the preliminary part of the deed, namely, that Fleming had determined and proposed, and did thereby expressly declare that it should be a general and indispensable condition of the sale of all or any part of the land intended to form the row, that the several proprietors of such land respectively for the time being should observe and abide by the several stipulations and restrictions thereafter contained or expressed in regard to the several houses to be erected thereon, and in all other particulars. Then follow the stipulations ; and, whatever may be the form in which the covenant is expressed, the stipulations are plain and distinct. One of them is that none of the proprietors of any of the several lots or parcels of land intended

to form the row, shall, at any time or times or on any account or [*207] pretence whatsoever, erect or suffer to be erected on any of the several lots or parcels of land, which shall be to them respectively belonging for the time being or on any part of them or any of them, any public livery stables or public coach house, or use, exercise or carry on, or suffer to be used, exercised or carried on thereon or on any part thereof, the trade or business of a melting founder, tobacco pipe maker, common brewer, tallow chandler, soap boiler, distiller, innkeeper, tavern keeper, common alehouse keeper, brazier, working smith of any kind, butcher or slaughterman, or any other noxious or offensive trade or business, whereby the neighborhood may be, in any respect, endangered or annoyed, or burn or make, or suffer to be burnt, or made, on any of the said lots or parcels of land or on any part of any of them, any bricks or lime ; and that no other building or buildings than good dwelling houses or lodging houses shall be erected in front of any of the said lots.

It is quite clear that all the parties who executed this deed, were bound by it : and the only question is whether, there being an agreement, all persons who come in as devisees or assignees under those who took with notice of the

(a) 10 East, 130.

1838.—*Sample v. London and Birmingham Railway Company*.

deed, are not bound by it. I see no reason why such an agreement should not be binding in equity on the parties so coming in with notice. Each proprietor is manifestly interested in having all the neighboring houses used in such a way as to preserve the general uniformity and respectability of the row, and, consequently in preventing any of the houses from being converted into shops or taverns, which would lessen the respectability and value of the other houses.

As the release of 1802 recites that Austin executed "the deed of [*208] 1799, I must take it as a fact that he did execute it: and then, whatever may be the form of the covenant, or whatever difficulty there may be in bringing an action on it, I think that there is a plain agreement which a court of equity ought to enforce: and, as the defendant Gomm admits that he intends to carry on one of the prohibited businesses, he comes within the purview of the deed, and ought to be restrained from so doing by the injunction of this court.

I do not think that I could state a case which would satisfactorily extract, from the Judges of a court of law, such an opinion as a Judge in a court of equity would require in forming his judgment; inasmuch as a court of law might look at the covenant only, without taking into consideration the preliminary matter in the deed. But, although no case may arise, at law, upon the covenant, there may be a question on the deed, which will demand the opinion of a court of equity.

Injunction granted.[1]

**SAMPLE v. THE LONDON AND BIRMINGHAM RAILROAD COM- [*209]
PANY.(a)**

1838: 23d March.—Nuisance; Pleading; Parties; Bankrupt.

A demised to B. (who was alleged to be an uncertificated bankrupt) a wharf, with the use of a road, in common with the occupiers of adjoining wharfs. C. obstructed the road. B. filed a bill against him to restrain the nuisance. Held, that neither A. nor the occupiers of the adjoining wharfs, nor the assignees of B. were necessary parties to the bill.

By an indenture of the 24th of August, 1824, The Regent's Canal Company demised to the plaintiff, for fifty-seven years, a wharf, with the ware-houses, erections, and buildings and two small dwelling-houses thereon, situate on the north side of the canal, in the parish of St. Pancras, and abutting north on a road leading into the Hampton Road, and called The Commercial Road: and the plaintiff covenanted to bear and pay, to the Company, a fair and reasonable proportion of the expense of keeping that road in repair, in common with the owners and occupiers of the adjoining wharfs. In De-

(a) *Ex relations.*

[1] *Vide Schreiber v. Creed*, 10 Sim. 9.

1838.—*Seiple v. London and Birmingham Railway Company.*

cember, 1824, the plaintiff became bankrupt, and, by an indenture of the 17th of May, 1830, his assignees assigned the leasehold premises, to Hollingsworth, by way of mortgage. By an indenture of the 4th of December, 1834, Hollingsworth demised the premises to the plaintiff for the residue of the term of fifty-seven years, except the last day, subject to the terms and conditions of the indenture of the 24th August, 1824.

The road mentioned in the lease was the only road leading to the plaintiff's wharf, and the only way by which goods could be conveyed to it by land.

The London and Birmingham Railway Company having purchased land on the north side of and adjoining to the Commercial Road, and also at [*210] the west end of and adjoining to the termination of that road, built 'a high wall on the north side and west end of the road, so as to fence off the road from their land. By their act of Parliament, they were expressly prohibited from using, damaging, passing along, or interfering with the road. In 1836, however, they commenced using the road for drawing timber, stone, and other articles, for the purposes of the railroad, and had ever since continued to use the road at intervals, and, in so doing, had cut up and damaged it, and rendered it impassable. They also made what is called a run, with planks, over the wall, from the west end of the road, for the purpose of removing to their works a large quantity of earth and clay, which had been provided for their use and deposited on the road; and, thereby, access to the plaintiff's wharf with carts and carriages was rendered impossible.

The bill, after stating as above, prayed that the Railway Company might be restrained from using, damaging, passing along, or interfering with the Commercial Road, and from laying down, carting, or wheeling any clay, soil, or other matter on the same; and from continuing the obstruction to the use of the road by the plaintiff.

The defendants demurred for want of equity and for want of parties.

Mr. *Jacob* and Mr. *Booth* in support of the demurrer.—There is no averment showing what property the plaintiff has in the road, if it be a private road. If it be a public road, he has only the same interest as the [*211] rest of Her Majesty's subjects. Supposing it to be a "private road, other persons are entitled to use it, and the Regent's Canal Company are the proprietors of it.

The plaintiff is an uncertificated bankrupt, and he derives title under a lease, obtained subsequent to his bankruptcy. Does not that make the assignees (who are not alleged to have disclaimed), necessary parties to the bill? The application is discountenanced by *Deere v. Guest*.(a)

Mr. *K. Bruce* and Mr. *Stinton*, in support of the bill:—'This is a possessory bill. An uncertificated bankrupt has a title against all the world except his assignees. *Webb v. Fox*;(b) *Fowler v. Down*.(c) The plaintiff has a mere possessory interest; but he has a right to maintain the bill upon possession.

(a) 1 Myl. & Craig. 516.

(b) 7 T. R. 391.

(c) 1 Bos. & Pull. 44.

1838.—*Woods v. Woods.*

It is for the purpose of protecting a present and possessory interest that the bill is brought. The road in question is the only road leading to the plaintiff's wharf. A man has a right to come into a court of equity to protect a mere possessory right. He has a right to come for an injunction against a person for darkening ancient lights without bringing landlords and reversioners before the court. *Drayton v. Dale*.(a)

THE VICE-CHANCELLOR :—The demurrer must be disallowed. The plaintiff, it is obvious, has a possessory right to the wharf; and it appears to me that the Commercial Road is not a general carriage road, but is only used by persons going to the plaintiff's wharf and the adjoining wharfs, and to the two houses. [*212]

The Railway Company are restrained, by their act, from taking, using, damaging, passing along, or interfering with the Commercial Road. The plaintiff is virtually in the situation of sub-lessee of the Regent's Canal Company. The acts complained of are that, at different times, the defendants have interfered with the road by using it with their carriages, and that they have deposited a quantity of clay opposite the entrance of the wharf in such a way, that the plaintiff is actually deprived of the use of his wharf; and, independently of this, they have contrived to make a road for their carriages, by means of a run over their wall which bounds the road, into their own land; and, by means of a trespass or nuisance on the plaintiff, they effect an access to their own land which they would not otherwise have had.

I apprehend that the plaintiff has a clear right to file a bill alone against these persons who are doing him an injury of a private and particular nature. He has the same right that the mere tenant of a house would have if the Railway Company had raised a building which blocked up his ancient lights.[1]

I conceive that there is nothing in the objection that the plaintiff's assignees ought to be made parties, because it is settled that an uncertificated bankrupt has a right against all the world except his assignees. Here the contest is not between the bankrupt and his assignees, but between the bankrupt and the Railway Company.

*WOODS v. WOODS.

[*213]

1838; 20th April.—Construction of Lord Lyndhurst's 12th Order; Practice.

Under Lord Lyndhurst's 12th order, the Master may, on his own authority, and whether he is attended by any one on behalf of the parties, or not, allow himself further time to make his report as to scandal, impertinence or insufficiency.

By Lord Lyndhurst's 12th order, it is directed that, when any order is made for referring an answer for insufficiency, or for referring an answer or

(a) 2 Barn. & Cres. 233.

[1] *Vide Best v. Stacy*, 2 Russ. 121, 122, n. 1.

 1838.—Woodley v. Boddington.

other pleading or matter, depending before the court, for scandal or impertinence, the order shall be considered as abandoned, unless the party obtaining it, shall procure the Master's report within a fortnight from the date of the order, or unless the Master shall, within the fortnight, certify that a further time, to be stated in his certificate, is necessary in order to enable him to make a satisfactory report.

The bill in this cause having been referred for impertinence, the Master, of his own authority, and without being attended either by the parties or by their solicitors, certified, within the fortnight, that a further time was necessary to enable him to make his report.

On the hearing of a motion made by Mr. *Koe* and opposed by Mr. *K. Bruce*, and Mr. *Anderdon*, one question was, whether the Master had power to allow himself the further time, except in the presence of the parties or their solicitors.

The Vice-Chancellor said that he was clearly of opinion that, under the order, the Master had a right, of his own authority and whether he was attended by the parties or their solicitors, or not, to allow himself further time for making his report.

[214]

*WOODLEY v. BODDINGTON.

1838; 23d April.—Contempt; Injunction.

After the first proclamation had been made under a writ of *exigi facias*, which the defendant had issued in an action which he had brought against the plaintiff, the plaintiff served the defendant with the common injunction. The sheriff, upon receiving notice of the injunction, applied to the defendant's solicitor for instructions as to the course which he was to pursue, but the solicitor said that he had no instructions to give: upon which the sheriff proceeded to make three of the remaining proclamations. Held, that the defendant had been guilty of a contempt.

MOTION, by the plaintiff, to commit the defendant for a breach of the common injunction.

The defendant had sued out a writ of *exigi facias*, in an action which he had brought against the plaintiff. After the writ had been delivered to the sheriff, and the first proclamation had been made under it, the plaintiff obtained the common injunction, and served the defendant with it. The sheriff, as soon as he had notice of the injunction, applied to the defendant's solicitor, for instructions as to the course which he was to adopt; but the solicitor said, that he had no instructions to give. Upon which the sheriff proceeded to make three of the remaining proclamations.

Mr. *Jacob* and Mr. *Hislop Clarke*, for the plaintiff:—The sheriff is, in truth, the agent of the party at whose instance a writ has issued. If a party is arrested, irregularly, at law, the party who issued the writ is liable to action for damages. Boddington, as soon as he was served with the injunction, was bound to stop the proceedings which had been commenced at his instance.

1838.—Weedley v. Boddington.

The refusal of his solicitor to give the sheriff any instructions, was, in effect, referring the sheriff back to his original instructions, and was equivalent to giving him to understand that he was to proceed upon those instructions. Boddington, therefore, "has been guilty of a contempt. *Marsack v. Bailey*, (a) *Bullen v. Ovey*, (b) *Bolt v. Stanway*. (c) [215]

Mr. Knight Bruce and Mr. Loftus Wigram, for the defendant:—This application is one of the first impression. In *Marsack v. Bailey*, the defendant took an active step after the injunction issued; for he sued out a new writ of *allocatur exigent* to compel the sheriff to proceed with the proclamations. Here the defendant has taken no active step since the issuing of the injunction; and the question is whether it is incumbent on a defendant in equity, after a writ has been issued and placed in the hands of the sheriff, to put an end to the authority of the sheriff, if he can do so. Where a writ has been well issued before the party who obtained it has been served with the common injunction, he is entitled to the full benefit of the writ. We admit that the party cannot take any new step; but he is not to lose the benefit of his writ. The party is not bound to stop the sheriff. The sheriff has a right to execute every process that is in his hands prior to the issuing of the injunction. If the proclamations had been stopped, the writ would have been wholly useless, and the defendant must have sued out a new writ of *exigent* after the injunction had been dissolved. (d) Is there any authority which shows that an injunction issued after a writ has been placed in the sheriff's hands, is to destroy the writ? The injunction never has the effect of destroying a step well taken before it was issued. *Franklyn v. Thomas*. (e)

"The relief to be administered (if any) is in the discretion of the [216] court, according to the particular circumstances of the case. This however is not an application to modify or regulate any benefit that the defendant may derive from the proceedings that have taken place; but it is an application grounded on this, namely, that a contempt has been committed; and, therefore, the court has no jurisdiction on the present motion.

Mr. Jacob, in reply, said that *Franklyn v. Thomas* did not apply, for it was not a case of contempt; but the question was whether the injunction which issued on the demurrer being overruled, ought not to have a retrospective effect, that is, whether the plaintiff was not entitled to be placed in the same situation as he would have been in, if the defendant had not delayed him in obtaining the injunction, by putting in the erroneous demurrer.

THE VICE-CHANCELLOR:—This application seems to me to be new *in specie*, and must be decided on principle. *Franklyn v. Thomas* was a strong case: for there, on a given day, the plaintiff in equity would have been entitled to the common injunction, if the demurrer had not been filed. After the demurrer had been put in, execution was taken out at law. The

(a) 2 Sim. & Sta. 577.

(b) 16 Ves. 141.

(c) 2 Anst. 556.

(d) Tidd's Pract., tit. Outlawry.

(e) 3 Mer. 225. See 234.

 1838.—*Boys v. Trapp*.

demurrer was afterwards overruled, and the common injunction was moved for; and then an application was made to the effect that the plaintiff in equity might be placed in the same situation as if no demurrer had been filed and the common injunction had issued on the day on which the demurrer was filed: and Lord Eldon thought it right to do so; and he devised at order accordingly. That case, however, does not exactly apply. But it is [*217] plain, from the way in which Lord Eldon discusses it, that this court will interfere to prevent the final execution of the process which is put into the sheriff's hands before the issuing of the injunction. In this case the writ was in the sheriff's hands and the first proclamation was made before the injunction issued. The sheriff who receives the writ, is, to a certain extent, the agent or servant of the plaintiff at law; for any intimation given, by the plaintiff at law, to the sheriff not to go on, would be an indemnity to the sheriff, and he would be bound not to proceed. Here no step was taken, by the sheriff, in execution of the process without knowing what had taken place in this cause. A communication took place between the solicitor, of Boddington and the sheriff; and the solicitor said that he would give no order. After that communication was made, I must consider that the refusing to countermand the writ, was an actual continuance of the order previously given.

I cannot but think that the conduct of the solicitor was not proper, and that this is a case of contempt. I do not, however, think that it is a case in which I ought to make an order for committal; but I shall order Boddington to pay the costs of the motion, and that he is not to have the benefit of any proclamation made subsequent to the service of notice of the present motion.

[*218]

*BOYS v. TRAPP.

1838; 23d April.—Construction of 3 & 4 W. 4, c. 94, sect. 13; Publication

The Master having been prevented by illness from attending at his office on the day appointed for hearing an application to enlarge publication; held that the application might be made to the court.

THE defendant being desirous to enlarge publication, the parties attended at the Master's office on the day appointed for making the application; but the Master was ill, and did not attend.

Mr. Koe, for the defendant, now moved to enlarge publication.

Mr. Stuart, *contra*, said that the application ought to have been made to the Master; as the power of the court to make an original order to enlarge publication was taken away by 3 & 4 Will. 4, c. 94, s. 13.(a)

The Vice-Chancellor said that the circumstance of the Master's not making the order on account of his illness, gave the party the same right to appeal to

(a) See also the 15th and 20th of the Orders of 1833.

1838.—Lord St. John v. Boughton.

the court as if the Master had exercised his judgment on the application and refused to make the order : and his Honor granted the application.

*LORD ST. JOHN V. BOUGHTON.

[*219]

1838: 1st May.—Statute of Limitations, 3 & 4 W. 4, c. 27; Debt.

Where an estate is devised to a trustee in trust to sell and pay the testator's debts, and, subject thereto, in trust for A., an acknowledgment of a debt in writing, signed by the trustee or his agent is sufficient to preserve the creditor's right of suit for twenty years after the giving of the acknowledgment.

IN 1802, Lady St. John executed two bonds to a gentleman named Aubert, one for securing the payment of 322*l.*, with interest, on the 1st of January, 1803, and the other for securing the payment of 330*l.*, with interest, on the 1st of May in that year. Lady St. John died in 1805, having, by her will dated the 26th of July, 1804, devised her real estates to Richard Bennett and Thomas Townsend, in trust to sell, and, after paying off incumbrances, to apply the proceeds, together with her personal estate, in payment of her debts, funeral and testamentary expenses and legacies; and to stand possessed of the residue upon certain trusts for the benefit of her son and his children; and she appointed Bennett, Townsend, and her son, her executors.

Lady St. John's will was proved by her three executors. At her death, her affairs were in a very embarrassed state; and, on the 23d of October, 1811, Townsend wrote to Aubert, stating that there was little prospect of her debts being paid for many years.

In 1814 Bennett died. In 1816 Aubert died, having appointed W. Davies and G. H. Wollaston his executors. After his death his executors made inquiries of Townsend, as to the state of Lady St. John's affairs; and, on the 2d of July, 1816, Wollaston, in answer to a letter which he had received from Townsend, wrote as follows: "I observe, by what you mention, that there is a distant likelihood of the demands on Lady St. John's estate being gradually liquidated. I am not certain whether the late Mr. Aubert informed you that he was in possession of two of her Ladyship's bonds, for 330*l.* and 322*l.* I think it proper, therefore, acting for his estate, to give you notice of those bonds being in the possession of the executors, who must wait the extinction of prior demands on the estate."

On the 15th of October, 1817, the testatrix's son died, leaving the plaintiffs, his only children. On the 24th of that month, Wollaston wrote the following letter to Townsend; "Sir: On the 2d of July, 1816, I had the pleasure of replying to your favor of the 24th of June. I then informed you that the executors of the late Anthony Aubert were in possession of two bonds of the late Lady St. John's amounting to 651*l.* Not having heard from you in reply, I conclude that you were aware of that demand upon her estate, or that the notice was sufficient, and that the claim would take its course of pay-

 1836.—Lord St. John v. Boughton.

ment in due time. The decease of the late Lord St. John has lately brought this claim under the notice of her executors; and I have been requested to ascertain whether the claim to which I allude, has been made in proper order, or whether it would be necessary to take any legal steps in order that the claim may be liquidated in due course with the other demands on her Ladyship's estate." On the 27th of October, 1817, Townsend wrote the following answer: "Sir: I am favored with yours of the 24th instant. I do not apprehend the death of Lord St. John will any way affect your claim on the late Lady St. John's estate, and that the notice you formerly gave is fully sufficient for every purpose. I beg leave to add that I hope, in a very few years, all her Ladyship's debts will be fully paid." In February, [221] 1823, Davies wrote, to Townsend, "to inquire when it was probable that the bond debts would be discharged. On the 1st of March in that year, the following answer was sent: "I regret it is not in my power to return you a more satisfactory answer with regard to the claim of the late Mr. Aubert upon the estate of the late Lady St. John, &c. &c. *Be assured I shall be happy to discharge the bonds to the late Mr. Aubert as soon as it is in my power*; and of such I will give you or Mr. Wollaston the earliest notice. Should you visit Clifton, I shall be glad to give you any further information on the subject. A severe attack of gout in the hand, obliges me to employ an amanuensis. I am, Sir, your most obedient servant for Thomas Townsend l, L. T." This letter was written by Laura Townsend, the daughter of Thomas Townsend, at the dictation of her father, and was signed by her in his presence. In 1824 Townsend died; and, thereupon, a suit was instituted for the appointment of new trustees of Lady St. John's will: and, in 1826, (at which time the incumbrances on her Ladyship's real estates had not been paid off,) the defendants Sir W. R. Boughton and Sir Robert Heron were appointed the new trustees.

The object of the present suit was to have Lady St. John's assets administered, and the trusts of her will carried into execution. The usual decree was made in June, 1833. In November, 1836, the Master reported that certain debts were due from the testatrix's estate; but the before mentioned bond debts were not included in the report. By the order on further directions, in January, 1837, the debts mentioned in the report, were ordered to be paid out of the funds in the cause. In January, 1838, Davies and Wollaston presented a petition in the cause, stating as above, and, further, that [222] "Townsend was, from the year 1814 until his death, the sole surviving executor and trustee of Lady St. John's will; and that, in the correspondence before set forth and on other occasions within the period of twenty years last past, he gave acknowledgments in writing signed by himself or by some person duly authorized by him, acknowledging the validity of the petitioners' demand against Lady St. John's estate: that the petitioners were advised that, under the circumstances aforesaid, the debt due on the bonds was not barred by the statute of limitations; but the petitioners, being

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uninformed of the Master's advertisement for creditors, had no opportunity to claim the debt before the Master had made his report. The petition prayed that it might be declared that the debt on the bonds was not barred, and that the petitioners might be at liberty to go in and prove it before the Master; and that they might be paid the same out of the funds in the cause.

On the hearing of the petition, the question was whether the correspondence, and, especially, the letter of the 1st of March, 1823, did not contain a sufficient acknowledgment of the bond debts within the meaning of 3 & 4 Will. 4, c. 27, sect. 40; which enacts that, after the 31st of December, 1833, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or a release of the same, unless, in the mean time, some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing "signed by the [*223] person by whom the same shall be payable or his agent, to the person entitled thereto or his agent; and, in such case, no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given.

Mr. Temple and Mr. Ellis, in support of the petition, said that where, as in the present case, a trust was created for payment of debts, neither the 9th Geo. 4, c. 14, (for rendering a written memorandum necessary to the validity of certain promises and engagements) nor the 3d & 4th Will. 4, c. 27, was of any force, unless the debt was barred at the time when the trust came into operation: that, here, the bonds were only two or three years old when Lady St. John's will took effect. *Phillipo v. Munnings*.(a)—[The Vice-Chancellor: The debts in question are charged upon or payable out of land; and, therefore, it seems to me that they are within the 3d & 4th Will. 4, c. 27. No part of the fruit or produce of the land was severed or set apart for payment of the debts; and, therefore, *Phillipo v. Munnings* does not apply.]—Supposing these debts to be within the act, yet, as the incumbrances on the testatrix's estates were not paid off in 1826, the twenty years did not begin to run until after that period.

Next: the decree made in 1833, which directed the necessary accounts and inquiries to be taken, with a view to the payment of the testatrix's debts, prevented the debts in question from being barred: at the date of that decree the twenty years had not expired. *Sterndale v. Hankinson*.(b)—[The Vice-Chancellor: *Sterndale v. Hankinson* "was decided before the [*224] 3d & 4th Will. 4, c. 27, was passed. That act applies to every debt attempted to be proved after the 31st of December, 1833.]—At all events

(a) 2 Myl. & Craig, 309.

(b) Ante, vol. 1, p. 393.

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Townsend's letters are sufficient to prevent the debts from being barred by the act: the letter of the 1st of March, 1823, contains not only an acknowledgment of the debts, but a promise to pay them.

Mr. *Barber* and Mr. *Bacon* appeared for the trustees, and Mr. *K. Bruce* and Mr. *Sharpe* for the plaintiffs, in opposition to the petition.

An acknowledgment by a trustee, is not sufficient to prevent a debt from being barred by the statute: it is not the trustee, but the estate that is liable to pay the debt.—[The Vice-Chancellor: Supposing that an estate were devised to a trustee, in trust to pay the testator's debts, and, subject thereto in trust for A. for life, and, after his death for his unborn children; would you say that an acknowledgment by the trustee would not be sufficient, but there must be an acknowledgment by the unborn issue?—None of the letters, except that of March, 1823, can be said to contain anything like an acknowledgment of the debts: and that letter is not sufficiently precise. Besides, that letter was not signed by Townsend, but by L. T., and, consequently, there must be extrinsic evidence to show who L. T. was. Supposing that an acknowledgment signed by an agent for the party by whom a debt is payable, is sufficient to prevent the debt from being barred by the act, the signature is not sufficient, if the agent signs his initials only. *Fearn v.*

Lewis; (a) *Dickenson v. Hatfield*; (b) *Hyde v. Johnson*. (c)

[*225] THE VICE-CHANCELLOR:—In my opinion there has been a sufficient acknowledgment of the debts in this case, within the meaning of the 3d and 4th Will. 4, c. 27.

The decisions under 9 Geo. 4, c. 14, sect. 1, are not applicable to this case; for the word "agent" is omitted in the first section of that act; and therefore an acknowledgment of a debt signed by an agent of the debtor, would not take the debt out of the operation of that act. In this case too the personal liability of the party is out of the question. The act of the 3d and 4th Will. 4, c. 27, applies to sums of money charged upon or payable out of any land. The trustee, who is the party by whom the money is payable, may acknowledge the debt by a writing signed either by himself or his agent; but such an acknowledgment will not impose on him any personal liability to pay the debt.

All that the act requires is that *some* acknowledgment of the right to the sum claimed, shall have been given in writing, signed by the person who represents the estate out of which it is payable, or by his agent. The act, therefore, allows of considerable latitude as to the form of the acknowledgment: and, consequently, it is not necessary that the acknowledgment should state the amount of the sum alleged to be due. If it refers to the thing in question, it is sufficient.

The letter of the 1st of March, 1823, is part of a correspondence. It commences thus: "I regret that it is not in my power to return you a more sa-

(a) 6 Bing. 349.

(b) 5 Carr. & Payne, 46.

(c) 2 Bing. N. C. 776.

1838.—*Phipson v. Turner.*

tisfactory answer with regard to the claim of the late Mr. Aubert upon the estate of the late Lady St. John. Be assured I shall be happy to [*226] discharge the bonds to the late Mr. Aubert as soon as it is in my power." Then there is this passage: "A severe attack of gout in the hand, obliges me to employ an amanuensis;" and the letter concludes: "I am, Sir, your most obedient servant, for Thos. Townsend, L. T." It is sworn that this letter was written by Miss Laura Townsend, the daughter of the trustee, according to her father's dictation, and that it was signed by her in his presence. I am of opinion, therefore, that the right of the petitioners to the sums due on these bonds, has been acknowledged by a writing signed by the agent of the person by whom the same are payable; and that the petitioners ought to be at liberty to go in before the Master and prove their debt.[1]

*PHIPSON v. TURNER.

[*227]

1838; 5th and 7th May.—Power; Appointment; Will; Revocation.

Testator bequeathed a sum of stock in trust for all or such one or more exclusive of the others of the children of his niece, as she should, by her will, appoint; and, in default of appointment, in trust for all her children living at his decease. The niece by her will, appointed 6000*l.*, part of the stock, to her daughter, for her separate use for life; and, after her death, *to such persons &c. as the daughter should, by will, appoint*, and, in default of appointment, to the niece's two sons. The two sons and the daughter were the niece's only children, and they were all living at the testator's death. After the death of the niece, her two sons and daughter and the husband of the daughter executed a deed by which, after reciting that it was conceived that the testamentary power of appointment given to the daughter, was invalid, as being an excessive execution of the power given to her mother, and that it was also conceived that, if that power should be valid and should not be exercised, then and in either event the reversion of the 6000*l.* expectant on the daughter's death, belonged to her two brothers and to herself and her husband; the parties, in order to obviate any doubts respecting the same and to carry their mother's intention into effect, assigned the fund to two trustees, in trust for the daughter, for her separate use for life, and, after her death, for the husband for life, and, after his death, for the children of the daughter and her husband, and, if they should all die under twenty-one, in trust for the daughter's next of kin; and the daughter alone was empowered to appoint new trustees of the deed. A few months afterwards, the daughter made a will, in exercise of the power given to her by her mother, and appointed the fund to her husband absolutely. Some time afterwards she executed a deed, by which she appointed a new trustee of the prior deed. Shortly afterwards she died, leaving her husband and four children surviving. Held that the testamentary power of appointment given to the daughter, was valid: that the first deed was not intended to operate, unless that power should be either void or not exercised: that the daughter's will was a good execution of the power, and was not revoked by the second deed.

WILLIAM GOORE, being possessed of 18,000*l.* three per cent. consolidated, and 12,000*l.* three and a half per cent. reduced bank annuities, by his will dated the 5th of February, 1825, bequeathed all the three per cent. consoli-

[1] *Vide Sheppard v. Duke*, post, 567. *Commercial Bank of Lake Erie v. Norton*, 1 Hill, 501. —567.

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dated annuities and the three and a half per cent. reduced annuities [228] then standing in his name, "to Richard Allison and Thomas Allison Hoskins, in trust for his sister, Elizabeth Goore, for life, and, after her death, in trust for his cousin Martha Tomlinson for life, and, after the decease of the survivor of them, *"in trust for all or every, or such one or more exclusive of the others, or other of the children of the said Martha Tomlinson, or of the issue of such of them as shall be dead, and, if more than one, in such parts, shares and proportions,* with such provision for their respective maintenance and education, *as she shall, by her last will and testament in writing,* or any writing in the nature thereof, to be by her duly executed, *direct or appoint,* and, for want of such direction or appointment, and so far as any such if incomplete shall not extend, for all and every *the child or children of the said Martha Tomlinson who shall be living at the time of my decease, or the issue of such of them as shall be then dead,* such issue, nevertheless, taking no more than their deceased parent or parents would have been entitled to if living, to be divided equally between them as tenants in common, and, if there shall be but one such child, then the whole to be in trust for such only child." And the testator appointed Richard Allison and Thomas Allison Hoskins executors of his will.

The testator died in December, 1829, and Richard Allison alone proved his will, and caused the stock to be transferred into his own name.

Elizabeth Goore died in 1831, and Martha Tomlinson died on the 17th June, 1833. She had three children only, namely, Sampson Tomlinson, James Tomlinson, and Mary, then the wife of the plaintiff but since deceased; and those children were living both at the decease of the testator and of their mother.

[229] "Martha Tomlinson, by her will dated the 9th of May, 1832, and duly signed and published by her in the presence of three witnesses, after reciting the testator's will and his death and the death of Elizabeth Goore, expressed herself as follows: "Now I, the said Martha Tomlinson, in pursuance and execution of the power and authority given to me by the said in part recited will, do, by this my last will and testament in writing by me duly executed, direct and appoint, from and after my decease, the sum of 6000*l.* three per cent. consolidated bank annuities, to and for the use and benefit of my daughter, Mary, the wife of John Phipson, and her issue, in manner following (that is to say,) the interest, dividends and annual produce thereof to my said daughter Mary during her natural life, to and for her own sole and separate use and benefit, independent of her present or any future husband; and, after the decease of my said daughter, then, as to the said principal sum and the interest, dividends and produce thereof, I hereby direct and appoint the same to and for the use and benefit of or in trust for *such person and persons, for such estate and estates, ends, intents and purposes, and with, under and subject to such powers, provisions, conditions, limitations, declarations and agreements as the said Mary Phipson, notwith-*

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standing her coverture, in and by her last will and testament, or any writing in the nature of or purporting to be her last will and testament duly executed, shall direct, limit, or appoint, and, for want or in default of any such direction or appointment and so far as any such if made shall not extend, and if my said daughter shall not leave any child or children, or grandchild or grandchildren, then I direct and appoint the same principal, interest and dividends unto my two sons, Sampson Tomlinson and James Tomlinson, equally to be divided between them, as "ten- [230] ants in common and their respective executors, administrators and assigns." The testatrix then appointed the remaining 12,000*l.* consols to her two sons, equally, as tenants in common, and to their respective executors, administrators and assigns; and, as to the remainder of the three and a half per cent. annuities, (part having been sold to pay legacy duty,) she appointed the same to her three children, equally, as tenants in common, and to their respective executors, administrators and assigns; and after certain specific bequests, she gave all the residue of her real and personal estate, to her three children and their respective heirs, executors, administrators and assigns, share and share alike; and she appointed her two sons and her nephew, George Baldwin, executors of her will.

Upon the testatrix's death, Richard Allison transferred the whole of the three per cent. and three and a half per cent. stock into the names of Sampson Tomlinson, James Tomlinson and George Baldwin. After the testatrix's death, doubts were suggested as to the validity of her appointment of the 6000*l.* stock, and as to the rights and interest acquired by Mary Phipson under the same; and, thereupon, it was agreed, as the bill alleged, between Sampson Tomlinson, James Tomlinson, and the plaintiff and his wife, that a deed of arrangement should be entered into and executed by all those parties, with a view to effectuate the testatrix's intention as expressed in her will; and, accordingly, by an indenture dated the 19th July, 1833, and expressed to be made between Sampson Tomlinson, James Tomlinson and the plaintiff and his wife of the one part, and Samuel Turner and William Palmer of the other part, after reciting the testatrix's will, and that it was conceived that the gift or appointment of the interest and dividends "of [231] the 6000*l.* stock to Mary Phipson for her life, was good, but that the power to enable her to dispose of that sum and the interest and dividends thereof, was void, as having exceeded the power given to the testatrix by the testator's will; and that it was also conceived that, if such power should be valid and should not be exercised by Mary Phipson, then and in either event the reversionary interest in the 6000*l.* stock expectant on the death of Mary Phipson, belonging to Sampson Tomlinson, James Tomlinson and the plaintiff and his wife, or some or one of them, and that Sampson Tomlinson, James Tomlinson and the plaintiff and his wife, in order to obviate any doubts respecting the same and to carry the testatrix's intention into effect, had agreed to assign the 6000*l.* stock to Turner and Palmer, upon the

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trusts thereafter declared: it was witnessed that, in pursuance of the said agreement and for carrying the testatrix's intention into effect, Sampson Tomlinson, James Tomlinson and the plaintiff and his wife, did assign the 6000*l.* stock and all their powers and remedies for recovering, receiving or enforcing the payment of the same, and all benefit and advantage incident or belonging thereto, and all the estate, right, title, interest, use, trust, property, possession, possibility, claim and demand of them, any or either of them, of, in or to the said sum of 6000*l.* stock and the dividends, interest and proceeds to accrue thereupon or to be paid or payable in respect thereof, in trust for Mary Phipson, for her separate use for her life; and, after her death, in trust for the plaintiff and his assigns during his life or until he should become bankrupt, or make a composition with his creditors, or an assignment of his effects for their benefit, and, after the decease of the survivor of the plaintiff and his wife, or, in case he should survive his wife, or his being de-

[*232] clared a bankrupt or making a composition with his creditors or 'an assignment of his effects for their benefit, then upon trust to assign the 6000*l.* stock unto all and every or such one or more of the child or children of the plaintiff and his wife, in such parts, &c., as the plaintiff and his wife should, by deed, jointly appoint, or as the survivor of them should, by deed or will, appoint, and, in default of appointment, in trust to assign the stock unto, between and amongst all the children of the plaintiff and his wife, equally to be divided between them, the shares of sons to be paid to them at twenty-one and the shares of daughters at that age or on their marriage, and, if any of such children should be then dead having left issue then living, then such issue should take his, her or their parent's share; and in case Mary Phipson should die without issue, or in case there should be such issue and they should all die under age and without issue, then upon trust to assign the 6000*l.* stock to such person and persons, &c., as Mary Phipson, notwithstanding her coverture, should, by deed or will, appoint; and, in default of such appointment, in trust to divide the same amongst such persons as, at Mary Phipson's death, should be her next of kin by blood under the statutes of distribution. The deed then contained a power enabling the trustees, with the consent of the plaintiff and his wife or the survivor of them, and, after the death of the survivor, of their own proper authority, to sell the 6000*l.* stock, and invest the proceeds in other securities or in the purchase of real or leasehold estates; and also a power enabling Mary Phipson to appoint new trustees of the trust property. This deed was executed by all the parties except Sampson Tomlinson. He refused to execute it or to ratify or recognize the arrangement made thereby, the same having been entered into, as his answer alleged, without any notice to him.

[*233] *By an indenture dated the 22d of December, 1835, and made between Turner of the first part, Mary Phipson of the second part, and A. Ryland of the third part, after reciting the deed of July, 1833, and that Turner was desirous of resigning the trusts reposed in him thereby, Mary

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Phipson, in exercise of the power given to her by the same deed, appointed A. Ryland to be a new trustee of it in the place of Turner.

Subsequently to the date of the deed of July, 1833, the plaintiff and his wife were advised, as the bill alleged, that the appointment made, by Martha Tomlinson's will, of the 6000*l.* stock in favor of the plaintiff's wife, was valid, and that they had executed that deed under a mistaken impression respecting the validity of the appointment, and that, by reason thereof and of the refusal of Sampson Tomlinson to execute the last mentioned deed, they were entitled to treat the same as inoperative: and accordingly, the plaintiff's wife, for the purpose of exercising the power given her by Martha Tomlinson, made her will dated the 26th of December, 1833, and which was signed and published by her in the presence of two witnesses, and was as follows: "I, Mary Phipson, wife of John Phipson, by virtue of the power and authority given to me in and by the several last wills and testaments of my late father and mother and of the late William Goore, and by virtue of all and every other power me therunto enabling, do, by this my last will and testament, give, devise, limit, appoint and confirm, unto my said husband the said John Phipson absolutely, all sum and sums of money in any of the public funds in Great Britain and elsewhere, and all other moneys and securities for money and other personal estate over which I have a disposing power or to which I am entitled, 'either in possession, reversion or otherwise, under the [*234] said wills or any or either of them or by any other means." Ryland was one of the attesting witnesses to this will.

Mary Phipson died on the 30th of December, 1835, leaving the plaintiff and four infant children her surviving; and, after her death, letters of administration with her will annexed, were granted to the plaintiff.

The bill was filed against Turner (in whose name part of the trust property still remained) Palmer, Ryland, James Tomlinson, Sampson Tomlinson and the children of the plaintiff by his late wife, and, after stating as above, it charged that, under the trusts and powers contained in the will of William Goore, it was competent, to Martha Tomlinson, to appoint the trust funds to or in trust for Mary Phipson during her life, and, after her decease, to or in trust for such person or persons or for such estates and interests as she should by will appoint, and that, if Martha Tomlinson's will was a valid execution of the power reserved to her by Goore's will, Mary Phipson became fully authorized under the said wills, to make the testamentary appointment so made by her as aforesaid in favor of the plaintiff, and that the same was a valid disposition of the trust funds in the plaintiff's favor; that, in case the plaintiff was not, by the means aforesaid, entitled to the trust funds, it was, at least, a question whether the same belonged to the infant defendants, or whether the same passed, under the ultimate limitation in Goore's will, to the children of Martha Tomlinson living at Goore's death, or the issue of such of them as should be then dead, and that, in the last mentioned case, Mary Phipson became entitled to one-third part thereof, as "one [*235]

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of the three children of Martha Tomlinson, and the plaintiff, in her right, was then entitled thereto: that the defendants pretended that, by reason of the execution of the deed of July, 1833, the plaintiff was precluded from raising any question with respect to the construction of the aforesaid wills, and from claiming any interest in the trust funds under the same, and that he was bound to give effect to that deed, and to permit the trust funds to be held and applied upon the trusts therein expressed, more especially as the plaintiff and his late wife, and the latter in particular, had recognized and confirmed the last mentioned deed by executing the deed of December, 1835: but the bill charged that the deed of July, 1833, was executed under a mistaken conception of Mary Phipson's rights and powers under Martha Tomlinson's will, and that it was never intended that the trust funds should become liable to the trusts of that deed in case the power of appointment reserved to Mary Phipson by Martha Tomlinson's will, was valid and should be well exercised by her; and that the trusts of the deed of July, 1833, were not framed in accordance with the intentions therein expressed, as would appear by reference to the recitals and trusts thereof: that the plaintiff and his late wife would not have executed the deed of July, 1833, if they had been aware that the testamentary appointment made by Martha Tomlinson, was a valid execution of the power reserved to her by Goore's will, and that, under such testamentary appointment, the plaintiff's late wife had herself the power to make a good testamentary appointment of the trust funds: that the deed of July, 1833, was executed on the faith and in expectation that all the parties thereto would concur in executing it, and that it had been rendered nugatory by Sampson Tomlinson's refusal to execute or recognize it: [*236] that neither the plaintiff nor his late wife had done any such act for confirming or recognizing the last mentioned deed as would preclude the plaintiff from insisting that the same ought not to be held binding upon him; and, although his late wife executed the deed of December, 1835, she did so for the purpose, merely, of insuring the proper management and protection of the trust funds, and did not mean thereby to recognize the deed of July, 1833.

The bill prayed that the testamentary appointment made by the plaintiff's late wife, might be established and carried into effect, and that it might be declared that, by virtue thereof and of the several other wills or testamentary appointments aforesaid, and notwithstanding the deed of July, 1833, the plaintiff had become absolutely entitled to the 6000*l.* stock: and, if necessary, that the last mentioned deed might be declared inoperative and void, as against the plaintiff, and might be vacated; and that Turner, Palmer, and Ryland might be decreed to transfer the 6000*l.* stock, to the plaintiff, discharged from the trust of that deed; or, otherwise, that the rights and interests of the plaintiff and all other parties claiming to be interested in the 6000*l.* stock, might be ascertained and declared and secured for their benefit.

Mr. *Knight Bruce* and Mr. *Girdlastone*, for the plaintiff:—The first ques-

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tion is as to the validity of the appointment made, by Mrs. Tomlinson, in favor of her daughter Mrs. Phipson.

In *Bray v. Hammersley*(a) your Honor decided "that, where a [*237] power was given to appoint a fund to the children of the donee, an appointment to a daughter of the donee, for her separate use for life, with a power to dispose of the capital after her death, was good. That case was affirmed by the House of Lords, under the name of *Bray v. Bree*, and is a conclusive authority in favor of the validity of the appointment in question. The mother's appointment did, in effect, give the whole beneficial interest in the 6000*l.* stock to her daughter, but in a particular manner. *Hales v. Margrum*.(b)

The next question is as to the effect to be given to the deed of July, 1833.

That deed was executed under a mistaken conception of the rights of the parties. It recites that it was conceived that the appointment of the stock to Mrs. Phipson for her life, was good, but that the power to enable her to dispose of it, was void, as being an excessive execution of the power given to Mrs. Tomlinson by W. Goore's will; and that it was also conceived that, if such power should be valid and should not be exercised by Mrs. Phipson, the reversionary interest in the stock, expectant on her death, would belong to S. Tomlinson and James Tomlinson and the plaintiff and his wife, or some or one of them. The deed, therefore, proceeds on the ground either that the power was not good, or that it would not be exercised by Mrs. Phipson. The recitals take no notice of the event that has happened, namely, of the power being good and being exercised. If, therefore, Mrs. Phipson had the power and exercised it, it was not the intention of the parties to interfere with her power; and, that being so, there is an end of the question.

Besides, S. Tomlinson never executed the deed: "and it is immate- [*238] rial whether he now assents to be bound by it or not, as he did not assent in the lifetime of Mrs. Phipson.

The next question is, what was the position of the parties to the deed, and who were intended to be bound by it? The persons named as parties to it, are Mr. and Mrs. Phipson (the latter of whom, according to the recitals of the deed, was considered not to have a valid power of appointment over the stock) and Sampson and James Tomlinson, who were entitled to it if either she had not a valid power or did not exercise it. Mrs. Phipson had no interest in the fund which she could assign: she had merely a life interest with a testamentary power of appointment, the validity of which was questionable. The object of the deed was to bind the interests of Sampson and James Tomlinson in the event of the power not being valid or not being duly exercised. No intention whatever appears, on the deed, of binding the interest of any other person. How then can it be contended that the new interest of the husband, is bound by this deed, which was executed with an entirely different view.

(a) *Ante*, vol. 3, p. 513. See also 2 Clark & Fin. 453.

(b) 3 Ves. 299.

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Then it will be said that Mrs. Phipson afterwards executed a deed by which a new trustee of the stock was appointed, and which altered the position of the parties. On the 26th of December, 1833, Mrs. Phipson made the testamentary appointment in favor of her husband, and, on the 22d of December, 1835, she executed this deed, which was made between Turner of the first part, herself of the second part, and Ryland of the third part; and the only object of it was to appoint Ryland a trustee of the stock in the place of Turner. Mr. Phipson was not a party to that deed, and therefore [*239] he cannot be affected by it. It proceeded on the footing of the deed of July, 1833; and, if Mr. and Mrs. Phipson were not, as we contend was the case, bound by that deed before the subsequent deed was executed, they were not bound by it afterwards; for the subsequent deed gave no greater effect to the deed of July, 1833, than it had before. We submit, therefore, that there is nothing in this case to preclude Mr. Phipson from claiming under the testamentary appointment made by his wife.

The *Solicitor General* for the defendant Sampson Tomlinson:—This is a most unfair attempt on the part of the plaintiff. In his wife's lifetime he executed a deed which gave him all that he could reasonably require; and he now comes to the court and says that he is not bound by the deed which he executed. He is seeking to undo his own voluntary act. The bill itself alleges that, after the death of Martha Tomlinson, doubts were suggested as to the validity of the appointment of the 6000*l.* consols made or purporting to be made by her will, and as to the rights and interests acquired, by Mary Phipson, under the same; and, thereupon, it was agreed, between Sampson Tomlinson, and James Tomlinson and the plaintiff and his wife, that a deed of arrangement should be entered into and executed, by all the said parties, with a view to effectuate the intention of Martha Tomlinson as expressed in her will. The deed of 1833 is then set forth, which recites, with greater particularity, the doubts that were entertained respecting the validity of the appointment, and that S. Tomlinson and James Tomlinson and the [*240] plaintiff and his wife, in order to obviate any doubts respecting the same, had agreed to assign the stock upon the trusts thereafter expressed. So that the plaintiff, being fully aware that there were doubts as to the validity of the appointment, agrees to settle them by executing this deed of 1833. He executed the deed accordingly, and concurred in transferring the fund to the trustees of that deed. The question then resolves itself into this, namely, whether, there being doubts existing between the parties as to their rights, and the plaintiff having agreed to put an end to those doubts by settling the fund in a manner the most beneficial to himself that could be, is he now at liberty to say that he will not be bound by that settlement?—[The Vice-Chancellor: How was Mrs. Phipson bound by the deed? The power given to her by Mrs. Tomlinson's will, was testamentary. How then could any instrument executed by her, which was not testamentary, be an execution of her

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power ?] [1]—Supposing that Mrs. Phipson was not bound by the deed ; yet her husband must be bound by the agreement that he had entered into, and he must be held to have taken the fund, under her will, as a trustee for carrying the trusts of the deed into effect. What reason is there for supposing that she would have made such a will, if she had not known that her husband was bound by the deed ? By executing the deed, the husband bound himself to settle the property upon the trusts of that deed, and his wife made her will upon the faith that he was so bound. Besides, it is very doubtful whether the wife's will was not revoked by the deed of 1835.

Mr. James Russell with the *Solicitor General* :—The case of *Bray v. Hammersley* has no application to the present case. In that case there was only one child of the marriage, and the real question was whether, 'as the husband insisted in his bill, the power contained in the [*241] settlement of 1805, had not, on that account, become inoperative. There the mother directed the trustees to pay the income of the fund to such person or persons, &c., as her child should, either by deed or by will, appoint, and, in default of appointment, to the child, for her separate use for her life, and, after her death, to transfer the fund to her executors or administrators. Here the power given by Goore's will, is to appoint the funds to the children of Mrs. Tomlinson, the donee, or the issue of such of them as should be dead ; and Mrs. Tomlinson appoints, to her daughter *and her issue*, in manner following : the dividends are given to the daughter for her separate use for life, with a general power of appointment by will, not by deed ; and, in default of appointment and in case the daughter should not leave any child or grand-child the stock is given to other objects of the power. The endeavor to give Mrs. Phipson a power to appoint by will generally, is, altogether, out of the terms of the power given by Goore's will. *Alexander v. Alexander*. (a) We submit, therefore, that the appointment made by Mrs. Tomlinson, was invalid beyond the life estate given to her daughter ; and that this case differs from *Bray v. Hammersley*, as, there, the only appointee got the fund in the most beneficial manner possible, and there was no attempt to give it to any other person. [The Vice-Chancellor : The parties to the deed of 1833, profess it to be their intention to carry the intention of Mrs. Tomlinson into effect. Her intention was to exclude the husband of her daughter ; but, by the deed, they give him a life interest in the stock. The deed, as I understand, does not at all point to this, namely, that, 'if [*242] the wife should appoint the stock to her husband, he should hold it as a trustee for his children. The parties might easily have bound any rights that they might have, by expressly doing so : but I do not see that they have used any words for that purpose.]

(a) 2 Vez. 640.

[1] That the execution of a power, by deed, which ought to have been executed by will, will not be remedied ; but, that the defective execution of a power by will when it should have been by deed, may be aided ; and for the reason of the distinction, see 1 Story's Eq. § 173.

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Mr. *Wigram* for James Tomlinson :—The plaintiff is suing in a representative character, but he was a party to the deed of 1833, in his individual character. In *Nail v. Punter*(a) the wife had a separate interest for life with a power to appoint the capital by will. The trustees, at the request of the husband, sold out the stock. Afterwards, the wife, by her will, exercised her power in favor of her husband; and he, after her death, sought to compel the trustees to replace the stock: but the court said that, as he was a party to the transaction, he could not sue the trustees. That case is precisely in point: for here the husband was a party to the deed of 1833, and got a consideration for joining in the execution of it. Next: Mrs. Phipson perpetuated the trusts of the deed of 1833, by appointing the new trustees: and the court, we apprehend, will hold that appointment to be a revocation of her will.

Mr. *Turner* with Mr. *Wigram* :—It is apparent, on the face of Mrs. Tomlinson's will, that she intended to provide for the issue of Mrs. Phipson, although she could not legally do so. The parties to the deed of 1833, intended to carry into effect the intention of Mrs. Tomlinson in favor of the children and issue of Mrs. Phipson. The question is, whether that deed is to [*243] be defeated by Phipson's claim? The deed is a contract, by all the parties, that the property shall be held upon the trusts of the deed. Can then Phipson, who is a party to it, claim against it and defeat it?

Mr. *Jacob* and Mr. *Booth*, for the defendants Turner and the children of Mr. and Mrs. Phipson :—The court cannot, at the suit of the father, take from the children the interests given to them by the deed of 1833, which was executed by the father. If the father is right in saying that he is not bound by that deed, the consequence is that he has a right to file a bill against the executors of Goore and the executors of Mrs. Tomlinson, to compel them to replace the 6000*l.* stock and to transfer it to him: but *Nail v. Punter* is a strong authority against that.

Supposing that the power given to Mrs. Phipson was valid, and that it was well exercised by her will, her will was revoked by the deed of 1835; for it purports to devote the fund to other trusts and purposes, namely, the trusts and purposes of the deed of 1833.

But we contend that the power was not valid. In *Bray v. Hammersley*, the power given by the settlement was given in much more extensive terms than the power given by Goore's will, and the appointment made under it, was essentially different from the appointment made by Mrs. Tomlinson. By Goore's will, Mrs. Tomlinson was authorized to appoint the funds to all and every, or such one or more exclusive of the other or others of her children, or of the issue of such of them as should be dead, in such parts, shares or proportions as she should direct. In *Bray v. Hammersley*, the appointment was, in effect, an appointment to the daughter herself. The [*244] power given to Mrs. Phipson, after her life estate, was a mere naked power; it was not either a part, a share or a proportion. The power

(a) *Ante*, vol. 5, p. 555.

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given to Mrs. Tomlinson was, to give property, not a power, to her children.
Campbell v. Sandys.(a)

Mr. Girdlestone in reply, said that there was nothing in the deed of 1833, which showed that the parties intended to bind any interest in the fund which Mr. Phipson might thereafter acquire: that there was an anxious intention, apparent on the face of the deed, to prevent its operating to defeat Mrs. Phipson's testamentary power: that, in *Nail v. Punter*, the husband had received the proceeds of the sale of the stock, and was seeking, by his bill, to avail himself of his own wrong.

THE VICE-CHANCELLOR:—Suppose that Mrs. Tomlinson had appointed the 6000*l.* consols to her daughter, Mrs. Phipson, and then had directed that such part of the fund as should not be disposed of by will or otherwise, should go to her two sons; it cannot be disputed that that would have been a good exercise of her power. Is not such a disposition the same, in substance, as a gift of the fund to her daughter, for her separate use, with a testamentary power of appointment, and, in default of that appointment, to the two sons? If Mrs. Tomlinson had named certain persons as appointees, who did not fall within the description of her own children or issue of her children, the appointment would have been void to that extent: but, when she gives, to Mrs. Phipson, a separate interest for her life, and a separate power of appointment by will, she is, in fact, giving her an in- [245] terest, though it is a more limited mode of giving her the property.

If Mr. Phipson, when he executed the deed of July, 1833, meant to deal with the interest he then had, that is one thing; but, if he meant to deal with the interest which he might subsequently acquire, that is quite a different thing. It is very extraordinary, if the parties to that deed meant to bind Mr. Phipson with respect to any interest he might thereafter acquire from his wife by testamentary appointment, that they did not say so. It is a remarkable feature in this case (where it is quite obvious that, if the parties had meant the thing, they might have expressed it in definite words,) that there should be any contention that though, in point of fact, the instrument has no such words, it must be said that the meaning of it is tantamount to such words.

Is there any thing like a bargain, on the face of the deed, is there any stipulation that Mrs. Phipson should not execute her power? If there had been a recital introduced into the deed to the effect that Mrs. Phipson had consented not to execute her power, though it would not have bound her, yet it would have been a good intimation of the intention of the parties; but, if there is no reference to her not executing the power, it seems to me, in the result, that they wished to leave it, altogether, to her to execute the power just as she pleased. It is so perfectly notorious, among the profession, that a party may bind the interest which he may at a future time acquire by a will,[1] that I cannot but think that, if the intention of the gentle-

(a) 1 Scho. & Lef. 281.

[1] *Vide Wethered v. Wethered*, 2 Sim. 183, 192, n. 1.

1838.—Phipson v. Turner.

[246] man who prepared this instrument, had been to bind any future interest that might be acquired by Mr. Phipson under his wife's will, the deed would, itself, have contained a direct provision to that effect, or at any rate a provision that nothing that might be done by Mrs. Phipson in the execution of her power, so far as it tended to vest the property in any other person, should be for any other purpose than the purposes of the deed, and that the natural and obvious inference from the deed itself, is that it was not intended to prevent the execution of the power by the wife in any way she pleased.

In order that I may be certain as to the contents of the deed, I will read it over before I dispose of the case.

7th May.—THE VICE-CHANCELLOR:—I have read over this instrument which was executed after the appointment had been made by Mrs. Tomlinson.

I do not see any substantial difference between the appointment that Mrs. Tomlinson made, and that one which the House of Lords, in affirming my decision in *Bray v. Hammersley*, held to be good: for the power of appointment is, in effect, an interest given to the party.

But the question mainly turns upon this instrument of July, 1833; and the question upon that instrument, is whether it is to be taken as one which had the effect of binding that interest which Mr. Phipson took by virtue of the appointment which was made by his wife after the execution of this deed. Now the deed professes to be made between Sampson Tomlinson,

James Tomlinson, and Mr. Phipson and his wife, of the one part.

[247] and two gentlemen of the name of Turner and Palmer, as trustees, of the other part; and it recites, first of all, the will of William Goore, which gave the fund in question to Elizabeth Goore for life, and then to Mrs. Tomlinson for life, with remainder to her children, or the issue of such of them as should be dead, and, if more than one, in such parts, shares and proportions as she should appoint by her will, and, in default of appointment, in trust for the child or children of Mrs. Tomlinson who should be living at the time of the testator's decease, or the issue of such of them as should be dead. Then the deed recites the death of Goore and the death of Elizabeth Goore; and then it recites the appointment which was made by Mrs. Tomlinson; and the first question is, what is the effect of the appointment that Mrs. Tomlinson made? Why it gave the interest of the fund to Mrs. Phipson for her life for her separate use; and it then gave her a general power of appointment by will. That, therefore, was not an appointment of the whole interest in the fund; but the absolute reversion of the fund, would remain undisposed of, altogether, if there was no testamentary appointment; and the consequence therefore was that that reversionary interest, subject to the contingency of there being a testamentary appointment, would belong to the two brothers of Mrs. Phipson, and to Mr. and Mrs. Phipson in her right. Then the parties, having recited the effect of the appointment, recite that it is conceived that the gift or appointment of the interest and dividends of the 6000*l.* to Mary Phipson for her life, is good, but that the power to enable Mary

1838.—Phipson v. Turner.

Phipson to dispose of the sum of 6000*l.* and the interest thereof, is void, as having exceeded the power given to Martha Tomlinson by the will of William Goore; that it is also conceived that, if such power should be valid and should not be exercised by Mary Phipson, then and in either event, the "reversionary interest in the sum of 6000*l.* consols expectant on the de- [248] cease of Mary Phipson, belonged to Sampson Tomlinson, James Tomlinson, John Phipson and Mary his wife, or some or one of them. The expression, "either event," means, as I understand the instrument, either the event of the testamentary power of disposition given to Mrs. Phipson, being void, or the event of its being valid and of her not exercising that power; and then it recites that the two Tomlinsons and Phipson and his wife, in order to obviate any doubts respecting the same and to carry the intention of the testatrix Martha Tomlinson into effect, had agreed to assign the fund to two trustees on the trusts thereafter declared. Then it is observable that the parties of the first part, according to their several and respective estates and interests in the premises, assign and transfer the fund, describing it, "and all the estate, right, title, interest, use, trust, property, possession, possibility, claim and demand whatsoever, both at law and in equity, of them the said Sampson Tomlinson, James Tomlinson and the plaintiff and Mary his wife, or any or either of them, of, in and to the said sum of 6000*l.*:" and this assignment is expressed to be made to the gentlemen named as trustees in trust to pay the interest to Mrs. Phipson during her life for her separate use, and then to Mr. Phipson, and then to transfer the fund among their children, according to their joint appointment, or as the survivor should appoint; and, in default of appointment, among the children in the usual form; and, in the event of there being no children to take vested interests, then the fund is to go to those persons who would be entitled to the clear residue of Mrs. Phipson's estate in case she died intestate and unmarried. That is the effect of the deed, though the words that are used are rather different. Then there follow "certain [249] provisions which are analogous to the power of changing stocks and securities in a common settlement: and then there appears to me to be something rather material with respect to the construction of the instrument; because I observe that it is provided, "that, in case the trustees or either of them, or any future trustees should happen to die, or be desirous to be discharged from, or neglect or refuse to act in the trusts thereby created, at any time or times before the same should be fully performed or otherwise determined, then and in any such case it should and might be lawful, to and for the said Mary Phipson, to nominate and appoint any other person or persons to be a trustee or trustees for the purposes aforesaid;" and no power of appointing new trustees is given to any one but her: and then there follows a covenant, in the nature of a covenant for further assurance; and, in that covenant, no allusion whatever is made either to the execution or non-execution of the power given to Mrs. Phipson.(a) Then, in the same year 1833, Mrs. Phipson executed the

(a) The brief did not contain this covenant.

1836.—*Phipson v. Turner.*

testamentary instrument in question, which bears date in December in that year; and then, in a subsequent year, namely on the 22d of December, 1835, she did, in professed execution of the power given by the trust deed, appoint Arthur Ryland to be a new trustee of that deed. It is remarkable that Arthur Ryland, who was so appointed to be the trustee of the deed, appears to be one of the witnesses to the execution of the testamentary power. Now, it certainly strikes me that, if the intention of the parties had been to bind, at all events, the power which Mrs. Phipson had, either in the way of [*250] providing that she should not exercise the "testamentary power or by providing that, if she did exercise it in favor of any of the parties to the deed, then such interest as those parties took should be bound by the deed and should not be taken by the party for his own benefit, an object so simple as that, might have been provided for in the easiest and simplest manner. But the parties do not do anything like that; they merely make the deed in the form I have mentioned: and then the question arises, has the deed, in that form, at all bound Mr. Phipson, in the event that has arisen, namely, of his being the appointee of his wife of the whole fund, to subject, what he takes by virtue of the power of appointment, to the trusts of the deed? My opinion is that it has not. It is observable that the parties contemplated the interests which they then had: for they recite, first of all, that it was conceived that the testamentary power given to Mrs. Phipson was void; and, next, that, if such power should be valid and not executed, then the reversionary interest in the fund would belong to S. Tomlinson, James Tomlinson and Mr. and Mrs. Phipson. They then assign and transfer, according to their respective estates and interests; and they profess to convey the fund and all their estate and interest in it; and it is perfectly plain that, at the time when the instrument was executed, Mr. Phipson and his wife and her two brothers had an interest which might have taken effect in possession if she never exercised her testamentary power: and it is that, I apprehend, which is the subject of assignment by the deed, and that only; and I am the more confirmed in that opinion by this fact, namely, that the power of appointing new trustees is given to Mrs. Phipson only. For what reason could the parties have done that, but for this, namely, that, during her own [*251] life, she had an interest in the fund "for her separate use, and she also had, in herself, that testamentary power which she might have exercised in the same manner as if she had been plenary owner of the fund in question; and, therefore, it was right and natural that she, who seemed to have all the dominion over the fund, should have the usual power of naming the persons who, from time to time, should succeed any one of the trustees who might happen to be incapable of acting in the trust: and, for that reason, I think that this execution of the power to appoint new trustees, cannot be taken to be a revocation of the will: but it is also quite collateral to the execution of the testamentary power, and is only meant to be an execution of the power which is given by this deed in the event of Mrs. Phipson

1838.—*Estcourt v. Ewington.*

not executing her original testamentary power. And, on the best consideration I can give the subject, my opinion is that so far as a resistance is made to Mr. Phipson's claim to the absolute ownership of the fund, it must totally fail.[1]

*ESTCOURT v. EWINGTON.

[*252]

1838: 3d and 8th May.—Practice: Husband and Wife.

An attachment having issued against a married man for want of answer of himself and wife, the sheriff returned *cepi corpus* but that the husband was insane, and, therefore, incapable of answering.

Ordered that the wife should answer separately, and that the senior six clerk not toward the cause, should be appointed guardian to the husband to put in his answer.

A MARRIED man and his wife were two of the defendants in this cause. An attachment having issued against the former for want of answer of himself and wife, the sheriff returned *cepi corpus* but that the husband was insane, and on that account, was incapable of answering.

Mr. *Shadwell*, for the plaintiff, thereupon moved that the wife might be compelled to put in an answer for herself and her husband.

The Vice-Chancellor desired the Registrar, Mr. Walker, to ascertain what was the proper order to be made in such a case.

Mr. Walker furnished his Honor with the following extracts from Reg. Lib.

LETHLEY v. TAYLOR.

Reg. Lib. 1768, fo. 139

An attachment having issued against the defendant Taylor, for want of his and his wife's appearance, the sheriff returned *non est inventus*. The matters in question arose in right of the wife, and it appeared, by affidavit, that the husband was gone abroad. The plaintiff, therefore, moved that he might be at liberty to sue out process of contempt against the wife, to compel her to appear to and answer the bill: which, upon hearing the affidavit and an affidavit of notice of the motion to her read, was ordered accordingly.

*TARLTON v. DYER.

[*253]

Hil. 1805, Reg. Lib. B. 227.

THE defendants, Dyer and wife, having answered the original bill, the plaintiff amended the same: soon after which the husband went abroad, and his wife, the material defendant, was served with a *subpœna* to appear to and answer the amended bill: but, she refusing to appear, the plaintiff moved that an attachment might issue against her. But the court ordered that service

[1] Vide *Goldmid v. Goldmid*, 2 Hare, 187.

1898.—*Estcourt v. Ewington*.

of a *subpœna* to appear to and answer the amended bill, on the defendant Mary the wife of the defendant Dyer, should be deemed good service on her.

NAYLER v. BYLAND.

26th May, 1814, Reg. Lib. B. fol. 845 and 908.

THE bill was filed against the Count and Countess Byland, she being the executrix of the testator therein named, and charged that the Count was out of the jurisdiction of the court. On affidavit that he was residing in Holland, it was ordered that service of the *subpœna* to appear, &c., on the defendant, the Countess, should be deemed good service to her : and she having refused to appear, on affidavit of such service, the clerk in court was ordered to issue an attachment against her.

DORRIEN v. LIVINGSTON.

ON the sheriff's return, on the attachment, that the defendant was [254] confined at the lunatic asylum at "Horton, and affidavit, by the superintendant, of the defendant's insanity, the Senior Six Clerk not toward the cause was appointed guardian.

FORD v. CLOUGH.

16th February, 1837.

SIMILAR order on return to the attachment that the defendant was insane, and that it was dangerous to remove him, and on affidavit of the defendant's insanity.

The Vice-Chancellor ordered that the wife should answer alone, and that service of the *subpœna* upon her should be good service : and that the Senior Six Clerk not toward the cause should be appointed guardian to the husband to put in his answer.[1]

[1] " Bill by a judgment creditor against the defendant K. The latter had become imbecile ; and the question was as to enforcing an appearance and answer. His Honor the Vice-Chancellor appointed a guardian *ad litem*." *Copous v. Kauffman*, 3 Edw. Ch. Rep. 370, and see the Reporter's note. *Ibid*.

1838.—Harrison v. Wiltshire.

*HARRISON v. WILTSHIRE.

[*255]

1838 : 8th and 9th May.—Taxation ; Security for Costs.

A solicitor being indebted to A., and being pressed by A. to give him a security for the debt, prevailed on one of his clients (against whom he had a demand for costs which had not been taxed) to execute to A. a bond for 3000*l.*, as a part satisfaction of the costs due from the client to the solicitor : and the solicitor afterwards delivered the bond to A. A. knew that the sum secured by the bond, was claimed by the solicitor, to be due to him for costs, but had no notice that those costs had not been taxed.

A bill filed by the client against A., and the solicitor, praying that the costs might be taxed, and that the bond might stand as a security for so much only as should be found due, from the client, on the taxation, was dismissed as against A., with costs.

THE defendant Bevir, who was a solicitor, being indebted to the other defendant Wiltshire, in the sum of 4500*l.*, Wiltshire applied to Bevir, to give him a security for the debt ; upon which Bevir represented to Wiltshire, that Estcourt Cresswell, since deceased, (whose personal representatives the plaintiffs were) and R. Harris, were severally indebted to him in considerable sums for moneys paid, laid out and expended, advanced and lent by him on their account, and *for business done by him as their solicitor and attorney ;* and offered to assign, to Wiltshire, the debts so due from Cresswell and Harris, as a security for the 4500*l.* Wiltshire agreed to accept the security ; and, thereupon, by an indenture dated the 24th of November, 1820, and made between Bevir, of the one part, and Wiltshire, of the other part, after reciting that Harris was indebted to Bevir, in the sum of 2000*l.* or thereabouts, for moneys paid, laid out and expended, advanced and lent to him or on his account, and for business done by Bevir as his attorney and solicitor in various transactions, and that Cresswell also was indebted to Bevir, in the sum of 2500*l.*, or thereabouts, on the balance of account for moneys paid, laid out and expended, advanced and lent to him on his account, *and for business done by Bevir, as his attorney and solicitor* in divers transactions, Bevir assigned to Wiltshire, all the debts and sums of money which then

'were or thereafter should be found due and owing to him by Harris [*256] and Cresswell, in respect of any matter or thing whatsoever, to the day of the date of the indenture, and all interest which then was or might accrue due in respect thereof, and also all bonds, bills, notes, deeds, mortgages, and other securities whatsoever, then in Bevir's custody or power, given or deposited for securing the same debts respectively, or either of them, or any part thereof, or on which Bevir had any lien in respect thereof : to hold the moneys to be recovered or received by virtue of the assignment, to Wiltshire, his executors, &c., in trust to retain, thereout, the 4500*l.* and interest, and to pay over the surplus, if any, to Bevir, his executors, &c.

Wiltshire did not consider this assignment to be a sufficient security for his debt, without some acknowledgment from Harris and Cresswell, of the amount due from them respectively to Bevir ; and, therefore, he pressed Bevir either to procure such acknowledgments, or to give him some further

1822.—Harrison v. Wiltshire.

security for his debt. In consequence of which, Bevir, in February, 1821, sent to him a bond, dated the 23d of that month, in the penalty of 6000*l.*, conditioned for payment, by Cresswell, his heirs, &c., to Wiltshire, his executors, &c., of the sum of 3000*l.*, with interest at five per cent., on the 23d of August, then next. This bond did not contain any recitals, but was a common money bond. It was executed by Cresswell, at Bevir's request, in part satisfaction of Bevir's demands on him. Cresswell's steward and two of his sons were present when he executed the bond, and one of his son's read it over and explained it to him. At the time when it was executed, Bevir had not delivered either his accounts or his bills of costs to Cresswell; [*257] but, at a "meeting held two days before, at which Cresswell's steward and several members of his family were present, the probable amount of Bevir's demands upon Cresswell, was taken into consideration and stated at 4000*l.* and upwards.

The bill alleged that, at the time when the bond was executed, no bills of costs had been delivered, to Cresswell, by Bevir, for the 3000*l.*, nor any account given to show in what manner that sum had become due, and that it was a fraud, on the part of Bevir, to prevail on Cresswell to execute the bond; that no money was paid, nor was any consideration given, by Wiltshire to Cresswell, for the bond; and that Wiltshire, at the time he accepted the bond, knew that Bevir was Cresswell's solicitor, and that Bevir had prevailed on Cresswell to execute it, by representing the 3000*l.* to be due to him for costs; that, under the circumstances aforesaid, the bond ought to be delivered up to be cancelled, or ought to stand as a security for such sum only as was really due, from Cresswell to Bevir, at the time it was executed; and that Bevir's bills of costs ought to be delivered and taxed. The bill prayed that it might be declared that the bond ought to stand as a security for such sum only as was justly due, from Cresswell to Bevir, at the time of the execution thereof; that an account might be taken of what was then due; and that Bevir might be decreed to deliver the bills of costs which were then due to him from Cresswell, and that the same might be taxed; and, if it should appear that nothing was then due, from Cresswell to Bevir, that the bond might be delivered up, to the plaintiffs, to be cancelled.

[*258] Cresswell, in his answer, admitted that, when he "accepted the bond, *he knew that Bevir was Cresswell's solicitor and that Bevir claimed the 3000*l.* as due to him, as such solicitor, from Cresswell*; but he denied that he then knew or had been informed that Bevir had not delivered either his bills of costs or his accounts to Cresswell.

Mr. Wigram, Mr. Wray, and Mr. Monro, for the plaintiffs:—At the time when the bond was executed, no bills of costs or accounts had been delivered by Bevir to Cresswell; and Wiltshire does not attempt to dispute that fact. If the bond had been given to Bevir, there can be no doubt that we should be entitled to the relief sought by the bill. Wiltshire, when he took the bond, knew that it was given in respect of costs due from a client to his

1838.—Harrison v. Wiltshire.

solicitor, and he does not affect to say that he had ascertained that those costs had been taxed. As he took the bond with notice of the circumstances under which it was executed, he stands in the same situation with respect to it as Bevir would have done, and must hold it subject to the same equities as Bevir would have been liable to, had it been given to him. If that were not so, it would always be in the power of a solicitor to evade the liability to have a security for costs reduced on taxation, by prevailing on his client to give the security to a third person. If a person takes a bill of exchange that is over-due, he takes it subject to all the equities to which it is liable, whether he had notice of them or not. There is nothing which makes this case different from a case between Bevir and Cresswell. *Horlock v. Smith*, (a) *Waters v. Taylor*, (b) *Detillin v. Gale*, (c) *Down v. Halling*, (d)

*Mr. Jacob and Mr. Wilbraham, for the defendant Wiltshire:— [*259] There is no case against Wiltshire, unless it be the law that a party who takes from a solicitor a security given by the client, stands in the same situation with respect to it as a person who takes a bill of exchange that is over-due. There is no analogy between a bond and an over-due bill. There is no evidence that Wiltshire, when he took the bond, knew that the costs due from Cresswell to Bevir, had not been taxed. Suppose that Bevir had prevailed on Cresswell to pay him the 3000*l.* in bank-notes, and had handed them over to Wiltshire: could Cresswell or his representatives have followed the money in the hands of Wiltshire and have compelled him to pay it into court, to await taxation of Bevir's bills of costs?

Mr. Parry appeared for the defendant Bevir.

THE VICE-CHANCELLOR:—This is a very simple case.

With respect to the defendant Wiltshire, it is a plain that the bill must be dismissed with costs. There is nothing whatever to impeach his right to hold the bond and to insist on being paid, the whole of what is due on it, out of Cresswell's estate. A previous assignment had been made to him, by Bevir, of debts due from Cresswell and Harris; and then a bond was given by Cresswell, which Bevir put into possession of Wiltshire, as a security, *pro tanto*, of the debt due to him. There was nothing whatever to raise a suspicion, in the mind of Wiltshire, that the bond was given for a demand the amount of which had not been ascertained; but, on the contrary, the amount of the demand was, to all appearance, settled. There is nothing, therefore, to affect the validity of the bond, as far as Wiltshire is concerned; and, as to him, the bill must be dismissed with costs.[1]

(a) 2 Myl. & Craig, 495. (b) Ibid, 526. (c) 7 Ves. 583. (d) 4 Barn. & Cres. 330.

[1] As to mortgages and other securities given by a client to his attorney. See *Jones v. Tripp*, Jac. 322. *Williams v. Piggott*, id. 598, 602, n. 1. *Jenkins v. Gould*, 3 Russ. 393. *Starr v. Federhuyden*, 9 Johns. Rep. 253.

 1838.—Piggott v. Garraway.

[*260]

*PIGGOTT v. GARRAWAY.

1838: 28th May.—Payment of Money out of Court; Construction of Lord Brougham's 28th order. Lord Brougham's 28th order, which directs that orders for paying out sums of money shall specify the amount to be paid out, applies to those cases only in which the amount to be paid out can be ascertained at the time when the order for payment is made.

By an order in this cause, it was directed that so much of the fund in court as should be sufficient to answer 10s. in the pound on certain ascertained legacies, should be raised and paid to the legatees: the amount to be verified by affidavit. The Accountant General's clerk objected to this order on the ground that it did not specify the amount to be paid; as, he contended, it ought to have done according to Lord Brougham's 28th order,[1] which directs that, in all cases where any sums of money or any securities or other effects belonging to the suitors of the Court of Chancery, shall be directed to be paid into or deposited in the Bank of England in the name and with the privity of the Accountant General of the said court, and in all cases where any such sum of money or any securities or other effects, be directed to be paid out or invested in the purchase of securities, transferred or carried over or delivered out, *the exact sum of money and amount of securities so to be paid out*, invested, transferred or carried over, be ascertained by the registrar and *specified and expressed in the order of court* in words written at length, except in the case of residues of money or securities remaining after a portion directed to be applied for particular purposes, *the amount of which cannot be ascertained at the time of making the said order*, in which cases the order shall direct that the amount of such residues and shares of residues shall be ascertained and specified by affidavit.

On the objection being mentioned by Mr. K. Bruce,

The Vice-Chancellor said that Lord Brougham's order could not be [*261] taken to be applicable, unless the sum *directed to be paid could be ascertained at the time when the order for payment was made; and that the sum mentioned in the affidavit, in this case, was the sum which the Accountant General ought to pay.

 DRIVER v. WRIGHT.

1838; 31st May.—Practice; Discovery; Production of Documents.

Where a defendant to a bill of discovery in aid of an action brought against him by the plaintiff, has been ordered to deposit, in the hands of his clerk in court, documents admitted, in his answer, to be in his custody, the plaintiff is entitled to have such of those documents as, by reference in the body of the answer, are made part of the answer, produced and read, at the trial, as part of the answer.

[1] Vide 1 Myl. & K. Appendix, xiv.

 1838.—Boys v. Morgan.

THE bill was filed for a discovery in aid of an action which had been brought, by the plaintiff, against the defendant; and, in obedience to an order made in the cause, the defendant had deposited, in the hands of his clerk in court, certain documents which his answer admitted to be in his custody or power.

The plaintiff now, moved that the defendant's clerk in court might attend, at the trial of the action, with the documents that had been deposited in his hands, in order that the same might be read as part of the answer.

Mr. *James Russell* appeared for the plaintiff in support of the motion.

Mr. *Willcock*, for the defendant, cited *Brown v. Thornton*.(a)

The Vice-Chancellor said that *Brown v. Thornton* did not apply; for it did not appear, in that case, that the documents to which the motion related, were, by *reference, made part of the answer: that the plain- [*262] tiff was entitled to have the whole of the answer produced at the trial of the action; and, therefore, if the officer of the court had in his possession documents which were made part of the answer, he ought to attend, at the trial, with those documents, as otherwise the court of law would not have the whole of the answer before it.

Ordered: That the defendant's clerk in court should attend at the trial, with such of the documents as were referred to in the body of the answer, in order that the same might be read as part of the answer.

 BOYS v. MORGAN.

1838: 31st May.—Demurrer; Practice.

In computing the twelve days allowed by Lord Brougham's 10th Order, for filing demurrers, an intervening vacation is not to be excepted.

THE defendant appeared, on the 11th of May, and filed a demurrer in the forenoon of the 24th, being the thirteenth day after his appearance.

Mr. *K. Bruce*, for the plaintiff, moved that the demurrer might be taken off the file for irregularity, on the ground that it had not been filed within the time prescribed by Lord Brougham's tenth order, namely, twelve days after appearance.[1]

Mr. *J. Russell*, contra, said that, if a demurrer was filed before eleven o'clock on any day, it was the practice of the offices to consider it as filed on the day preceding: that, in this case, the office had been closed, for the Easter recess, during the preceding week; and, in *Bullock v. Edington*,(b) Sir A. Hart, V. C., held *that the eight days allowed by [*263] the orders of the court for entering a demurrer with the registrar,

(a) 1 Myl. & Craig, 243.

(b) Ante, vol. 1, p. 481, [n. 1.]

[1] Vide 1 Myl. & K. Appendix, vii.

1838.—Stanley v. Chester and Birkenhead Railway Company.

were eight office days ; and consequently, the demurrer in this case had been filed in due time.

THE VICE-CHANCELLOR :—The case cited does not affect the present question. In that case the demurrer had been filed, and the question was, whether it had been entered with the registrar, which was an act subsequent to the filing, had been done in due time ; and Sir A. Hart thought that the eight days mentioned in the order there alluded to, were days on which the office was open.

Here the question is, not whether the demurrer was properly dealt with in the offices after it had been filed, but whether it was filed in due time. By Lord Brougham's tenth order, the time within which a demurrer must be filed, is twelve days after appearance ; and every one knows that a demurrer as well as a bill, may be filed in vacation.

Motion granted.[1]

[*264] *STANLEY v. THE CHESTER AND BIRKENHEAD RAILWAY COMPANY.

1838 ; 29th May.—Agreement ; Railway Company ; Corporation.

Certain persons intended to form a railway from A. to B., which was to pass over the plaintiff's estate. The plaintiff opposed the project ; but, on the agent for the projectors agreeing, in writing, to pay him, 20,000*l.* for the portion of his estate over which the railway was to pass, he consented to withdraw his opposition. At the same time, certain other persons intended to form a railway between the same termini, but by a different line, which also passed through the plaintiff's estate, but not through the same part of it as the former line : fourteen acres of the plaintiff's land were required for the former railway, and sixteen acres for the latter. The plaintiff opposed the latter railway also. The agents for the rival projectors then entered into and signed an agreement (which was approved of and signed by the plaintiff's agent) by which they agreed that the first line should be abandoned and the second adopted, and that the adopted line should take the engagements entered into, with the landowners, by the abandoned line ; and, thereupon, the plaintiff withdrew his opposition to the adopted line : and the act of Parliament for making the second railway and for incorporating the projectors of it, was passed. Held that the incorporated company were bound to perform the agreement made with the plaintiff by the projectors of the first railway.

In the year 1836, certain persons were proposing to form a company to make a railroad from Chester to Birkenhead, and were intending to apply for

[1] The question as to the computation of time is examined by Wigram V. C., in *McIntosh v. Great Western Railway Company*, 1 Hare, 328, where it was held that in the number of days for notice of the time and place of examining a witness *de bene esse*, an intermediate Sunday is to be reckoned. The Vice-Chancellor notices the doubts in which this question of computation of time was involved, and observes : " It is certainly much to be desired that the practice of the court should be uniform and settled upon such a subject as the computation of time, which enters more or less into its daily business. Yet this seems far from being the case. It appears that in some respects a different practice prevails between the registrar's and six clerk's officers. Again, if the last of a specified number of days allowed for doing an act, falls on a Sunday, the Sunday is not reckoned in the computation of time : but from the case of *Manners v. Bryan*, (1 Myl. & K. 453.

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an act of Parliament to enable them so to do; and they proposed to call themselves, "The Chester Junction Railway Company;" but they afterwards changed that name for, "The Birkenhead and Chester Railway Company." The line of railway proposed to be formed by the intended company, was, according to the plans deposited by them with the clerk of the peace for the county of Chester, to pass through and over certain parts of the estates of the plaintiff, and would have been injurious to and destructive of the plaintiff's property; and he was, therefore, in the first instance, much opposed to the formation of the railway. William Spurstow Miller was the [*265] solicitor employed by the promoters of the intended railway; and, in that character, he made overtures, to the plaintiff, for his consent to the execution of the plan; and, after some negotiation, the plaintiff undertook to give his consent to the company for the proposed line of railway, and to permit them to form the same through and over his estates, on terms to be fixed by the agents of the plaintiff and the intended company. The promoters of the railway appointed Miller to act for them in settling the terms, between them and the plaintiff, for the purchase of so much of his land as was required for the purposes of the proposed railway, and for the damage to the plaintiff consequential on the formation of it; and Miller was duly authorized to act therein for the promoters of the company; and the plaintiff appointed and authorized Richard Blundell to act for him. Miller and Blundell accordingly met; and, on the 17th of January, 1837, a memorandum bearing that date, was signed by them, which was as follows: "Memorandum of terms of arrangement, this 17th day of January, 1837, agreed upon between the undersigned Richard Blundell, on behalf of Sir Thomas Stanley, Bart., on the one part, and William Spurstow Miller, on behalf of the proposed Chester Junction Railway Company, on the other part. Whereas the said company propose applying to Parliament, in the ensuing session, for an act of Parliament to form a railway, from the ferries opposite to a certain place, on the proposed Grand Junction Railway now forming, called Crewe, or some portion thereof, and have deposited plans, with the clerk of the peace for the county of Chester, of such proposed measure: and whereas the line of railway as delineated in the said plans, will run a considerable distance through the lands and property of

S. C. 5 Sim. 147,) it seems doubtful whether this applies to a holiday. In *Bullock v. Edington*, (1 Sim. 481,) Sir Anthony Hart decided that the eight days allowed for entering a demurrer with the Registrar, meant eight office days, excluding intervening holidays. But in *Manners v. Bryan* the Vice-Chancellor in deciding that when the last day is a holiday, that day is not to be reckoned said, 'If it had been one of the intermediate days it ought to have been counted.' I have always understood that in the time allowed to a party for taking a step in a cause, Sundays in general are reckoned, unless the last day be a Sunday, in which case it is excluded. This is the practice as to the time allowed for filing demurrers. *Boys v. Morgan*, (*supra*,) *Myburn v. Lyster*, (5 Sim. 565,) *Angell v. Wescombe*, (1 Myl. & Cr. 48.) For unless, in these cases the intervening Sunday were counted, the questions would not have arisen. The practice at law is certainly no guide for the practice of the courts of equity, &c. &c." Vide 1 Dunl. Pract. 372.

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[*266] Sir Thomas Stanley, and will, as he alleges, seriously injure his property, and cause considerable damage to himself and his tenants: and whereas Sir Thomas Stanley hath been applied to for the sale of his land so to be taken by the said railway, and the same, including compensation for all damages both present and consequential, both to himself and his tenants, of every description whatsoever, whether arising from severance or otherwise, have been agreed and fixed at the sum of 20,000*l.*: now it is hereby agreed and fixed that, in case the said act shall pass into a law, the said company shall pay, to Sir Thomas Stanley, the said sum of 20,000*l.* at the following times and in the following manner, that is to say, the sum of 5000*l.* previous to the company entering on to the land for the purpose of commencing the formation of the said railway, and within three months from the day the act of Parliament shall receive the royal assent, and the sum of 10,000*l.*, within twelve months from the day of the first mentioned payment, and the sum of 5000*l.*, within twelve months from the day of payment of the last mentioned payment; and that, on payment of the last mentioned sum of 5000*l.*, and not before, Sir Thomas Stanley shall execute, with all proper parties, a conveyance of such part of his property as shall be required for the railway, as delineated and marked out in the plan so deposited; and that, in the formation of the railway, such conveniences as Sir Thomas Stanley shall require for communication with the land on each side and for hunting purposes, shall be made, and, in case of any difference on this point, the same shall be left to his surveyor and one to be appointed by the company, and of such third person as the two so named shall appoint, and the decision of any two of them shall be conclusive."

[*267] About the same time as the scheme for forming "the Birkenhead and Chester Railway Company" was on foot, another proposal was made, by other parties, for forming a railway between the same points, Chester and Birkenhead, but by a different line; and it was proposed by them that application should be made to Parliament for forming them into a company, with powers to make such railway, and which should be called, "The Chester and Birkenhead Railway Company."

The proposed line of the proposed Chester and Birkenhead Railway, also passed through and over the plaintiff's estates, and to such line the plaintiff dissented.

Joseph Mallaby was the solicitor for the company intended to be called The Chester and Birkenhead Railway Company, and was authorized to act for them; and in the session of 1837, two bills were introduced into the House of Commons, by the respective promoters of them, one for forming the line of railway to be called "The Birkenhead and Chester Railway," and the other for forming the line of railway to be called "The Chester and Birkenhead Railway." Both the bills were referred to the same committee of the House, by whom the respective merits of the two rival lines were examined; and, in the progress of such examination, a proposal was made, by one of the

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members of the committee, that it should be referred to Lord Sandon and Mr. Wilson Patten, two members of the committee, to determine which of the two proposed lines should be adopted. This proposal was assented to by the promoters of the two bills; and an entry of the fact of such agreement for reference, was made in the minutes of the proceedings of the committee. Before the committee adjourned for the day on which such proposal was made and agreed to, an agreement was made and signed by the respective solicitors for the two bills, which was as follows: "It is agreed, by the undersigned solicitors of the Chester and Birkenhead, and Birkenhead and Chester Railways, for and on behalf of their respective clients, that the merits of the two lines shall be submitted to Lord Sandon and Mr. Wilson Patten, who are to decide which line shall be adopted, and what ought to be done for the accommodation of the different ferries by the line selected. It is the basis of the agreement that the shareholders of the rejected line, are to be at liberty, if they think proper, to take shares in the other line: and further, *that the adopted line is to take the engagements entered into, with the landowners, by the rejected line.*—18th. April, 1837.—Joseph Mallaby, solicitor for the Chester and Birkenhead Railway.—W. S. Miller, Samuel Brittain, jun., solicitors to the Birkenhead and Chester Railway." This agreement was approved of and adopted by the promoters of the two bills, and by the agent of the plaintiff; and such approval was testified by the agreement being signed as follows: "Approved, R. Bryan, chairman, Christopher Bentham: Approved, George John Chamberlayne, Samuel Brittain: Approved, Richard Blundell." Bryan and Bentham were two of the members of the committee acting for the promoters of the Chester and Birkenhead Railway Company's bills, and Chamberlayne and Brittain were two of the committee acting for the promoters of the Birkenhead and Chester Railway Company's bill; and Blundell was the agent authorized to act for the plaintiff.

The referees made their award, which was filed amongst the minutes and proceedings of the committee of the House of Commons. The award, after deciding in favor of the Chester and Birkenhead line, concluded as follows:—"Having no authority from the landowners, we have not felt ourselves at liberty to go into detail into the question of injuries apprehended by them from the respective lines. They will, of course, remain in full possession of the right of being heard before the committee, and stating their objections to either line.—Sandon. T. Wilson Patten."

Upon this award being made, the Birkenhead and Chester bill was withdrawn; and the bill for making a railway from Chester to Birkenhead, was passed by the House of Commons.

The plaintiff, relying on the agreement so made between Miller on behalf of the Birkenhead and Chester Railway Company, and Blundell on the plaintiff's behalf, and so as aforesaid agreed to be adopted by the Chester and Birkenhead Railway Company, assented to the proposed bill for forming the Chester and Birkenhead Railway, and took no part in the further opposition that was made thereto in the House of Commons and in the House of Lords

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The Chester and Birkenhead Railway Bill passed the House of Lords, and the royal assent was given to it, on the 12th of July, 1837: and, by the act of Parliament so passed, it was enacted that certain persons therein named, of whom Bryan and Bentham were two, should be united into a company for making and maintaining that railway, and should be a body corporate by the name of "The Chester and Birkenhead Railway Company."

The bill, after stating as above, and that the defendants pretended that no contract or agreement was ever made, by them, with the plaintiff or [*270] any one on his behalf, for the purchase of any part of his estates, charged that, by the terms of the agreement under which the reference to Lord Sandon and Mr. Wilson Patten was made, the defendants adopted the agreement of the 17th of January, 1837, which had been entered into between Miller and Blundell as aforesaid; and took upon themselves all the liabilities under it of the promoters of the other line of railway, who, under it, would have been bound to pay, to the plaintiff, and therefore the defendants became bound to pay him, at the times and in the manner in that agreement specified, the sum of 20,000*l.*: that the defendants pretended that, although they undertook, in general terms, to adopt all the engagements entered into, by the promoters of the other line of railway, with the landowners, yet that they did not know of the existence of the contract or agreement with the plaintiff, and were, therefore, not bound by it: but the bill charged that, at the time when the proposal for reference to Lord Sandon and Mr. Wilson Patten was under consideration between the several parties, Miller, acting as solicitor and agent of the promoters of the line, which was afterwards rejected, distinctly informed Mallaby, who was acting as solicitor and agent of the promoters of the line which was adopted, and in the presence and hearing of Blundell, the agent of the plaintiff, of the existence of a contract or agreement with the plaintiff; and, although Miller declined to name the exact sum which, under such contract or agreement, was to be paid to the plaintiff, yet he informed Mallaby, and also two of the persons acting as a committee for the Chester and Birkenhead Railway Company, that the sum was more than 15,000*l.*, but would not exceed 20,000*l.*; and that it was

after they had distinct knowledge, to that extent, of the contract or [*271] agreement with the plaintiff, that the agreement for reference to

Lord Sandon and Mr. Wilson Patten was made and signed: that the defendants pretended that the contract or agreement so made between Miller and Blundell, was binding upon them only in the event of their taking the same line of road that was the subject of that agreement; and that the line that they were authorized, by the act of Parliament, to take, would not require so much of the plaintiff's land as would have been required or taken by the other line, and would not do so much injury, to the plaintiff's estate, as would have been done by the other line; and that, therefore, they ought not to be bound to pay so large a price as had been agreed upon; whereas the plaintiff charged that, by the line of road proposed to be formed by the Birken-

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head and Chester Railway, only 14½ statute acres would have been taken of the plaintiff's land; whereas, by the line to be formed by the defendants, 16½ statute acres were to be taken; and the rejected line was purposely laid down so as to avoid certain fox coverts and preserves on the plaintiff's estate; whereas the line of the defendants went through and destroyed two fox coverts and preserves, and, in other respects, did much greater injury, to the plaintiff and his estate, than would have been done by the line of railway, the formation of which was the subject of the agreement.

The bill prayed that it might be declared that the agreement of the 17th of January, 1837, was binding upon the defendants, and ought to be performed by them; and that, under it, they were bound to pay, to the plaintiff at the time and in the manner therein mentioned, the sum of 20,000*l.*; and that they might be decreed specifically to perform the said agreement, and, forthwith, to pay to the plaintiff, the sum of 5000*l.*, *and to [*272] pay to him the sum of 10,000*l.* on the 13th of October then next, being twelve months from the day when the first 5000*l.* ought to have been paid, and to pay, to the plaintiff, the further sum of 5000*l.* on the 13th day of October, 1839; the plaintiff offering to perform and execute the agreement, in all respects, on his part.

The defendants demurred, to the bill, for want of equity.

Mr. Jacob, Mr. Wigram, and Mr. Walker, in support of the demurrer:— In *Edwards v. The Grand Junction Railway Company*, (a) a body corporate was held to be bound by an agreement entered into, not by the body corporate, but by an agent for the projectors of the company, before they were incorporated. It is not very easy to collect, from the judgment on the appeal in that case, on what principle the company were held to be bound. In this case, however, the object is to transfer an agreement entered into with one company and relating to one set of lands, to another company and another set of lands, or, in other words, a contract with A., respecting black acre, is to be considered as a contract with B., respecting white acre.

This bill treats of two intended railway companies; one, proposed to be called, The Chester Junction Railway Company, which name was, afterwards, changed for that of The Birkenhead and Chester Railway Company, but which never came into existence; and the other, The Chester and Birkenhead Railway Company, *which was brought into existence by [*273] an act of Parliament passed in 1837. Miller is described, in the bill, as the solicitor for the *promoters* of the intended railway; and the bill states that, in that character, he made overtures, to the plaintiff, for his consent to the execution of the plan; and that, after some negotiation, the plaintiff undertook to give his consent, to the company, for the proposed line, and to permit them to form the same through his estates, on terms to be fixed by the agents of the plaintiff and the said *intended company*. In the next allegation, a different phraseology is used, namely, that the *promoters* of the rail-

(a) 1 Myl. & Cr. 650, and ante, vol. 7. p. 337.

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way appointed Miller to act for them in settling the terms between them and the plaintiff. The bill then sets forth the agreement which was entered into between the agent for the plaintiff, and the agent for *the promoters* of the company. It related to the compensation to be made, to the plaintiff, for land to be taken and damage to be done in making the Birkenhead and Chester Railway; and it was to be binding only in case "the said act," that is, the act which Miller's clients were applying for, should pass into a law.

Now we come to the other company, to which the liability under this agreement, is sought to be transferred: the company with which the agreement was made, proved to be an abortion. This other railway was to be formed between the same points, but *by a different line*; and it was intended to be called the Chester and Birkenhead Railway. The bill then alleges that Mallaby was the solicitor for the Chester and Birkenhead Railway Company, and was authorized to act for them; and that two bills were introduced, into the House of Commons, by the respective *promoters* of the two [*274] railways. Then an agreement entered into by "the solicitors of the railways is set forth; and, in that agreement, we find a different term used, namely, *shareholders*. This latter agreement was a contract of indemnity between the two rival companies. The plaintiff cannot be entitled to the benefit of it; for he was no party to it: and, moreover, his agreement with the rejected company was to be binding on them in the event only of their bill passing into a law, which it did not.

In order to bind a company by a contract entered into previous to their incorporation, the contract must be one which was binding on all the individuals of the company. But here the object is to transfer a contract, entered into with the promoters of one railway to the promoters of another railway, and, from them, to the company: and, it does not appear that the individuals who were incorporated, were the promoters of the second railway.

Lastly: If a party seeks to enforce an agreement, he must show mutuality, that is, that there is an agreement binding on both sides. But, if the defendants were to seek to enforce this agreement against the plaintiff, he would say, "*Non hæc in fœdera veni*. I contracted to sell a smaller quantity of land and in another line." The plaintiff does not offer, by his bill, to give up the land over which the Chester and Birkenhead Railway is to pass; but he asks for a specific performance of the agreement entered into by him with the promoters of the Birkenhead and Chester Railway. That agreement was to take effect on the happening of an event, which has not occurred and is never likely to occur; and, if the defendants were compelled to take the land which forms the subject of that agreement, it would be utterly useless to them.

[*275] "Mr. Knight Bruce, Mr. Temple, and Mr. Lowndes, appeared for the plaintiff: but

THE VICE-CHANCELLOR, without hearing them said:—This case is a very simple one.

Certain persons entered into an agreement to form a railway, to be called

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The Birkenhead and Chester Railway, and a Mr. Miller was appointed their agent and solicitor. As the proposed line was to pass through the estates of the plaintiff, he objected to the project. An agreement was then made between Miller, as the agent for the projectors of the railway, and Blundell as the agent for Sir T. Stanley, the immediate effect of which was that, on certain terms specified therein, Sir T. Stanley should withdraw his opposition to the intended railway and allow it to pass through his estates: so that, by making this agreement, the promoters of the railway obtained the advantage which they stipulated for. The agreement provided that the company should pay to Sir T. Stanley 20,000*l.* by instalments; and that the company should not enter on his lands until the first instalment was paid.

About the same time, other persons projected a railway, which was to be called The Chester and Birkenhead Railway, and which was to be formed between the same *termini* as the first mentioned railway, but by another line; and it was designated, by their plan, that their line also would pass through Sir Thomas' estates. An agreement was subsequently entered into between the solicitors for the two bills for making the rival railways, which were then pending before a committee of the House of Commons, by which it was agreed that the merits of the two lines should be submitted to Lord Sandon and Mr. Wilson Patten, two of the members of the committee, who were to decide which line should be adopted. Then Lord Sandon and Mr. Patten made their award, by which they determined that the line projected by the Chester and Birkenhead Company should be adopted: and, at the close of their award, they say: "Having no authority from the landowners, we have not felt ourselves at liberty to go into detail into the question of injuries apprehended by them from the respective lines. They will, of course, remain in full possession of the right of being heard before the committee and stating their objections to either line."

That award having been made, the bill represents that the Birkenhead and Chester bill was withdrawn, and the bill for making a railway from Chester to Birkenhead was passed by the House of Commons.

While this arrangement between the Chester and Birkenhead Railway Company and the Birkenhead and Chester Railway Company was under discussion, an agreement, dated the 18th of April, 1837, was entered into by the solicitors of the promoters of the two bills, by which agreement they, first of all, determined that the merits of the two lines should be decided as I have mentioned, and also that it was the basis of the agreement that the shareholders of the rejected line should be at liberty, if they thought proper, to take shares in the other line; and that the adopted line should take the engagements entered into with the landowners by the rejected line: and there is no difficulty in understanding what the parties meant, namely, that everything agreed to be done, which bound the Birkenhead and Chester Railway Company, should bind the Chester and Birkenhead Company, as between the two companies "themselves. But, as that alone would

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not be sufficient, the agreement between Miller and Mallaby was approved and adopted by the promoters of the two bills; and such approval was testified by the signatures of two of the committee acting for the promoters of the Chester and Birkenhead Railway, and by two of the committee acting for the promoters of the Birkenhead and Chester Railway; and it was signed by Blundell, the plaintiff's agent, as follows: "Approved, R Blundell."

The bill then states that the plaintiff, relying on the agreement made between Miller on behalf of the Birkenhead and Chester Railway Company and Blundell on the plaintiff's behalf, and so agreed to be adopted by the Chester and Birkenhead Railway Company, and not doubting that the same would be faithfully adhered to and executed by the latter company, assented to the proposed bill for forming that company, and took no part in the further opposition that was made thereto in the House of Commons, or in the House of Lords. And so it appears, that a consideration was actually given, by the plaintiff, to the persons who afterwards formed the Chester and Birkenhead Company, namely, by his making no opposition to the further progress of their bill. It was quite plain, when the matter was in discussion, that the plaintiff's estates would be affected by the Chester and Birkenhead bill, and what part of his estates would be affected by it: and it is immaterial that there is a slight difference in the quantities required for forming the two lines, that is to say, fourteen acres and a half for the rejected line, and sixteen acres and three quarters for the adopted line, except that it shows fairness on the part of Sir T. Stanley.

[*278] *The agreement of the 18th of April, 1837, was signed by the agents of all parties; and the stipulation thereby made that the adopted line should take the engagements entered into with the landholders by the rejected line, was the same in effect, as saying that, instead of a new agreement being entered into between the plaintiff and the Chester and Birkenhead Railway Company, the agreement between the plaintiff and the Birkenhead and Chester Company, should be the agreement between the plaintiff and the Chester and Birkenhead Company. The Chester and Birkenhead Company, are, therefore, as much bound to pay the 20,000*l.* for taking the lands of the plaintiff over which their line passes, as the Birkenhead and Chester Company would have been for taking the lands over which their line was intended to pass.

The plaintiff asks, by his bill, that the agreement of the 17th of January, 1837, may be specifically performed; and that the defendants may be decreed to pay the 20,000*l.* to him, in the specified instalments; and, there is not the least doubt, in my mind, that he is entitled to the relief which he asks; and, therefore, the demurrer must be overruled.(a)

(a) Affirmed by the Lord Chancellor; see 3 Myl. & Cr. 773. [And see *Greenhalgh v. The Birmingham and Manchester Railway Company*, post, 416. S. C. 3 Myl. & Cr. 784.]

1838.—Marriott v. Tarpley.

*MARRIOTT v. TARPLEY.

[*279]

1838; 29th May 1st and 4th June.—Church-wardens; Jurisdiction; Pleading; Misjoinder.

A suit, in this court, by the church-wardens of a parish, to restrain a person from pulling down the churchyard wall is maintainable: and the church-wardens, notwithstanding their office has ceased, may file a supplemental bill for the purpose of stating facts occurred since the filing of the original bill, and may join their successors as co-plaintiffs with them in the supplemental suit.

THE REV. K. M. Tarpley, who was the vicar of the parish of Floore, in Northamptonshire, claimed a right of way from the vicarage house, to the parish church, over land belonging to Richard Packe, Esq., upon which the wall of the churchyard abutted: and, in assertion of that right, he, in 1833, began to pull down part of the wall of the churchyard, in which he alleged, that a gateway had formerly existed.

The plaintiff was William Marriott, who was one of the church-wardens of the parish. The defendants were Tarpley, the Dean and Chapter of Christ's Church, Oxford, who were the patrons of the vicarage, and rectors of the parish, and Thomas Marriott, who was the other church-warden of the parish. The bill prayed for an injunction to restrain Tarpley from pulling down the wall: and an injunction for that purpose was obtained on an *ex parte* application. An action of trespass was afterwards brought against Tarpley, by Jakeman, the tenant of the land over which the right of way was claimed. Tarpley, in justification of his trespass pleaded, first, a right of way, for the vicar for the time being, from the vicarage house to the parish church; and, secondly, a common public highway over the land. Issue was joined on both pleas; and the action was tried at the spring assizes for Northamptonshire, in 1834, when a verdict was found for the plaintiff in the action; on both issues. In the following term, an application was made to the Court of Common Pleas, for a *new trial, on the ground that the verdict [*280] was against evidence. But Mr. Justice Littledale, before whom the action was tried, having been referred to, and having certified that the verdict was satisfactory, the new trial was refused. Tarpley then put in his answer; and, thereby, set up a new claim to the right of way, namely, as a church-way. He afterwards moved to dissolve the injunction; but the motion was refused. A supplemental bill was then filed by William Marriott, who had ceased to be church-warden, and James Phillips, who had succeeded him, against Tarpley, the Dean and Chapter of Christ's Church and Thomas Marriott, who had been re-elected church-warden, for the purpose of stating the proceedings that had taken place at law.

The cause now came on to be heard. In the course of the argument, three questions were raised:

First, whether the church-wardens were entitled to institute the suit:

Second, whether William Marriott, who had ceased to be a church-warden, ought to have been made a co-plaintiff with his successor, Phillips, in the supplemental suit: and,

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Third, whether the Ecclesiastical Court had not exclusive jurisdiction over the subject matter of the suit.

Mr. *Wakefield*, Mr. *Jacob*, and Mr. *Turner*, for the plaintiffs, said that the guardianship of the fabric of the church and of the walls and fences belonging to it, was vested by law in the church-wardens; and that they [*281] might maintain an action for a trespass committed on *the property of which they were guardians; and, consequently, they could maintain a suit in equity to restrain the trespass.(a)

Mr. *Knight Bruce*, for the defendant, Tarpley, said that church-wardens might maintain an action for chattels, but not for things real belonging to the church, as appeared from the passage in *Viner's Abridgment* which had been cited by the plaintiff's counsel: that the proper course of proceeding, in a case like the present, was either by indictment, or by information in the name of the Attorney General, or by a bill filed, by one parishioner, on behalf of himself and the other parishioners: (b) that, as the suit was instituted by an annual officer, it did not enable the court to adjudicate, finally, on any right; that it was not the habit of the court, in any case, to decide a right after a single trial only; and, therefore, the court would not make the injunction perpetual, without allowing Tarpley to try, over again, the issues in *Jakeman's* action: that, at all events, he ought to be allowed to try the right to a church-way which he insisted on, for the first time, in his answer, and which never had been tried: that William Marriott, being no longer a church-warden, had ceased to have any interest in the subject matter in dispute, and, therefore, the original suit, the object of which was to decide a right between two parties one of whom had ceased to have any interest, must fail; that at all events, the supplemental suit could not be [*282] maintained; because a person who had no interest was joined, as *a co-plaintiff, with a party who had an interest, and such a misjoinder of parties was a fatal objection to the suit.

Mr. *Koe* and Mr. *Waddington*, with Mr. *K. Bruce*, said that church-wardens might be the owners of the goods, but that they had no interest in the freehold of the church, (c) and, therefore, they could not maintain an action with respect to the realty; and, moreover, the bill expressly alleged that the Dean and Chapter of Christ's Church were the owners of the boundary fence of the churchyard.—[The Vice-Chancellor: Suppose that the church-wardens are liable, at law, to keep the walls of the churchyard in repair, would it not follow that they might bring an action on the case against any person who injured the walls?—The church-wardens are not personally liable to repair any of the buildings or erections belonging to the church: they are liable to repair them only as representing the parishioners and if they have, in their

(a) 1 Burn. E. L. 346, 413; 2 Roll's Ab. 287; Vin. Ab. tit. Churchwardens, A. 2, *placita* 4 and 5. and see same tit. *placitum*, 10; *Anon.* 1 Vent. 127; *Watson's Clergyman's Law*, 382; *Gibson's Codex*, 218.

(b) 3 Com. Dig. tit. *Eglise*, F. 3, p. 656.

(c) Bac. Ab. tit. Church-wardens, (B); Year Book, 12 H. 7, page 27; 11 H. 4, page 12; Bro. Ab. tit. *Corporations*, folio 185.

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hands, funds produced by the church rates for that purpose, and it is doubtful whether they can maintain an action in respect of such a liability. *Phillips v. Pearce*.(a) By the 59 Geo. 3, c. 12, church-wardens were created corporations for certain purposes;—but, until that act was passed, they were incapable of holding land for any purpose whatever. *Doe v. Tarry*.(b)

This case is peculiarly within the jurisdiction of the Ecclesiastical Court. *Bennett v. Bonaker*.(c) *Walter v. Montagu*.(d)—[The Vice-Chancellor: The bill in this case is filed for an injunction; and, if the Ecclesiastical Court will interfere as against a person who has pulled down the wall of the churchyard, it follows that this court will grant an injunction. The cases cited are, therefore, in favor of the jurisdiction of this court.]

It is impossible to maintain the suit in the manner contended for by the plaintiffs; for, as Phillips does not derive his title under the prior church-warden, he ought to have been brought before the court, not by a supplemental bill, but by an original bill in the nature of a supplemental bill. *Lloyd v. Johnes*.(e)

Mr. Wakefield, in reply:—Church-wardens are bound, by law, to keep the church fence in repair: and it is no answer, to the censures of the Ecclesiastical Court for a neglect of that duty, for them to say that they have no funds in their hands; for they are bound to provide the funds in the manner which the law directs.(f)

The Ecclesiastical Court cannot issue an injunction; and, therefore, although it may punish an injury to the freehold of the church after it has been done, it has no power to prevent its being done.

In *Dent v. Prudence and Bond*(g) it is laid down that if church-wardens institute a suit whilst they are in office, they may continue it after their office has *determined; but they cannot commence a suit after [284] they have gone out of the office. The plaintiff, therefore, had a right to proceed with the original suit after his office had determined. The supplemental suit was not an original suit instituted by the plaintiff after he had gone out of office; but it was a continuation of the original suit which was instituted by him whilst he was in office. Supposing that the plaintiff was wrong in joining Phillips as a co-plaintiff with himself in the supplemental suit, the only consequence is that that suit must be dismissed, and the plaintiff will be deprived of the benefit which he would otherwise have had from the evidence as to the proceedings in Jakeman's action. We submit, however, that the objection of misjoinder of plaintiffs must be taken either by plea or by demurrer, and that if it is delayed until the hearing of the cause, it comes too late. *Raffety v. King*.(h)

THE VICE-CHANCELLOR:—There are several points in this case which

(a) 5 Barn. & Cross. 433. (b) 4 Adol. & Ell. 274; see p. 281. (c) 2 Haggard, Eccl. Rep. 25.

(d) Curtis' Rep. 253. (e) 10 Ves. 37.

(f) Watson's Clergyman's Law, 382; see also Vin. Ab. tit. Church-wardens, A. 2, *placitum* 8.

(g) 2 Strange, 852. (h) 1 Keen, 601. [619. n 1.]

1838.—Marriott v. Tarpley.

are not matters of frequent consideration ; and, therefore, I should like to look into them before I pronounce my judgment.

4th June.—THE VICE-CHANCELLOR :—I desired that this case might stand over for a few days in order that I might satisfy my own mind about the jurisdiction of the court to entertain such a suit : and I must say that it appears to me to be beyond all question that the court can entertain such a suit as this.

[*285] *The suit is of this form. The bill was filed, on the 18th of August, 1833, by a person of the name of William Marriott, who described himself as being one of the church-wardens of the parish of Floore ; and a gentleman of the name of Tarpley, who was alleged to have pulled down part of the wall of the churchyard, was one of the defendants, and the other church-warden, a gentleman of the name of Thomas Marriott, was also made a defendant. The court granted an *ex parte* injunction to restrain the act complained of. Afterwards, in the month of April, 1834, another gentleman of the name of Phillips was chosen a church-warden in the place of William Marriott, the plaintiff in the original bill ; and a supplemental bill was filed, in 1835, by William Marriott, the original plaintiff, and Mr. Phillips, who had been chosen the church-warden in his room ; and that supplemental bill was also against Mr. Thomas Marriott, who still continued to be a church-warden, and against Mr. Tarpley.

In the course of the argument at the bar, a case was quoted from Ventris, which was to this effect :—A prohibition was prayed on the behalf of a church-warden to the Ecclesiastical Court, for that they tendered him an oath upon these articles following : 1st, Whether any person within this parish hath encroached upon the churchyard. It was said that it concerned matter of freehold, but this was overruled by the Court of King's Bench ; and it was held that the church-wardens may take notice, in the Ecclesiastical Court, of encroachments on the churchyard.(a) There is another case (which

[*286] *occurred in the 2d year of William and Mary) of *Quilter v. Newton*.(b) In a prohibition, the case was that Newton, one of the churchwardens, libelled against Quilter for stopping the church-door and windows, by sheds, &c. built, as he supposed, upon part of the churchyard. It was moved for a prohibition upon a suggestion that the sheds were not built upon any part of the churchyard, but were built upon a lay fee, and that cognizance of lay fees appertains to the temporal courts. *Sed per curiam* : A prohibition shall not be granted, to any suit in the Spiritual Court, for any nuisance or other matter done in the churchyard, upon a suggestion that the churchyard is a lay fee : for a nuisance there is properly of ecclesiastical cognizance.

(a) In the report it stands thus : " It was said, to the first of these, that it concerned matter of freehold. But this was overruled : for they may take notice of encroachments on the churchyard."

(b) Carthew, 151.

1838.—*Marriott v. Tarpley.*

It was said, in the course of the argument in this case, that this court could not entertain the suit, because the church-wardens could not bring an action : but, if the church-wardens could institute a suit in the Ecclesiastical Court for the nuisance, there seems to be no reason whatever why this court should not interfere to prevent the very commission of the nuisance in respect of which they might have a suit.

Then, with regard to the circumstance which I have stated, namely, that the character which William Marriott originally held as church-warden, had ceased. It was said that, as he had ceased to be church-warden, he ought not to have been a party to the supplemental bill, and that no relief could be given on the original bill, with respect to him : and that, inasmuch as Mr. Phillips had become a church-warden in W. Marriott's place, Marriott had no interest in the original suit. *Now, with respect to that, it appears [*287] that, in the case of *Dent v. Prudence and Bond*, it was held that church-wardens, after their term of office had expired, could not bring a suit for a rate which accrued during their time : but it was agreed that if the suit had been begun within their year of office, they might have proceeded in it after their year was out. Besides that authority there is also the case of *Bodenham v. Ricketts*,^(a) which came before the Lords Commissioners in the year 1835, and which was brought before me in the spring of this year. The proceedings in that case show both the points, namely, that a church-warden cannot institute a suit in respect of a matter which happened before he became church-warden ; but that if, in the year in which he is church-warden, he does institute a suit in respect of something which then occurred, he may, notwithstanding his church-wardenship has expired, prosecute the suit. The facts of the case were as follows :—The suit was commenced, in the Ecclesiastical Court, for several church rates which accrued in the years 1828 and 1829, in which the libellers were not church-wardens ; and also for rates which accrued in 1830 in which they were church-wardens. They abandoned the suit for the rates accrued in the years in which they were not church-wardens, and gained a decree in the suit for the rate which became due in the year in which they were church-wardens. In 1837, which was long after they had ceased to be church-wardens, they took out a *significavit* to enforce payment under the decree ; and, in March, 1838, Ricketts moved before me to squash the writ ; but I refused the motion.

It is clear, therefore, from the cases to which I have referred, that [*288] a church-warden may libel in the Ecclesiastical Court for an injury done to the wall of the churchyard whilst he was church-warden ; and, if he commences the suit whilst he is church-warden, he may continue it when his church-wardenship has ceased. And in my opinion this court ought, in such a case, to be ancillary to the Ecclesiastical Court, and to grant an injunction as in other cases where any act in the nature of waste is either threatened or committed. I must, therefore, hold not only that the original

(a) Not reported.

 1838.—Boys v. Morgan.

suit was properly instituted by Mr. William Marriott, but that he had a right to continue it by filing the supplemental bill, notwithstanding his year of office had expired. And, inasmuch as Mr. Phillips was a church-warden at the time when the supplemental bill was filed, it is perfectly manifest that he had an interest as church-warden, in the continuance of that injunction which had been pronounced in 1833; for it applied to the very subject matter of which he was the guardian, and in respect of which he might have instituted a new suit in the Ecclesiastical Court.

My opinion therefore is, on the objections with respect to the maintaining of the suit, that they are unavailing, and that the suit may be maintained. I should, therefore, as a matter of course, have now made a decree for a perpetual injunction, but for this circumstance, namely, that those proceedings which were taken in the action which was brought by Mr. Jakeman, who was the tenant of Mr. Packe, have determined, merely, that there is not the vicar's right, nor is there the general right which was asserted by the two special pleas. In respect of them, a motion was made for a new trial,

[289] and that motion was refused by the Judges of the Court of "Common Pleas, who had received a certificate from the learned Judge who tried the cause, (Mr. Justice Littledale,) that he was satisfied with the verdict of the jury; and I think it right therefore, that those points shall not be tried again. But I think, that if Mr. Tarpley is desirous that there shall be further proceedings had, for the purpose of determining whether there is that which has been called the church-way, I certainly will give him liberty to try that question. The injunction, however, must be continued in the meantime.

BOYS v. MORGAN.

1838; 11th, 13th, and 19th of June.—Construction; Will; Residuary Gift.

A testator concluded his will as follows: "I guess there will be found sufficient in my banker's hands, to discharge all my debts, which I desire Mrs. E. M. to do, and keep *the residue* for her own use." Held, (the whole of the will being taken together) that E. M. was entitled, not only to the residue of the money in the banker's hands, but to the residue of the testator's general personal estate.

THE plaintiff was one of the next of kin of John Boys, who died in August, 1835. The defendants were the other next of kin, and Eliza Morgan to whom probate of the deceased's will had been granted.

The bill alleged that, in 1825, Eliza Morgan went to reside with John Boys, and continued to live under his protection until his death: that, having acquired great influence over him, she, in the years 1831 and 1834, prevailed upon him to transfer into her name, four sums of stock, namely, two of 6000*l.* each, one of 6317*l.*, and another of 5200*l.*: that she alleged that John Boys had left a will which was in the following words:

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"London, No. 11 Gower street North, 28th June, 1835. To my friends and relations who may be curious *to inquire, be it known [*290] that, a few years back, of my own free will, I gave to Eliza Morgan, commonly called Eliza Castillo, all my furniture, table and bed linen and apparel, plate, watches and trinkets of any kind then in my possession, a piano forte, all my library, manuscripts, papers, &c., whatever have been added, and may hereafter be added previous to my decease, without any exception whatever, to her sole use and disposal, under promise from her that she will take care that I shall never be in want of any articles as long as I live. Having attained to the 82d year of my existence, and finding the infirmities of age increasing, I choose to give her this voucher of the truth, that none may question or trouble her to make declaration of it. She knows that, 30 years ago, I agreed with Dr. Hector Campbell, that he should have my carcase for chemical and anatomical experiments to be by him performed upon it, if he could prevail on her to give it him; doubting her compliance, I will trouble my head no more about it. The world may think this to be from a spirit of singularity or whim in me. Be that as it may, I have always had a mortal aversion to funeral pomp and expense: and therefore trust she will avoid it: and had rather be given away, with the sum a funeral would cost, for the purpose of dissection and chemical experiments. I guess there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire Mrs. Eliza Morgan to do, and keep *the residue* for her own use and pleasure. John Boys."

The bill charged, that the before mentioned transfers were made without consideration, and that Eliza Morgan held the stock as a trustee for John Boys; and that, at the date of his will, he had money at his banker's *more than sufficient to pay all the debts that he *then* owed. The [*291] bill prayed that it might be declared that *the general* residue of the deceased's personal estate did not pass by the will, and that Eliza Morgan was a trustee of the several sums of stock for the testator's next of kin.

Eliza Morgan demurred, generally, to the bill.

On the argument of the demurrer the question was, what was the meaning of the word *residue* in the will: whether it meant the residue of the testator's money in his banker's hands, or the residue of his general personal estate.

Mr. Jacob and Mr. James Russell, in support of the demurrer, contended that the word *residue* meant the residue of the testator's general personal estate. They said that Eliza Morgan was the only person for whom any provision was made by the will; that, in the introductory part of it, there was such a large expression of bounty to her as to be nearly sufficient to carry the whole of the testator's property; that the testator had, in effect, appointed Eliza Morgan his executrix, and so placed the whole of his property in her custody that he had directed her to pay his debts; but it was clear that he did not mean her to pay them out of the money in his banker's hands only; that there was no source from which the funeral expenses could come, unless

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Eliza Morgan took the testator's property generally, and consequently, that the residue which she was to keep, was not, merely, the residue in the

[*292] banker's hands, but the general residue of the testator's estate.

Legge v. Asgill, (a) *Crooke v. De Vandes*. (b)

Mr. *Knight Bruce* and Mr. *G. Richards*, in support of the bill :—The question is, whether the word *residue*, in this will, means a special or a general residue.

The instrument begins thus: "To my friends and relations who may be curious to inquire, be it known that, a few years back, of my own free will, I gave to E. Morgan, commonly called Eliza Castillo, all my furniture, table and bed linen and apparel, plate, watches and trinkets of any kind then in my possession, a piano forte, all my library, manuscripts, papers, *et cetera*." If that introductory passage is to be considered as a gift, the expression *et cetera* must be confined to things *ejusdem generis* as those before mentioned. But it is not to be taken as a gift; but as a recognition of a prior gift.

The word *residue* is a relative term; and where, as in this will, a testator speaks of a particular fund, and then, in the same sentence, uses the term *residue*, he must be taken to mean the residue of that particular fund which he had just before spoken of, and not the residue of his property generally. In this court we are apt to put a technical signification upon the word *residue*; but, in common parlance, it is synonymous with remainder; and, if the testator had used that word, there would have been no doubt as to his intention.

[*293] "Can it be contended that if the testator had intended that Eliza Mor-

gan should take the large sums of stock which are mentioned in the bill, he would have been so cautious as to mention that he had given her his furniture, table and bed linen, &c. ? Why did he mention that he had given her those articles, if he meant to give her all his property by his will? Why did he mention the money in his banker's hands, if she was to take every thing under the will?—[The Vice-Chancellor: The bill states that the testator, at the date of his will, had, in his banker's hands, money more than sufficient to pay all the debts that he then owed: but there is no allegation that he had in his banker's hands money more than sufficient to pay the debts which he owed at his death. When he speaks of the money in his banker's hands, he speaks conjecturally. He says: "I guess there will be found sufficient, in my banker's hands, to defray and discharge my debts." But the direction which he gives to E. Morgan, to pay his debts, is positive. He meant that she should pay his debts at all events, that is, whether there was or was not sufficient, in the banker's hands, to pay them. May he not, therefore, have meant, by the word *residue*, the residue of that property out of which his debts were to be paid at all events?]—If a party is directed to pay a testator's debts generally, it does not follow that that party is to take the residue of

(a) *Turn. & Russ.* 265, note.

(b) 9 *Ves.* 197, and 11 *Ves.* 330.

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the testator's property. The only property that is dealt with in this will, is the money in the banker's hands.—[The Vice-Chancellor: The testator alludes to the money which his funeral would cost; and, therefore, he adverts, impliedly at least, to some fund in contradistinction to the money in his banker's hands, that is, his general personal estate.]

*The cases that have been cited are clearly distinguishable from the [*294] present case. In *Crooke v. De Vandes*, the testator, after having mentioned the whole of his property, concluded his will as follows: "What remains to go to my grandsons:" and, as the testator had before enumerated the whole of his property, there was nothing to which those words could refer, except his general estate.(a) In *Legge v. Asgill*, the expression in the codicil, "if there is money left unemployed," meant money left unemployed after the general administration of the testator's estate.

The case of *Ommaney v. Butcher*(b) is decisive of the present: it is a conclusive authority if ever there was one. The *Attorney General v. Johnstone*.(c) *Hastings v. Hane*.(d)

THE VICE-CHANCELLOR:—In this case of *Boys v. Morgan*, I wished the matter to stand over after the argument, that I might read through the pleadings, to see whether there was any thing stated on the bill (the whole statement of which is admitted by the demurrer) which would vary the case, that is, which would make the case which is made by the bill depend upon anything else than merely the construction of the will: and it appears to me, on reading it all over very deliberately, that the right of the plaintiff does solely and exclusively depend on the construction of the will. The will is in a very singular form; and I must say, with reference to the cases that have been cited, that they are no otherwise applicable to this case

*than to show that, where wills are made in such a singular form [*295] as the wills in *Legge v. Asgill*, *Crooke v. De Vandes* and the *Attorney General v. Johnstone*, you must construe the expressions that are used in them, as well as you can, by looking at the whole of the context.

In this case the testator sets out, first of all, with giving the world notice, and showing, therefore, that he was clearly aware that he had friends and relations, that is, persons to whom, if he made no disposition, his property would devolve. "To my friends and relations who may be curious to inquire, be it known that, a few years back, of my own free will, I gave to Eliza Morgan, commonly called Eliza Castillo, all my furniture, table and bed linen and apparel, plate, &c., whatever have been added and may hereafter be added previous to my death, without any exception whatever, to her sole use and disposal, under promise from her that she will take care that I shall never be in want of any article as long as I live. Having attained to the eighty-second year of my existence, and finding the infirmities of age increas-

(a) See 11 Ves. 331.

(b) Turn. & Russ. 260.

(c) Ambler, Blunt's edit. 577.

(d) Ante, vol. 6, p. 67.

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ing, I choose to give her this voucher of the truth, that none may question or trouble her to make declaration of it." What was the precise quantity of that gift, does not appear: but I cannot but think that the testator meant that, whatever it was, it should at least receive confirmation by his will, to the extent of acknowledging the fact to be such. Then he says: "She knows that, thirty years ago, I agreed, with Dr. Hector Campbell, that he should have my carcase for chemical and anatomical experiments to be by him performed upon it, if he could prevail on her to give it to him. Doubting her compliance, I will trouble my head no more about it. The [*296] world may think this to be "from a spirit of singularity or whim in me: be that as it may, I have always had a mortal aversion to funeral pomp and expense, and therefore trust she will avoid it; and had rather be given away, with the sum a funeral would cost, for the purpose of dissection and chemical experiments."

Now it is plain, I think, on that part of the will, that the testator considered that there was so much kindness and confidence reposed by him in Eliza Castillo, that he countermands his own personal wish in favor of her wish; and, rather than oppose her wish, he submits to have his body buried in the usual way, and, in effect, authorizes her to bury the body; because, he says: "I, therefore, trust she will avoid it," that is, avoid funeral pomp and expense: "and I had rather be given away, with the sum a funeral would cost, for the purpose of dissection and chemical experiments." I mention this because it struck me, at the hearing, as a strong circumstance to show that here he does evidently refer to his general personal estate; because he does, in effect, direct that Eliza Castillo shall bury him, and she could not bury him except at the expense of his general personal estate.[1] Then he says: "I guess there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire Mrs. Eliza Morgan to do, and keep the residue for her own use and pleasure."

It is quite obvious, I think, that there is no direction here that the debts shall be paid out of that fund only which happened to be in the banker's hands. I observe it is stated, in the bill, and, of course, it is admitted by the demurrer, that, at the date of his will, the testator had at his bank- [*297] er's more than sufficient to pay the "debts which were then owing from him: but, as the testator could not foresee what would be the amount of money in the hands of his banker at the time of his death, it is plain that he alludes to the contingent sum, whatever it might be, when he says: "I guess there will be found sufficient in my banker's hands;" and, therefore, he was not referring to the amount that was then in his banker's hands, any further than as the amount which was then in his banker's hands might furnish him with more or less reason for guessing that there

[1] Vide *Willis v. Plaaket*, 4 Beav. 208, cited 2 Keen, 13, n. 2. *Gaffney v. Hovey*, 1 Dru. & Walsh, 24.

1838.—*Boys v. Morgan.*

would be found sufficient in the banker's hands to defray and discharge his debts; and it is quite obvious that the amount of his debts might vary as well as the fund itself.[1]

Then he takes a contingent view of the sufficiency of the sum in his banker's hands, and says: "To defray and discharge my debts:" and immediately afterwards he adds these words: "which I hereby desire Mrs. Eliza Morgan to do:" and he does not there direct that she shall apply that fund only which is in the banker's hands to the payment of his debts; but gives a positive and absolute direction that she shall pay and discharge his debts. Then follow these words, on which the discussion principally turned: "and keep the residue for her own use and pleasure." Now it was said that the term, *the residue*, plainly, from the context, referred only to that which might remain of the fund in the banker's hands after satisfaction of the debts. But it seems to me, in the first place, that there is nothing which stints the words, "the residue," to the residue of that fund: and, as the testator, in that part of his will in which he directs the expenses of his funeral to be paid, has plainly referred, although not in express terms yet by implication, to all his personal property, it is quite "obvious that this expression, "the resi- [298] due," may as well apply to the residue of the general personal estate, as to the residue of the fund in the banker's hands: and as, in case the debts might happen to exhaust the money in the banker's hands, still they were to be paid, the true construction in my opinion, is that the residue which E. Castillo is to keep, is the residue of the property liable to pay the debts, which will remain after the payment of them, including of course the funeral expenses, which, by law as well as by plain implication, were to be paid out of the general personal estate. And I think that this construction is aided by the circumstance that, from the beginning to the end of his will, though he does notice friends and relations, yet the sole object of bounty, the sole depository of confidence and trust, is Eliza Castillo: and, therefore, it appears to me that, on the true construction of this will, she is entitled to the residue; and consequently the demurrer must be allowed.(a)

[a] Affirmed by the Lord Chancellor. See 3 Myl. & Craig, 661. [But without costs; doubtless on the ground that the case was one of so much difficulty that it was a fair case for an appeal. And see 3 Myl. & Cr. 699, n. 1, and cases there cited. 4 Rums. 371, where the case of *Gaffney v. Hevey*, 1 Dru. & Walsh, 12, is stated. 2 Keen, 13, n. 2. *King v. Woodhull*, 3 Edw. Ch. Rep. 83.]

[1] So, in *Gaffney v. Hevey*, 1 Dru. & Walsh, 17, Lord Plunket appears to have adopted a similar train of reasoning when he says; "I think I am rather to presume that the testator was ignorant of the state of his property; for he mentions property, which it appears he had not at the time of making his will." And see *ibid.* 20.

1838.—*Cowley v. Cowley.*

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*COWLEY v. COWLEY.(a)

1838; 6th, 18th and 23d June.—Practice; Plaintiff; Dismissal.

A. and B. co-plaintiffs, claimed under a will, and B. claimed, also, under a deed executed by the testator. The claims under the will, failed; but B.'s claim under the deed, succeeded. The bill was dismissed as against both plaintiffs, but without prejudice to B.'s filing a new bill.

THE plaintiff, Mary Cowley, claimed to be entitled to an annuity of 40*l.* charged upon the estates of her deceased husband by a deed executed by him, and also, to an annuity of 50*l.* and a sum of 100*l.*, charged upon the same estates by the will of the deceased. Lovell Cowley, the other plaintiff, claimed to be entitled to the sum of 200*l.* charged upon the estates by the will; but he made no claim under the deed.

At the hearing of the cause, the court decided against the claims of both the plaintiffs under *the will*; but held that Mary Cowley's claim under *the deed*, was valid.

Mr. *Knight Bruce* and Mr. *Blunt* for the defendant, the heir of the deceased, contended that it was the practice of the court not to make any decree, where the claim made by one of the plaintiffs, wholly failed, although another plaintiff might be entitled to relief in respect of a distinct separate claim; and, therefore, that the bill ought to be dismissed as against both the plaintiffs. *Denton v. Davy*.(b)

Mr. *Jacob* and Mr. *Koe*, for the plaintiffs, said that where, as in the present case, all the plaintiffs sued jointly in respect of part of the whole relief prayed, and one of them prayed distinct separate relief, the proper course was to dismiss the bill, as against all the plaintiffs, with respect to the joint demand, but to grant relief to the plaintiff who had succeeded in establishing his separate demand. *Gemmel v. Block*,(c) *Mattison v. Mattison*.(d)

Mr. *K. Bruce*, in reply, said that the cases reported by Dickens were not much to be relied upon: and that he had an extract, from Reg. Lib., of the case of *Mattison v. Mattison*, which showed that it was a legatee's suit, and such suits, like creditor's suits, were excepted out of the usual practice, and did not furnish any authority as to other suits.

THE VICE-CHANCELLOR, having been furnished by Mr. Walker, the Registrar, with an extract, from Reg. Lib., of the case of *Gemmel v. Block*, was at first disposed to adopt the course contended for by the plaintiff's counsel: but, on the 23d of June, his Honor said that he had conferred with the Lord Chancellor, and that his Lordship was of opinion that the bill ought to be dismissed, as against both the plaintiffs, but without prejudice to Mary

(a) *Ex relations.*

(c) 2 Dick. 513.

(b) Moore's Priv. Council Cases, 15.

(d) Cited in *Gemmel v. Block*.

1838.—Woodward v. Twinaine.

Cowley's right to file a new bill; and also without costs, as the objection had not been raised by the answer.(a) [1]

*WOODWARD V. TWINAINE.

[*301]

1538: 27th and 30th November, and 4th December.—Practice; Contempt; Waiver.

A defendant, being in contempt for want of answer, filed his answer and the plaintiff took an office copy of it. Held that the plaintiff did not, thereby, waive the contempt.

THE defendant, being in contempt for want of answer, filed his answer, and the plaintiff took an office copy of it. The defendant now moved to dismiss the bill for want of prosecution.

Mr. E. Montagu, for the defendant, contended that the plaintiff, by taking an office copy of the answer, had waived the contempt, and, therefore, the defendant was entitled to make the motion. He referred to *Landars v. Allen*,(b) *Green v. Thomson*,(c) *Sidgier v. Tyte*,(d) *Smith v. Blofield*,(e) *Const v. Ebers*,(f) *Hoskins v. Lloyd*,(g) *Anon.*(h), and *Watson v. Fairlie*.(i)

Mr. K. Bruce, for the plaintiff, said that the question was raised in *Landars v. Allen*, but that, in fact, it was not decided; that the motion stood over in order that the point might be looked into, and, in the meantime, the order was drawn up as if the question had been decided; that, in *Green v. Thomson*, it was to be inferred, although the fact was not stated in the report, that the plaintiff had taken an office copy of the answer: that, in *Hoskins v. Lloyd*, the defendant had acted on the answer, as well as taken an office copy of it; for he had moved for a production of deeds admitted by the answer to be in the defendant's custody; and *that [*302]

Watson v. Fairlie, showed that the defendant was not entitled to make his motion.

30th November.—On this day, the orders in *Green v. Thompson*, and *Landars v. Allen*, were produced from the office of Messrs. Lowe, Garey,

(a) See *Rafety v. King*, 1 Keen, 601. [618, n. 1.]

(b) Ante, vol. 6. p. 419.

(c) 1 Sim. & Stu. 121.

(d) 11 Ves. 202.

(e) 2 Ves. & Beam. 190.

(f) 1 Mad. 530.

(g) 1 Sim. & Stu. 393.

(h) 15 Ves. 174.

(i) Reg. Lib. B. 1824, fol. 1581, and see next page.

[1] So, in *Sanders v. Benson*, 4 Beav. 350, 57. Lord Langdale, M. R., said: "I have considered the costs of this case, which *prima facie* would belong to the defendants; and if they had put in a plea, stating that point of objection which has prevailed, undoubtedly, they would have been entitled to costs; but they have put in a long defence, and stated that the defendants had no interest whatever in the lease, and have raised points, which, it appears to me, are not sustainable. I, therefore, think the justice of this case is satisfied by dismissing the bill without costs." If a bill is correctly filed on the authority of a reported case, there being no authorities in conflict with it, and the decision in the reported case is afterwards reversed, the plaintiff, in the suit commenced on its authority, is entitled, on motion, to have his bill dismissed without costs. *Robinson v. Roeder*, 1 Ya. & Coll. C. C. 7.

1838.—Woodward v. Twinaine.

& Sweeting, of Chancery lane. The Vice-Chancellor, after observing that the order in the former case appeared to tally with the printed report of it, directed the motion to stand over, in order that the Registrar's book might be searched for the case of *Watson v. Fairlie*.

5th December.—THE VICE-CHANCELLOR:—In this case, I have been supplied by Mr. Walker (the Registrar) with a short note of what took place in *Green v. Thompson*, and I find that it corresponds with what is stated in the printed report: and I have read over the case of *Watson v. Fairlie*, as it appears in the Registrar's book. The facts appears to be these:—The defendant's time for answering being out, the plaintiff sued out an attachment, which was sent to the sheriff of Hertfordshire; and then the defendant put in an answer, which was excepted to. The exceptions were referred to the Master, who allowed nine of them. The plaintiff then served the defendant with a subpoena for a further answer, and, that further answer not being put in in time, another attachment was issued; and then an answer was put in. It is not stated whether the plaintiff took an office copy of it or not, but I think it is fairly to be inferred, from the fact of there being no further proceedings on the exceptions, that he had taken an office copy [*303] and was satisfied with the answer. Then it "appears that the defendant obtained an order to dismiss the bill for want of prosecution; and the court afterwards discharged that order: and I cannot but think that the fair inference is that the mere taking of an office copy is no discharge of the contempt.

I am inclined to think that there must have been some misrepresentation, made inadvertently, of what took place in the case of *Landars v. Allen*.^(a)

I am of opinion that the mere taking of the office copy, by the plaintiff, of the defendant's answer, is no such waiver of the contempt as will justify the defendant, without more, in moving to dismiss for want of prosecution; and I have the satisfaction of knowing that the Lord Chancellor is of the same opinion; and, therefore, the motion to dismiss for want of prosecution in this case must be refused.

Motion refused, without costs.[1]

(a) In consequence of the observation in the text, the Reporter referred to Reg. Lib., where he found the following entry, under the date, mentioned in the report, of the 29th of May, 1834.

"*Landars v. Allen*.—Whereas Mr. Spence, of counsel for the defendant, this day moved this court that the plaintiff's bill might stand dismissed out of this court for want of prosecution, in the presence of Sir E. Sugden, of counsel for the plaintiff, who alleged that the plaintiff is willing to proceed in this cause with effect: Whereupon, &c." Then follows an order in the terms stated, ante, vol. 6, p. 620. Reg. Lib. B. 1833, fol. 1392.

[1] Vide *Livingstone v. Cooke*, post, 468; 1 Hoff. Ch. Pract. 181; 1 Russ. & M. 324, n. 1.

1839.—*Jones v. Creswicke.***JONES v. CRESWICKE. BOOTH v. CRESWICKE.*

[*304]

1839 : 3d December.—Mortgagor and Mortgagee ; Foreclosure.

Under a decree in a foreclosure suit, the time fixed for payment of principal, interest and costs, was the 31st of July. On the 25th, the defendant obtained an order, referring it to the Master to fix a further time, on his paying the interest and costs on the first mentioned day. The defendant, however, failed to make that payment, and on the 3d of August following, the plaintiff obtained the usual order for foreclosure absolute ; but, owing to the press of business in the Registrar's office, it was not drawn up. On the 16th of August, the defendant moved for a further extension of time, on the ground that a person who had agreed to lend him the amount of the principal, interest and costs, was prevented, by illness, from coming to London on the 31st of July, and his wife, whom he had deputed to bring the money, was prevented from doing so, by the coach being full on the 30th. Motion granted.

ON the 8th of March, 1837, the plaintiff Booth obtained a decree of foreclosure against the defendant Humphrey Creswicke.

On the 8th of May, 1839, the Master, by his report made in pursuance of the decree, found 1229*l.* 9*s.* 7*d.* to be due, for principal, interest and costs, from Creswicke to Booth, and directed the former to pay that sum to the latter, at the Rolls Chapel, on the 31st of July following. On the 25th of that month, Creswicke applied, to the Vice-Chancellor, to enlarge the time for making the payment ; and his Honor ordered that, on Creswicke paying, to Booth, the interest and costs then reported due, amounting to 549*l.* 4*s.* 2*d.*, on the 31st of the same month, and on the terms that Booth's costs in *Jones v. Creswicke* should be added to the principal due to him, it should be referred, to the Master, to compute the subsequent interest and costs, and enlarge the time for redemption on payment of the principal, interest and costs to be reported due, at a new time and place to be appointed by the Master. Booth attended at the Rolls Chapel, on the 31st of July, 1839, at the time appointed, but neither Creswicke nor any person on his behalf came to pay either the 1229*l.* 9*s.* 7*d.*, or the 549*l.* 4*s.* 2*d.* *On the 3d of August, [*305] 1839, the plaintiff obtained the usual order for foreclosure absolute ; but, owing to the press of business in the Registrar's office, that order was not drawn up. On the 16th of that month, Creswicke moved that it might be referred back to the Master to compute subsequent interest, on the mortgage, from the foot of the report of the 8th of May, and to tax Booth his subsequent costs, and to appoint a new time and place for Creswicke to pay what should be reported due. The motion was supported by two affidavits, one made by G. M. Daubeney, and the other by H. Creswicke. Daubeney's affidavit was to the following effect :—that he was ready and willing to advance the 1229*l.* 9*s.* 7*d.*, and any further sum that might be necessary for the purpose of paying Booth the principal, interest and costs due to him ; that he had the money ready to advance forthwith, on having a transfer of the mortgage made to him ; that he had the money ready to advance on the 31st of July last, but was prevented, by illness, from coming to London for that purpose ; that, not being able to come to London himself, he deputed his

1839.—*Jones v. Creswicke.*

wife to come up with the money ; but, in consequence of the only London coach which passed near his residence being full on the 30th of July last, his wife could not reach town, with the money, until after the 31st, or it would have been ready to be advanced on that day. Creswicke deposed that he was in treaty for the loan of the 1229*l.* 9*s.* 7*d.* from Daubeny, who would have lent him that sum on or before the 31st of July last, but was prevented by illness, from coming to London, in time to advance it : that the deponent used every exertion to raise the money by the 31st of July ; and had now obtained a promise of the loan of that sum, and any other sum that might be necessary to pay the principal, interest and costs due to the plaintiff.

[*306] *In opposition to the motion, Booth's solicitor deposed that Creswicke's solicitor had not proceeded to draw up the order of the 25th of July, and, as the deponent believed, had abandoned the drawing up thereof : that on the 3d of August then instant, Booth obtained the usual order for absolute foreclosure, upon the customary affidavit of his attendance to receive the amount reported due and of the defendant's default : that the deponent had bespoken that order, but owing to the press of business in the Registrar's office, *it had not been drawn up.*

The motion was made on the 16th of August ; but was directed to stand over, in order that search might be made for precedents.

The motion was renewed on the 3d of December, Mr. Colville, the Registrar, having, in the interval, furnished the Vice-Chancellor with the following extracts from Reg. Lib.

✱

Monday, 12 January, 1747. Between John Lee and Anne his Wife, John Hervey and George Nicholls, Esquires, Plaintiffs ; Gilbert Heath, Defendant.

UPON opening of the matter this present day unto the Right Honorable the Lord High Chancellor, &c., by Mr. Hervey, of counsel with the plaintiffs, it was alleged that, by the decree made on the hearing of this cause, on the 14th day of May last, it was amongst other things ordered that it should

be referred to Mr. Spicer, one of the Masters, &c., to take an account of what was *due to the plaintiffs for principal and interest on their mortgage therein mentioned, and to tax them their costs of this suit ; and the said defendant was to pay unto the plaintiffs what should be reported due to them for such principal, interest and costs, within six months after the said Master should have made his report, at such time and place as the said Master should appoint, or, in default thereof, he was to stand absolutely foreclosed : That pursuant thereto, the said Master made his report, dated the 3d day of July last, and thereby certified that there was due to the plaintiffs on their said mortgage the sum of 946*l.* 1*s.* 4*d.*, which he appointed the defendant to pay to the plaintiffs at the time and place in the said report particularly mentioned : That the plaintiff John Lee did accordingly attend at the time and place in the said report mentioned, in order to receive of the

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defendant the said money, but the said defendant did not then attend to pay the said money, nor hath the same, or any part thereof, been since paid: and therefore it was prayed that the said defendant may stand absolutely foreclosed. Whereupon and upon hearing of Mr. Sewell, of counsel with the defendant, who alleged that the said mortgaged premises are considerably worth more than the money due thereon, and prayed that the said defendant may have six months further time to redeem the said mortgaged premises; and upon hearing of an affidavit of the defendant, an affidavit of Benjamin Glanville and Leonard Dix, read, and what was alleged by the counsel on both sides, and upon the defendants agreeing to deliver possession of the said mortgaged premises at the end of the said six months to the plaintiffs if he shall not redeem by that time, his Lordship doth order that the time for the said defendant's redeeming the said mortgaged premises be enlarged for six months, and that it be referred back to the said Mas- [*308] ter to compute subsequent interest on the said mortgage, and tax the plaintiffs their subsequent costs and appoint a new time and place for payment of what shall be found due.—Lib. B. 1746, fol. 83.

Monday, 7 July, 1766. Between John Nanfan, Esquire, Plaintiff; James Perkins and Edmund Perkins, Esquires, and others Defendants.

WHEREAS by an order made the 5th day of June last, for the reasons therein contained, it was ordered that the defendants James Perkins and Edmund Perkins should stand absolutely foreclosed of all right, title, interest, and equity of redemption of, in, and to the mortgaged premises therein mentioned: Now upon motion this day made unto the Right Honorable the Lord High Chancellor of Great Britain by Mr. Wedderburn, of counsel with the defendants James and Edmund Perkins, it was alleged that Mr. Browning, one of the Masters of this court to whom this cause is referred, by his report of the 10th of December last, certified that there would be due to the plaintiff for principal, interest and costs in this cause, on the 3d of February then next, the sum of 3218*l.* 4*s.* 2*d.*, which he appointed the defendants James Perkins and Edmund Perkins to pay unto the plaintiff on that day, at the chapel of the Rolls: That the said defendants, being desirous to pay the plaintiff what was reported due to him, came to London from Hampshire, in order to raise money for that and other purposes, and a person had promised to lend the same, but such person *requiring a particular of the estates, the defendant James Perkins went into the country again, in April last, to get it made out, and to get the several title deeds and leases belonging to the estates: That the said defendants, under these circumstances, being in expectation of raising money to pay the same, omitted to move to enlarge the time to redeem, and not attending to pay the money reported due, the plaintiff obtained the said order of the 5th of June last to foreclose the defendants: That the said defendants will be able to raise money to pay the plaintiff as soon as proper conveyances of the estate can be

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made to the person who is to advance the same; and therefore it was prayed that the said order, made the 5th day of June last, may be discharged, and that it may be referred to the said Master to compute the plaintiff's subsequent interest, and to tax him his subsequent costs, and to appoint a new time and place for payment of what shall be found due to the said plaintiff for principal, interest and costs; and that, on payment thereof, the plaintiff may convey the said mortgaged premises to the defendants, or such person or persons as they shall appoint: Whereupon, and upon hearing of Mr. Hett, of counsel with the plaintiff, and the affidavit of James Perkins read, and what was alleged by the counsel on both sides, it is ordered that the said defendants James Perkins and Edmund Perkins paying to the plaintiff, in a fortnight from this time, the sum of 1000*l.*, in part of what is reported due to him for principal, interest and costs, that the said order of the 5th day of June last be discharged, and that it be referred back to the said Master to compute subsequent interest on what shall remain due to the plaintiff, and likewise to tax the plaintiff's subsequent costs, and to appoint a new time and place for payment of what shall be found due to the plaintiffs for principal, interest and costs, not exceeding six months from this

[*310] *time; and, in default of the said defendants James Perkins and Edmund Perkins their paying to the plaintiff the said sum of 1000*l.* by the time aforesaid, it is ordered that the said order of the 5th day of June last do stand.—Lib. B. 1665, fol. 307.(a)

[*311] *Thursday, 21 November, 1782. Between Samuel Crompton, Esquire, and Thomas Stamford, Esquire, Plaintiffs; and the Right Honorable Thomas Earl of Effingham, Defendant.

(a) An affidavit, sworn by James Perkins, on the 21st of June, 1766, and filed on the 3d of July following, (and which, it is presumed, was the affidavit mentioned in the above order to have been made by him,) was set out in the briefs of the defendant's counsel in the case above reported. It was to the following effect: That the lands comprised in the several mortgages in the pleadings named, were of the yearly value of 600*l.* and upwards, and, in the deponent's judgment, were worth, to be sold, the sum of 13,000*l.* and upwards: that the deponent, intending to borrow a sum of money in order to pay off the moneys due to the plaintiff and for other purposes, did, in or about the month of February last, come to town for that purpose, and the deponent, having a promise of the money wanted by him, caused the plaintiff to be informed thereof: that, in or about the beginning of the month of April, he returned to the country in order to prepare a rental and particular of the said lands and of other lands proposed by him to be conveyed as a further security for the money proposed to be borrowed by him; that, soon after his return to the country, *he was taken extremely ill* with a bilious disorder, and continued so for some weeks, and the said disorder had continued on him ever since; *by which means he was rendered incapable, for some weeks, of coming to London to complete his agreement for borrowing the money*: that he did not come to town till the 12th of June, then instant, when he found that the plaintiff had, on the 5th of that month, obtained an order in the cause, whereby he and the other defendant, Edmund Perkins, stood absolutely foreclosed: that, on the deponent coming to town, he caused application to be made to the plaintiff's solicitor, to see if he would waive the said order, but he refused so to do: that upon the tide to the lands proposed to be mortgaged by the deponent being approved of, and on the execution of the proper securities, the money due to the plaintiff for principal, interest and costs, was ready to be paid to him.

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UPON opening of the matter this present day unto the Right Honorable the Lord High Chancellor of Great Britain by Mr. Attorney General and Mr. Madock, being of counsel for the defendant, it was alleged that, by the decree made on the hearing of the original cause, wherein Samuel Crompton and Thomas Stamford were plaintiffs, and the defendant the Earl of Effingham was defendant, on the 16th day of February, 1781, it was ordered and decreed that it should be referred to Mr. Leeds, one of the Masters of this court, to take an account of what was due to the late plaintiff, Samuel Crompton, deceased, for principal and interest on the mortgage in question, and to tax the plaintiffs their costs of this suit, for the better taking of which account the usual directions were given; and, upon the defendant's paying to the plaintiffs, Samuel Crompton and Thomas Stamford, what should be found due for principal, interest and costs as aforesaid within six months after the said Master should have made his report, at such time and place as the said Master should appoint, it was ordered and decreed that the plaintiffs should reconvey the said mortgaged premises, free and clear of and from all incumbrances done by them or those under whom they claimed, and deliver up all deeds and writings in their custody or power relating thereto, upon oath to the defendant, or to whom he should appoint; but, in default of the said defendant paying unto the plaintiffs what should be reported due to them for principal, interest, and costs as aforesaid, by the time aforesaid, the defendant was from thenceforth to stand absolutely debarred and [*312] foreclosed of and from all right, title, interest, and equity of redemption of, in, and to the said mortgaged premises: and any of the parties were to be at liberty to apply to the court as there should be occasion: That, pursuant to the said decree, the said Master made his report, dated the 29th day of June, 1781, and thereby certified that there would be due to the late plaintiff, Samuel Crompton, as surviving administrator of Henry Coape, Esq. deceased, for principal, interest, and costs on the mortgage, on the 29th day of December, 1781, the sum of 6229*l.* 12*s.* 5*d.*, which he appointed the said defendant to pay to the plaintiff, Samuel Crompton, on the 29th day of December, 1781, at the Chapel of the Rolls in Chancery lane, London, between the hours of 11 and 12 of the clock in the forenoon of the same day: That, afterwards, the said Samuel Crompton died, having made his will, and appointed the now plaintiff, Samuel Crompton, his executor, and he has proved the will; and, thereupon, the plaintiffs exhibited their bill of revivor in this court, and the said suit and proceedings were, by an order dated the 11th day of April last, ordered to stand revived, and which order was obtained on an allegation that the defendant had appeared, and his time for answering was out: and, the defendant not having paid the principal, interest, and costs at the time appointed for payment thereof, the plaintiff obtained an order, dated the 3d day of July last, that the defendant should stand absolutely foreclosed which order has been since signed and enrolled: That the defendant is advised that the said mortgaged premises are now worth 12,000*l.* and upwards

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to be sold, and he never was informed of the order for confirming the Master's report, otherwise he should have applied for an order to enlarge the time to *redeem; and he was, at the time of obtaining the said order [°313] for an absolute foreclosure, in treaty with some persons to raise the money reported due, and redeem the mortgaged premises, and he is advised that the said order to revive was obtained on false allegations, viz. that he had appeared, and that his time for answering was out, whereas, in truth, he never did appear until the 20th day of April, last, many days after the obtaining the said order to revive, and the cause not being duly revived was, at the time of obtaining the said order to foreclose, out of court: And therefore it was prayed that the enrolment of the proceedings in this cause, and the order bearing date the 3d day of July last, for making the foreclosure in this cause absolute, may be discharged, and that it may be referred back to the said Master to compute subsequent interest on the plaintiff's mortgage, and tax the plaintiff his subsequent costs, and that, upon payment of what shall be reported due to the plaintiff within a month after the Master shall have made his report, the mortgaged premises may be reconveyed, and the title deeds delivered up to the defendant, or to whom he should appoint: Whereupon, and upon hearing Mr. Price and Mr. Mitford of counsel for the defendant, an affidavit of the defendant, the Earl of Effingham, an affidavit of John Foljambe, an affidavit of Isaac Milbourne, and an affidavit of Darcy Tancred, read, and what was alleged by the counsel on both sides, his Lordship doth order that it be referred back to the said Master to compute the plaintiffs their subsequent interest, and tax them their subsequent costs; and, it being admitted that the plaintiff, Samuel Crompton, is now in the possession of the mortgaged premises, it is ordered that the said Master do take an account of such rents and profits which have been received by the plaintiff, [°314] Samuel Crompton, or by any other person or *persons by his order, or for his use, or which he without his wilful default might have received thereout; and it is ordered that what should be found due on the said account of rents and profits, be deducted out of what shall be reported due to the plaintiff, Samuel Crompton, for principal, interest, and costs as aforesaid; and it is further ordered that the said Master do also inquire what ought to be allowed for the expense of preparing the conveyance to the plaintiff Stamford; and, upon payment by the defendant to the plaintiffs of what is already reported due for principal, interest, and costs, and what shall be reported due for subsequent interest and subsequent costs, and of what ought to be allowed for the expense of the plaintiff, Thomas Stamford's conveyance, on the 23d day of January, next, at such time and place as the Master shall appoint, it is ordered that the said order of the 3d day of July, last, and the enrolment thereof, be discharged.—Lib. A. 1782, fol. 26.

Friday, 2 November, 1798. Between William Joachim, Plaintiff; James M'Douall, deceased, and William Ward, Defendants.

1839.—Jones v. Creswicke.

Upon opening of the matter this present day unto the Right Honorable the Lord High Chancellor of Great Britain, by Mr. Attorney General, of counsel for the defendant William Ward, it was alleged that, by an order dated the 27th day of June, 1798, suggesting that, by the decree in this cause bearing date the 18th day of June, 1796, it was ordered and decreed that it should be referred to Mr. Simeon, one of the Masters of this court, to take an account of what was due to the plaintiff for principal and interest on his mortgage in the pleadings mentioned, and to tax him his costs of this suit; [*315] and, upon the defendants, or either of them, paying unto the plaintiff what should be reported due to him for principal, interest and costs as aforesaid, within six months after the said Master should have made his report, at such time and place as the said Master should appoint, it was ordered that the plaintiff should re-assign the said mortgaged premises, free from incumbrances, to the defendants, or either of them, who should so redeem the plaintiff as aforesaid, or as they or either of them so redeeming the plaintiff as aforesaid should appoint: but, in default of the defendants, or either of them, paying to the plaintiff what should be reported due to him for principal, interest and costs as aforesaid, by the time aforesaid, the defendants were from thenceforth to stand absolutely foreclosed: and the defendant, William Ward, making default at the hearing, the said decree was to be binding on him, unless cause shown to the contrary: and the said decree was, by an order dated the 17th day of May, 1797, made absolute against him: that, in pursuance of the said decree, the said Master made his report, dated the 12th day of December, 1797, and thereby certified that there would be due to the plaintiff for principal, interest and costs, on his mortgage, on the 12th day of June, 1798, the sum of 1377l. 14s. 3¼d., which he appointed the said defendant, William Ward to pay to the plaintiff on the said 12th day of June, between the hours of 11 and 12 in the forenoon, at the Rolls Chapel in Chancery-lane: that the defendant, William Ward, not having paid the sum of 1377l. 14s. 3¼d. to the plaintiff at the time and place fixed by the said Master's said report, it was ordered that the said defendant, William Ward, should stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of, in, and to the said mortgaged premises: that the [*316] defendant William Ward, from a variety of unfortunate circumstances, and by being misinformed by the plaintiff's solicitor as to the day fixed by the said Master for payment of the said principal, interest and costs, he, the said defendant, was prevented from attending to pay the same on the said 12th day of June: that the plaintiff, between the said 12th day of December, 1797, and the 12th day of June, 1798, received some further sums of money on account of the rents and profits of the said mortgaged premises: that the said mortgaged premises are a very ample security for the money due to the plaintiff in respect of his mortgage thereon: it was therefore prayed that the said order dated the 27th day of June, 1798, might be discharged with costs, and that the time for payment of the money reported to be due to

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the plaintiff for principal, interest and costs may be enlarged for six months. Whereupon, and upon hearing of Mr. *Romilly*, of counsel for the plaintiff, and the said order dated the 27th day of June, 1798, read, and what was alleged by the counsel on both sides, his Lordship doth order that the said order dated the 27th day of June, 1798, be discharged, and that the time for the defendant William Ward, his redeeming the mortgaged premises in question, be enlarged for three months. And it is further ordered that it be referred back to the said Master to carry on the subsequent account of receipts and payments, and to compute the plaintiff his subsequent interest, and tax him his subsequent costs, and appoint a new time and place for payment of what shall be found due to the plaintiff. And it is ordered that the said Master do proceed *de die in diem*.—A. 1797, fol. 894.(a)

[*317] *Mr. *Knight Bruce* and Mr. *Parry* for the defendant, H. Creswicke, in support of the motion.

Mr. *James Russell* and Mr. *Beales* for the plaintiff, said that the present case was distinguishable from every one of the precedents that had been produced; for, on the 24th of July, H. Creswicke applied for and [*318] obtained an order, enlarging on certain terms, the time *fixed by the Master, for payment of the sum reported due from him, but that he had complied with none of those terms; that, when the order for foreclosure was made absolute, the discretionary power of the court to enlarge the time of payment, was gone; that none of the precedents except those in which the order absolute had been obtained, had any application; that in, *Crompton v. The Earl of Effingham*, Crompton sued as administrator of Coape, and, on Crompton's death, the suit was revived by his executor,

(a) In addition to the above extracts, the Reporter is indebted to Mr. Colville for the following notes:—

Lord Keeper Sir Nathan Wright. Hilary Term, 1701.

Abney v. Wordsworth.

Dobyns for plaintiff:—We come to show cause why Wordsworth should not have further time to redeem; the decree is signed and enrolled, and the father was foreclosed by his own consent by signing the Registrar's book, and now the son (the heir of the mortgagor) wants a year longer time to redeem.

Mr. *Cowper*, for same side:—The estate is not worth our money.

[Affidavit read.

Mr. *Sergeant Bretland*, for the son:—The estate has been computed at more than 9000*l*.

Lord Keeper:—Let the son have six months longer time, from this day, to redeem. Take till Michaelmas term to redeem; if money not then paid, let the order to foreclose stand—and this to be peremptory.

Ismoord v. Claypool. 18 Charles II.

Notwithstanding signing and enrolling of the decree of foreclosure, let defendant have six months longer time to redeem.

[On motion, 1666.

This case is reported in 1 Ch. Rep. 139.

Lord Chancellor, 21 Nov. 1745. *Clay v. —*

Stanley prays absolute foreclosure.

Capper prays time.

Cw. Enlarge time to redeem for six months.

 1838.—*Jones v. Creswicke.*

which was irregular; and consequently, the order absolute and all the other proceedings subsequent to the revivor, were irregular: that, in *Nanfan v. Perkins*, the time fixed for payment of the principal, interest and costs, was the 3d of February, but no step was taken to obtain the order absolute, until the 5th of June, and the defendant was prevented by illness, from completing his agreement for borrowing the money; and, under those circumstances, he abstained from applying to the court to enlarge the time of payment: that, in *Joachim v. M^r Douall*, the defendant had been misinformed, by the plaintiff's solicitor, as to the day appointed by the Master, for the payment of the principal, interest and costs; and, moreover, in the interval between that day and the date of the Master's report, the plaintiff had received some further sums on account of the rents and profits of the mortgaged premises; so that, when the day of payment arrived, the whole sum found by the Master remained no longer due.

The Vice-Chancellor said, that *Nanfan v. Perkins* was a sufficient authority for granting the present application; that, in that case, the court having regard to the circumstances under which the defendant was prevented from raising the money found due from him, did enlarge *the [319] time of payment, notwithstanding the order for foreclosure had been previously made absolute: and that it was sworn, in this case, that, but for certain adverse circumstances, the money would have been obtained and paid on the 31st July last.

. Motion granted.[1]

[1] Where, after the second report and day of payment fixed; in a foreclosure suit, the mortgagor was prevented by the act of the mortgagee from receiving the rents of the property, the time of payment was ordered to be enlarged for three months, upon payment by the mortgagor, within one month, of the interest and costs found due by the last report, notwithstanding there was doubt whether the value of the security was ample. *Geldard v. Hornby*, 1 Hare, 251. A sale of mortgaged premises under a decree, will not be postponed, merely on the account of the existence of war; war, as a general calamity, not being sufficient to justify the court in interrupting the regular administration of justice, and the collection of debts: but if it should be made satisfactorily to appear, that there was any immediate or impending calamity, over the city or place where the mortgaged premises were situated, which would cause a suspension of all civil business, the court would interfere and postpone the sale. *Astor v. Romayne*, 1 Johns. Ch. Rep. 310. A sale of mortgaged premises was postponed for six weeks, to give the mortgagor an opportunity to comply with the proposal of the mortgagee, such delay being equally beneficial to both parties. *Ibid.* The last cited case was a bill for a foreclosure and sale; the principal case, and those there cited, were cases of strict foreclosure: but the same principle must pervade cases of both descriptions.

1838.—*Bardswell v. Bardswell.***BARDSWELL v. BARDSWELL.**

1838: 2 July.—Will; Construction; Trust.

Testator bequeathed all his property, both real and personal, to his son Charles, his heirs, executors, &c., to and for his and their own use and benefit, well knowing he would discharge the trust the testator reposed in him by remembering his (the testator's) sons and daughters, William, Edmund, Martha, &c. Held that no trust was created for the sons and daughters; but that Charles took the property for his own benefit absolutely.

CHARLES BARDSWELL, by his will, gave all his estate and effects, both real and personal, unto his son Charles Bardswell, his heirs, executors, administrators and assigns, to and for his and their own use and benefit, *well knowing* he would discharge *the trust* the testator reposed in him, *by remembering* his (the testator's) sons and daughters, William, Edmund, Martha, Eliza, and Maria; and the testator appointed Charles Bardswell, who was his eldest son, the executor of his will.

The bill was filed by Edmund Bardswell against his brothers and sisters, praying for the usual accounts of the testator's property, and that the rights and interests of the parties therein might be ascertained and declared. Charles Bardswell put in a general demurrer.

Mr. Jacob and Mr. James Russell, in support of the demurrer:—There is no statement, in the bill, that the will was made, by the father, on the faith of a promise given by C. Bardswell, the son, that he would give any part of the property to his brothers and sisters.

[*320] "This is an attempt to carry the doctrine of implied trust further than it was ever carried before. In order to raise a trust by implication, there must be certainty both as to the objects and the subject; and it must be ascertained what proportion each child is to have. But there is nothing, in this case, from which the court can adjudicate that the testator intended that his younger children should have part of his property. If C. Bardswell had taken the plaintiff into partnership, or had bought the plaintiff a place under government, he would have fulfilled his father's intention. The plaintiff appears, from his bill, to labor under considerable uncertainty as to how much, if any thing, Charles Bardswell, himself, is to have.

The words: "to and for his and their own use and benefit," clearly show that no trust was intended. In *Sale v. Moore*,^(a) *Meredith v. Heneage*,^(b) and *Benson v. Whittam*,^(c) no such words were used, and yet the court held that no trust was created. The principle upon which *Hoy v. Master*,^(d) was decided is precisely applicable to the present case. There the testator gave the whole of his property to his wife, for her life, and directed that, upon her death, one-third of it should devolve upon his daughter, and that the other two-thirds should be at the sole and entire disposal of his wife, trusting that, should she not marry again and have other children, her affec-

(a) Ante, vol. 1, p. 534. (b) Ibid, 542. (c) Ante, vol. 5, p. 22. (d) Ante, vol. 6, p. 568.

1838.—*Bardswell v. Bardswell.*

tion for their daughter would induce her to make the daughter her principal heir. It was uncertain, therefore, how much the daughter was to have; and, moreover, the daughter was to be heir to the property which the wife might leave at her death; and, consequently, the testator's property [321] was not pointed at as the property which was to furnish the provision. *Leckmere v. Lavie*,(a) *Wood v. Cox*.(b) In the latter of those two cases, the words: "for his and their own use and benefit," were used: and the Lord Chancellor founded his judgment on those words, and held that the devisee took beneficially. [The Vice-Chancellor: I do not see, in any part of the bill, that the plaintiff gives a hint as to the share which he considers himself entitled to.]

Mr. *Knight Bruce* and Mr. *Wakefield*, in support of the bill:—The testator has devised the whole of his property to his son Charles, well knowing that he would discharge the trust he reposed in him. It is impossible, if we stop there, not to see that the testator intended his son Charles to take the property subject to some trust; and, if there is a plain trust fixed upon the property, the words: "to and for his and their own use and benefit, will not destroy it." These words mean no more than that the devisee is to take the property absolutely. The testator then proceeds to describe the trust. [The Vice-Chancellor: Was the devisee himself to be a participator in the property?] No: he was not to take any share, but was to be a trustee of the whole for his brothers and sisters.

In none of the cases cited, was the word *trust* used. In *Sale v. Moore*, the persons intended to be benefited were uncertain, and it was impossible for the court to ascertain what provision was intended to be made for them. In *Meredith v. Heneage*, the words: "unfettered and unlimited," were used; and there was great "uncertainty as to the objects of the tes- [322] tator's bounty. In *Benson v. Whittam*, no direction was given, to Arthur Benson, to apply the dividends for the benefit of the children of Francis Benson, but the words were: "to enable him to assist such of the children of my deceased brother, Francis Benson, as he may find deserving of encouragement." In *Hoy v. Master*, it is clear that no trust was imposed; for the daughter was to be principal heir, not of the testator's property, but of his widow's.

It is clear that Charles Bardswell takes the whole of the property subject to some trust; and that is sufficient to sustain this bill. The children are the next of kin of the testator: and, if Charles Bardswell takes the property subject to a trust, but that trust is too vague for the court to execute, he is a trustee of the property for the testator's next of kin. *Ellis v. Selby*.(c) *Marice v. The Bishop of London*.(d)

THE VICE-CHANCELLOR:—This case has been ingeniously argued: but

(a) 2 Myl. & Keen, 197.

(b) 2 Myl. & Craig, 684.

(c) Ante, vol. 7, p. 352, and 1 Myl. & Craig, 286.

(d) 9 Ves. 399, and 10 Ves. 522.

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the result is that one part of the argument destroys the other. It was first said that a clear trust was created, and then, that there was no trust.

The words on which the question arises are : "I give, devise and bequeath all my estate and effects, both real and personal, of what nature or kind soever and wheresoever the same may be, unto my son, Charles Bardswell, his heirs, executors, administrators and assigns, to and for his and their own [*323] use and benefit, well knowing *he will discharge the trust I have reposed in him by remembering my sons and daughters.

It is clear, from the first part of the sentence, that the whole of the property is given to the son absolutely for his own use and benefit. The words of gift, point to heirs, executors, &c. ; but the words by which the trust is said to be created, relate solely to the son ; so that it is a gift to the son, his heirs, executors, administrators and assigns, without imposing any trust on the heirs, executors, administrators or assigns. Now a case might easily be put in which the trust could be performed only by the heirs, executors, administrators or assigns ; as, for instance, if the son had died the day after his father. But there is a plain expressed intention to give the property to the son for his own use and benefit, well knowing, &c., &c., so that the testator has left it, to the son, to execute the trust of remembrance in what manner he thinks proper. If we take the words in their common and ordinary sense, the testator has given the property to his son absolutely, and has given a recommendation merely, of his other children, to the kindness of his son.

There is no doubt that the expression ; "well knowing," would have created a trust if it were pointed out who were the parties to take, and what they were to take.

The objection that no trust is declared, does not apply ; as the testator has, himself, declared what the trust is. The demurrer must therefore be allowed.[1]

[1] The whole subject of the effect of precatory words in a will was fully and elaborately entered into in a later case. *Knight v. Knight*, 3 Beav. 148, decided August 7, 1840. The editor, considering that some length of time must necessarily elapse before that case could be arrived at in the regular course of publication of the present series of reports, deemed it advisable, (a course which he has pursued in some other instances and for the same reason,) to introduce very copious abstracts in his note to *Horwood v. West*, 1 Sim. & Stu. 387, which last case, although not noticed in *Bardswell v. Bardswell*, has a bearing on the point there under discussion. And see 1 Sim. 542, n. l. 2 Myl. & Cr. 691, n. l. *Pope v. Pope*, 10 Sim. 1, 5.

CASES IN CHANCERY

BEFORE

THE VICE-CHANCELLOR.

GROOM v. THE ATTORNEY GENERAL AND OTHERS.(a)

1837; 4th November.—Practice; Attorney General.

The Attorney General not having answered the bill within a reasonable time, the court ordered that he should put in his answer within a week after service of the order, or that the bill should be taken *pro confesso* against him.

THE Attorney General not having put in his answer to the bill within a reasonable time.

The Vice-Chancellor, on the application of Mr. *G. Richards*, ordered that the Attorney General should, within a week after the service of the order, put in his answer to the bill, or, in default thereof, that the bill should be taken *pro confesso* against him; and that service of the order on the Attorney General's clerk in court, should be good service.(b)

*NICHOLSON v. KNAPP.

[*326]

1838; 7th June.—Injunction; Bishop.

In a suit for the specific performance of an agreement for the sale of the next presentation to a living, the court will restrain the Bishop of the diocese from taking advantage of a lapse pending the suit.

THE defendant Knapp had agreed to sell to the plaintiff, the next presentation to a living. After the agreement was entered into, the incumbent died; and Knapp having refused to complete the contract, the bill was filed against him and the Bishop of the diocese, praying for a specific performance, and for an injunction to restrain Knapp from presenting, and the Bishop from instituting, or, in the case of a lapse taking place pending the suit, from collating to the living, any clerk not nominated by the plaintiff.

(a) *Ex relatione*,

(b) See 1 Fowl. Ex. Prac. 452, and *Barclay v. Russell*, 2 Dick. 729.

 1838.—*Hammond v. Messenger.*

Mr. *K. Bruce* and Mr. *Beavan*, now moved for the injunction.

Mr. *Jacob* and Mr. *James Parker*, for the defendant *Knapp*.

Mr. *Flather* for the Bishop of the diocese, contended that the court had no right to interfere with the legal rights of the Bishop. But,

The Vice-Chancellor granted an injunction in the terms of the motion.—[1]

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*HAMMOND v. MESSENGER.

1838: 5th July.—Assignee of Debt; Debtor and Creditor; Demurrer.

The assignee of a debt cannot sue for it in a Court of Equity, unless the assignor refuses to allow the assignee to sue for it, at law, in his name, or has done or intends to do some act which will prevent the assignee from recovering it at law, in the assignor's name.

THE plaintiff was the assignee, for valuable consideration, of a debt of 80*l.*, due, from the defendant *Charles Messenger*, to the defendants *William Wilks* and *Henry Thomas Wooler*, who had been co-partners as coal merchants.

The bill alleged, amongst other things, that, on the 2d of October, 1837, the plaintiff applied to *Messenger* to pay him the 80*l.*, and fully apprised *Messenger* of his right and title to be paid the debt; and that *Messenger*, for the first time, pretended that the plaintiff was not entitled to receive the debt, but that he was bound to pay it to *Wilks & Wooler*; that the plaintiff had since renewed his applications, but *Messenger* had refused to comply therewith, pretending that no debt was due from him to *Wilks & Wooler*, or to the plaintiff as the assignee thereof, but that the alleged debt was due to *Wilks*, solely, on his own private account: but the plaintiff charged that the 80*l.* was a debt due to the late firm of *Wilks & Wooler* at the time of the dissolution of their partnership, and that, after such dissolution, the 80*l.* became and still was due, by *Messenger*, to the plaintiff, and that *Messenger* had had express notice, from the plaintiff, of the plaintiff's right to receive the same from him; and, on receiving such notice, *Messenger* became and still was a trustee, in equity, for the plaintiff, of the 80*l.*: that *Wilks* and *Messenger*, (although, at other time, they did not dispute the plaintiff's right to receive the debt) acting in collusion together, pretended that there was some private and

*328] *separate debt, due from *Wilks* to *Messenger*, equal to or greater in amount than the 80*l.* due from *Messenger* to the firm, and that *Messenger* was entitled to set off his private debt against the debt so due from him to the firm; but the plaintiff charged that, if any private debt was due from *Wilks* to *Messenger*, *Messenger* was not entitled to set off the same against the 80*l.*: that, if any agreement had been entered into between *Wilks* and *Messenger* for the purpose of enabling *Messenger* to set off such alleged private debt against the 80*l.*, the same was

[1] Vide *Attorney General v. Cuming*, 2 *Yo. & Coll. C. C.* 139. *Daly v. The Archbishop of Dublin*, 1 *Flan. & Kel.* 263.

1838.—Hammond v. Messenger.

entered into, collusively, with Wilks solely, without the privity or concurrence of Wooler, and such agreement was fraudulent and void as against the plaintiff and Wooler; and, as evidence that such agreement (if any such had been entered into) was collusive and fraudulent as against the plaintiff and Wooler, the plaintiff charged that Messenger having, in October then last, applied to Wilks for a debt claimed to be due to him from Wilks, and proposed to set off the same against the debt of 80*l.*, was informed, by Wilks or by his agent or attorney, that he, Messenger, had no right to do so, and that he could not consent thereto, and that the debt due from Wilks to Messenger, should be paid if Messenger would grant to Wilks a little time for that purpose, and that Messenger had admitted the facts so to be to the plaintiff and other persons: and that Messenger, at other times, alleged that he had paid the 80*l.* to Wilks & Wooler; but the plaintiff charged the contrary to be true: that Messenger, further colluding with Wilks, at other times alleged that he had obtained and had then in his possession a release or other instrument in writing, signed by Wilks & Wooler, whereby they acknowledged to have received the 80*l.*, and released and discharged Messenger therefrom; but the plaintiff charged that, if in fact, such release or instrument of discharge *had been given to Messenger or he had any [*329] such in his possession, the same was, in fact, signed and given, by Wilks alone, to Messenger, without the privity or knowledge and against the will and consent of Wooler; and that the same was so given, to Messenger, collusively and fraudulently, and that no money passed between Wilks and Messenger upon the occasion of Wilks giving the same: that if, in fact, any payment or any such release or receipt as was pretended, had been made, signed or given by Messenger to Wilks, such payment and such release or receipt had been made and signed or given in consequence or in consideration of some bond of indemnity of Wilks or of his agent or attorney or of some other person or persons on his behalf, whereby Wilks or such agent or attorney or other person or persons as aforesaid had agreed to indemnify Messenger from all losses, damages and expenses to which he might thereafter be subject in consequence of such payment to Wilks or of such release or receipt so alleged to have been given by Wilks to Messenger: that Wilks, Wooler and Messenger had had various conversations with each other and with other persons, in which they had admitted the matters before stated or some of them as true; and that they and other persons had written, sent, received and seen divers letters, notes, &c., relating to the matters aforesaid; and that they then had or theretofore had, in their possession or power divers deeds, &c., relating to the co-partnership affairs and accounts of Wilks & Wooler and the assets thereof and to the agreement for payment and to the payment of the debt of 80*l.* and to the other matters aforesaid or some of them, and whereby the truth of such matters would appear.

The bill prayed that Messenger might be decreed to *pay, to the [*330] plaintiff, the 80*l.*, or, if necessary, that an account might be taken of

1838.—*Hammond v. Messenger.*

all sums due, by Messenger, to the firm, and that he might be decreed to pay to the plaintiff, what, upon taking such account, might be found due; or that the plaintiff might be at liberty to use the names of Wilks & Wooller in an action at law to be brought by him against Messenger; and that Messenger might be restrained from pleading to such action, any plea or pleas of payment or satisfaction of the debt of 80%, or, in manner, availing himself thereof in such action, and that Wilks & Wooller might be restrained from releasing the debt or discontinuing the action, or, in any way, interfering with the plaintiff in the proceedings thereunder.

Messenger put in a general demurrer.

Mr. *Wigram* and Mr. *Girdlestone*, in support of the demurrer:—The plaintiff is the assignee of a debt due from Messenger to Wilks & Wooller; therefore, his remedy is, naturally, at law. In order to give jurisdiction, in such a case, to a Court of Equity, the plaintiff must show that there is some legal bar existing, which prevents his suing at law. This bill does not allege that Messenger has, in fact, obtained a release of the debt from Wilks & Wooller; but it states, merely, that Messenger *says* that he has obtained such a release. Nor does the bill contain any allegation that Wilks & Wooller have threatened or intended to release the debt, or that they have refused to permit the plaintiff to sue at law, in their names, for the recovery of the debt. On the argument of a demurrer, it is not sufficient for the plaintiff to show that he may, possibly, be entitled to relief at the hearing. Unless [*331] such a case appears, on the face of the bill, that relief must be, necessarily, given at the hearing if all the statements are proved or admitted, the bill is demurrable. *Mittf. Treat.* 3d edition, 100. *Attorney General v. Mayor of Norwich*; (a) *Jones v. Jones*; (b) *Barber v. Hunter*; (c) *Stansbury v. Arkright*; (d) *Kemp v. Pryor*. (e)

Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *Tripp*, in support of the bill, contended that the assignee of a debt might sue for it in a Court of Equity; and though, according to the modern practice at law, a judge at chambers might order the assignor to allow his name to be used in an action to be brought, by the assignee, against the debtor, yet a Court of Equity was not to be ousted of its jurisdiction by modern innovations. *Aston v. Lord Exter*; (f) *Hylton v. Morgan*; (g) *Cathcart v. Lewis*; (h) that, according to the averments in the bill, which were admitted by the demurrer, Messenger had notice of the assignment; thereof, he could not pay the assignors, and he would not pay the assignee, and consequently, if the bill was not maintainable, he must retain the debt subject to the risk of his insolvency: that the bill contained distinct charges of collusion between the debtor and one of the joint legal creditors, for, if a defendant admitted that he averred a fact, he could not dispute the truth of it; and, as Messenger admitted, by his demurrer, that he alleged that he had obtained a fraudulent release of the debt, he must be

(a) 2 Myl. & Craig, 406. (b) 3 Mer. 161. (c) Cited in 3 Mer. 173. (d) Ante, vol. 6, p. 481.
(e) 7 Ves. 237. (f) 6 Ves. 268. (g) Ibid. 293. (h) 1 Ves. 463.

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taken to have admitted the fact alleged: that *Jones v. Jones* was decided on the ground that, in that case, there was no allegation of any legal bar *existing; but where, as in the present case, a legal impediment [*332] was averred, there was an end to the objection against the assignee of the debt suing for it in a Court of Equity.

THE VICE-CHANCELLOR:—If this case were stripped of all special circumstances, it would be, simply, a bill filed by a plaintiff who had obtained from certain persons to whom a debt was due, a right to sue in their names for the debt. It is quite new to me that, in such a simple case as that, this court allows, in the first instance, a bill to be filed, against the debtor, by the person who has become the assignee of the debt. I admit that, if special circumstances are stated, and it is represented that, notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this court will interpose for the purpose of preventing that species of wrong being done; and, if the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction, in the first instance, to compel the debtor to pay the debt to the plaintiff; especially in a case where the act done by the creditor, is done in collusion with the debtor.[1]

If bills of this kind were allowable, it is obvious that they would be pretty frequent: but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances.

The only question then is, whether, on this record, there are any special circumstances which create a ground for a Court of Equity to entertain the bill against the debtor.

The bill sets out with a statement that a partnership was carried [*333] on between Wilks & Wooller; and a variety of instruments and transactions are stated, the result of which was, that the partnership was to be dissolved, that the plaintiff was to pay the debts due from the partnership, and to be entitled to the partnership assets. Then it represents that Messenger, the demurring party, at the time of the agreement for the dissolution of the partnership, was justly indebted, to the firm, in the sum of 80*l.* for coal and coke sold and delivered to him by the firm, and that Messenger is now indebted to the plaintiff in the said sum of 80*l.* as the assignee of such debt. Therefore the debt in question was, purely, a debt recoverable at law. Then the bill states a notice given to Messenger by the plaintiff to pay the debt to him. It then states that on the 2d of October, the plaintiff called on Messenger, and applied to him for payment of the sum of 80*l.*, and fully apprised him of the plaintiff's right and title to demand and receive payment of it from him: that Messenger, for the first time, pretended that the plaintiff was not entitled to receive

[1] When the equity of the case gives the assignee a *locus standi* in this court, the suit must be in his own name, and not in that of the assignor. *Field v. Maghee*, 5 Paige, 539. *Rogers v. The Traders Ins. Co.*, 6 Paige, 584.

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the debt, but that he was bound to pay it to Wilks & Wooler. That, of itself, creates no equitable ground.

The bill then alleges, in the usual manner, that the plaintiff had applied, to Messenger, for the payment of the debt, and that Messenger, combining and confederating with Wilks, had refused so to do, and pretended that there was no such debt: that, however, gives no equity. Then it charges that Messenger, on receiving notice of the plaintiff's right and title to the debt became and still was a trustee of it for the plaintiff. That again does not

make him a trustee, that is to say, such a trustee as the plaintiff has
[*334] a right to sue in equity, unless the whole circumstances of the case taken together, do show that the plaintiff has a right to sue in equity.

Then the bill charges that Wilks & Messenger, colluding together, allege that there was a large sum due from the plaintiff to Wilks & Wooler; but that is denied. It then charges that Wilks & Wooler, acting in collusion together, pretend that there was or is some private and separate debt of Wilks due and owing from him to Messenger, equal to or greater in amount than the said debt of 80*l.*, and that Messenger was entitled to set off his private debt against the debt of 80*l.* *Prima facie* one would imagine that could not be so: but if it were so, it appears to me that, if there was any transaction or any circumstance of such a nature as that it will be available to Messenger, at law, for the purpose of reducing or annihilating the debt of 80*l.*, Messenger has a right, at law to avail himself of that circumstance. Then the bill charges that Messenger, having, in the month of October last, applied to Wilks for a debt claimed to be due from him to Messenger, and proposed to deduct and set off the debt owing to Messenger by Wilks from and against the 80*l.* owing by Messenger to the plaintiff, was informed, by Wilks or his agent or attorney, that he, Messenger, had no right to do so. I do not see how that affects the case at all.

Then comes the charge which was mainly relied upon as creating the equity in this case. It is as follows:—"That Messenger, further colluding with Wilks, at other times alleges that he has obtained and now has in his possession a release or other instrument in writing signed with the names of

Wilks & Wooler, whereby Wilks & Wooler acknowledge to have received the said sum of 80*l.*, and do release and discharge *Messenger therefrom." Then the bill charges: "That if in fact, such release

or instrument of discharge has been at any time given to Messenger, or he has any such in his possession, the same was, in fact, signed and given, by Wilks alone, to Messenger, without the pivity or knowledge and against the will and consent of Wooler, and the same was so given, to Messenger, collusively and fraudulently, and that no money passed between Wilks and Messenger on the occasion of Wilks giving the same." Now if we take the former of these charges by itself, and, more especially, if we couple it with the latter, it is plain that it cannot be considered as amounting to a positive charge that Messenger has obtained and has in his possession a release of the debt from

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Wilks & Wooley; but it is merely a charge that Messenger *alleges* that he *has* obtained and has in his possession such a release. A statement that a party *alleges* a certain thing to be so and so, cannot be considered as a positive statement that the thing is so and so.

A similar point was brought under my notice in the case of *Stansbury v. Arthwright*,^(a) where there was an allegation in the bill, that the defendant threatened to set up some outstanding term of years or other legal estate, and I expressly stated, as the ground of my judgment in that case, that the bill did not allege that there *was* any outstanding term or estate, but, merely, that the defendant threatened to set up some outstanding term or other legal estate: and I looked upon it therefore, and treated it as a statement that the defendant alleged a fact, and that it was not to be taken as a statement that what he alleged was the fact; and it "seems to me that that is the fair [*336] inference in this case: moreover, in the next charge, there is a sort of hypothetical account given of the circumstances under which the release was signed and given if it existed, without there being anything on the face of the bill which at all tends to show that that which the defendant has alleged as a fact, is true in fact.

Then there is another charge: "that Wilks, Wooley and Messenger, have had various conversations with each other, and with other persons, in which they have admitted the matters hereinbefore stated and mentioned." That would have been strong if it stood alone; but then the bill goes on to say; "or some of them, or referred to such matters, or some of them, as true." And, as I am not informed, by this bill, which of those matters were admitted or referred to as true, but only that such matters or some of them were so referred to or admitted, that allegation does not affect the case. If it had been stated that there had been such a release given, or that it was the intention of Wilks & Wooley to give it, or if it had been stated there was any intention on the part of Wilks & Wooley to give, and on the part of Messenger, to receive from them anything which would be destructive of the action, that statement would be a ground for interfering; but there is no such statement in the bill.

When I come to the prayer, I find that it first of all, prays; "that Messenger may be decreed to pay to the plaintiff the sum of 80*l.* so due to the firm of Wilks & Wooley as aforesaid, or, if necessary, that an account may be taken." Now, no case whatever, is stated to show the necessity for an account, and, therefore, it "must, of necessity, stand as a mere prayer, that Mes- [*337] senger may be decreed to pay the debt. It then proceeds as follows: "or that the plaintiff may be at liberty to use the name of the defendants, Wilks & Wooley, in an action at law to be brought by him against Messenger." There is, however, no case stated which shows that Wilks & Wooley have at all interfered to prevent, or that they intend to prevent the plaintiff from using their names at law. Then it goes on thus, "and that Messenger may be restrained from pleading, to such action, any plea or pleas of payment or

(a) *Ante*, vol. 6, p. 481.

1838.—Munch v. Cockerell.

satisfaction of such debt of 80*l.* to Wilks & Wooler, or in any manner availing himself thereof." I do not understand what is meant by this part of the prayer: because the bill no where states that there has been a fictitious payment or satisfaction, of which Messenger intends to avail himself at law. Why then does it ask that Messenger may be restrained from pleading any plea or pleas of payment or satisfaction of the debt to Wilks & Wooler, or in any manner availing himself thereof.

It seems to me that this case is altogether denuded of those special circumstances, the existence of which is the only ground for this court to lend its aid to a party who, like the plaintiff, has taken an assignment of a debt: and consequently, the demurrer must be allowed.

Demurrer allowed, with liberty to the plaintiff to amend his bill.[1]

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1838: 14th July—Costs; Construction of Lord Lyndhurst's 31st Order.

Where a demurrer to the whole bill is allowed, but the plaintiff has leave to amend, the costs which he is to pay to the defendant are not the whole costs of the suit, but of the demurrer only.

A question arose, on drawing up the order in the above case whether the plaintiff ought to pay the costs of the demurrer only, or those costs and the costs of the suit also: as Lord Lyndhurst's 31st order[2] directs that, upon the allowance of any plea or demurrer, the plaintiff shall pay, to the defendant, the taxed costs thereof; and, when such plea or demurrer is to the whole bill, then the further taxed costs of the suit also.

The Vice-Chancellor decided that the plaintiff ought to pay the costs of the demurrer only.

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*MUNCH v. COCKERELL.

1838: 16th, 17th, 19th, 21st and 23d July, and 23d December.—Trustees; Breach of Trust: Acquiescence.

By a settlement made in India, in 1778, the trustees were directed to invest a certain sum of rupees in good public or private securities, at the highest rate of interest that could be obtained, upon certain trusts under which one of the daughters of the marriage became entitled to a moiety of the fund after the death of her father and mother. The fund was accordingly invested in notes of the Indian Government; and these notes were deposited with Palmer & Co., of Calcutta. On the daughter's marriage, in 1791, her moiety of the fund was assigned to other trustees, in trust, after the deaths of her father and mother, to receive and lay out the same in such of the public stocks or parliamentary funds or other securities (private personal security only excepted) as the daughter and her husband should appoint. After the father's death, the mother filed a bill against the trustees of the two settlements and her daughter and her husband, to have the trust of 1778 carried into execution. By the decree in that suit made in 1809, at which time the mother was dead, certain arrears of interest on the fund were ordered to be paid to the mother's representative, and the daughter's moiety of the fund was declared to have vested in the trustees.

[1] As to the right of the assignee of a debt to come into equity to have the benefit of a set-off at law, see *Clarke v. Cort*, Cr. & Ph. 154.

[2] Vide 2 Russ. p. 645 of this edition.

1836.—*Munch v. Cockerell*.

of the settlement of 1791 upon the trusts thereof, and was paid to them accordingly. The trustees of 1778 did not comply with that decree, but allowed the notes to remain in the hands of Palmer & Co., who failed in 1830, having previously received the amount of the notes. Held that the trustees of 1778 were responsible for the loss. Held also that, although the *cestui que trust* knew and acquiesced in the mode in which the fund had been invested and dealt with, and approved of its remaining under the management of Palmer & Co., yet, as the trustees were aware that Palmer & Co. were in pecuniary difficulties some time before they failed, but did not inform the *cestui que trust* thereof, the acquiescence did not exempt the trustees from their liability.

THIS cause came on to be heard in November, 1836, when an objection was taken, for want of parties, and in part allowed.(a)

The necessary parties having been brought before the court, the cause again came on to be heard.

'In addition to the facts contained in the former report, it is necessary to state that, it appeared from the proceedings in a suit relating to the fund in question, which was instituted in 1820, by Mr. Silberschildt, in the name of himself and his daughters, Mrs. Munch and Mary Elizabeth Süberschildt, against Sir W. Paxton, Sir C. Cockerell, and Mr. Trail,(b) and also from the correspondence which subsequently took place between Mrs. Munch and Cockerell & Co. and their respective solicitors, that Mrs. Munch knew of and acquiesced in the manner in which the fund in question in the suit, had been invested and dealt with, and expressed a wish that it should continue under the management of Palmer & Co. It did not, however, appear that Mrs. Munch was aware that, in 1823, Palmer & Co. received the sum of 164,000 rupees, being the amount of the India Company's note, on which the fund was then invested, and, afterwards, took a new note for 114,000 rupees, but kept the balance of 50,000 rupees in their hands. [*340]

Mr. Knight Bruce and Mr. G. Richards appeared for the plaintiffs.

Mr. Walker, for the parties entitled to Mrs. Le Gros' moiety of the fund.

Mr. Jacob and Mr. Cockerell, for the representatives of Sir C. Cockerell, who had recently died, and also for the representatives of Logan.

Mr. Wigram and Mr. Sharpe, for Trail's representatives.

'The Solicitor General and Mr. J. F. Hall, for Sir W. Paxton's [*341] representatives.

Sir W. Horne, and Mr. Shadwell, for Evelyn's representatives.

The counsel for the representatives of Cockerell and Trail relied, principally upon the acquiescence, on the part of the plaintiffs, in the mode in which the fund had been dealt with. They contended also that the trustees of the settlement of 1791, and not their clients, were responsible to the plaintiffs.

The cases cited in the course of the argument, were *Langston v. Olivant*; (c) *Massey v. Banner*; (d) *Macdonnell v. Harding*; (e) *Heathcote v. Hulme*; (f) and *Twyford v. Trail*.(g)

(a) See ante, vol. 8, p. 219. (b) See post, p. 345. (c) Coop. C. C. 33. (d) 1 Jac. & Walk. 241.
(e) Ante, vol. 7, p. 178. (f) 1 Jac. & Walk. 122. (g) Ante, vol. 7, p. 92.

1838.—*Munch v. Cockerell.*

THE VICE CHANCELLOR :—After the marriage of William Barton with Harriett his wife, a settlement was made, in the year 1774,^(a) which directed that a sum of 40,320 rupees should be invested, either in the East India Company's interest notes, if the same could be procured, or, otherwise, in such good and sufficient security or securities as the trustees should think proper. In December, 1778, another deed was executed, by which a slight variation was made in the mode of investment directed by the deed of

1774 ; and, there the direction was that the fund should be invested [*342] in some good or sufficient public or private *security or securities, at

the best and highest rate of interest that could be obtained, and that those securities should be held on certain trusts for the benefit of Mrs. Barton and her children. There was issue of the marriage two children, Harriet, who married J. F. Silberschildt, and Elizabeth, who married William Le Gros ; and they became the parties entitled to the fund after the death of their father and mother.

In April, 1791, upon the marriage of Harriet with Mr. Silberschildt, a settlement by which her moiety of the fund was assigned to Archibald Paxton, Sir W. Paxton, and John Le Gros, in trust to receive and lay out and invest the same in or upon such of the public stocks or parliamentary funds or other securities (private personal security only excepted) as the husband and wife should appoint.

There was a power to change trustees in the deed of 1778 ; and a deed was executed in the month of September, 1792, under which Sir Charles Cockerell, Henry Trail, and William Logan became trustees of the deed of 1778, in conjunction with John Evelyn, one of the original trustees. William Barton died in 1799 ; and shortly after his death, his widow married Mr. Eyles ; and in February, 1802, Mr. and Mrs. Eyles filed a bill, to which John Evelyn, Sir Charles Cockerell, Henry Trail, William Logan, William Le Gros and his wife, and their son, William Beaufroy Le Gros, and Mr. and Mrs. Silberschildt and their children, were defendants : and it seems that one of the objects of that suit was to settle a question as to what was due in respect of interest that had accrued on the fund comprised in the deed of 1778.

There were various proceedings in that cause, and the ultimate result of it was that, in the *year 1809 there was a final decree made, [*343] which directed the arrears of interest on the fund, accrued between the death of William Barton, and the death of Mrs. Eyles, (who died pending the suit) to be paid to Mr. Eyles : and it was declared that Mrs. Le Gros was entitled to one moiety of the capital of the fund ; and the remaining moiety was directed to be paid to the defendants A. Paxton and Sir W. Paxton, upon the trusts of the settlement of 1791. It appears, by the proceedings in the cause, that there had been a reference to the Master to see whether the

(a) It did not appear to be necessary to notice this deed in the former report of the case.

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deed of 1791 was a proper settlement of Mrs. Silberschildt's share; and the Master made a report in which he sets forth the settlement at length, and finds that it was a proper settlement; and that report was confirmed. I mention this, because in my opinion, *this ordering part of the decree in 1809, has made it quite unnecessary to enter into the question, that was very much discussed, namely, what was the sort of investment in India which the trustees were at liberty to make under the directions which were contained in the deeds of 1774 and 1778.*

At the time when the final decree was made in the cause of *Eyles v. Evelyn*, William Le Gros was dead; and, though Mrs. Eyles was alive when the suit was instituted, yet she died pending the suit, in the year 1806; and her husband, Mr. Eyles, administered to her; and then a bill of revivor was filed: so that it appeared, by the proceedings in the cause, that the Silberschildt moiety had come into possession in the course of the cause: therefore the court was justified in decreeing, in 1809, that that moiety should be transferred to Sir William Paxton and A. Paxton, who were the surviving trustees of the settlement of 1791. Now, by the trusts of that settlement, that moiety was to be *invested in the public stocks, or parliamentary funds, or other private securities (private personal security only excepted); and, in my opinion, *the very least obligation which was imposed, by the settlement of 1791, on the trustees of the deeds of 1774 and 1778, was that they should transfer a moiety of the fund, which is the moiety in question, to Archibald Paxton and Sir W. Paxton.* If they did not choose to do so, they might have been perfectly safe if they had invested that moiety in those securities which were pointed out, by the settlement of 1791, as the securities in which Mrs. Silberschildt's moiety was to be invested when it came into possession. Instead of which, the trust fund was allowed to remain in India in the state which I am about to mention.

There was a firm formed of certain gentlemen at Calcutta, for the purpose of carrying on mercantile business there, which, at first, consisted of Sir C. Cockerell, Mr. Trail and Sir William Paxton. Then, in 1795, Sir W. Paxton retired, and Mr. Palmer became a partner. Afterwards Sir Charles Cockerell and Mr. Trail withdrew themselves: and ultimately the partnership firm became the firm of Palmer & Co.

Before the year 1800, A. Paxton, Sir W. Paxton, Sir C. Cockerell and Mr. Trail became partners, in London, in an East India house, and that firm was, from time to time, carried on under various names. The London house had a great many transactions with the house at Calcutta; and, up to the year 1823, the trust fund was allowed to remain invested on securities of the Indian government: and a great deal of the evidence in the cause relates to the nature of the securities and to the circumstance that the trustees, if they had taken certain precautions, might have prevented any one from receiving *the money due on those securities, without their concurrence. In 1823, when the whole amount of the trust fund was

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164,000 rupees or thereabouts, the Government paid off the notes, and Messrs. Palfner, who acted in the transaction, took a new note for 114,000 sicca rupees, and kept the balance, the difference between the amount of that note and the 164,000 rupees, that is, 50,000 rupees, in their hands; and, from time to time, accounts were transmitted from Palmer & Co. to Cockerell & Co. which showed what was the state of the trust fund.

For a considerable time the payment of the interest on the moiety in which Mr. Silberschildt was interested, was made to him, and without complaint: but Silberschildt afterwards found some occasion to quarrel with what had been done; and, in the year 1820, he filed a bill in the name of himself and Mr. Munch, who had then married his daughter Harriet Elizabeth Munch, and of his other daughter Mary Elizabeth Silberschildt, against Sir W. Paxton, Sir C. Cockerell and H. Trail, praying for an account of all sums of money received, by Sir C. Cockerell and his agents, in respect of his late wife's moiety of the yearly interest of the trust fund, which then amounted to 164,000 sicca rupees, and of what had been paid in respect thereof; and it also prayed that the defendants might be decreed to pay the balance of the interest to Mr. Silberschildt. To this bill answers were put in by Sir W. Paxton, Sir C. Cockerell, and Mr. Trail, which represented that the defendants had been, for many years last past, resident in this country, and had carried on business, in co-partnership together and with other persons, as merchants in

London, and that the management of the trust fund had been entrusted by them to Palmer & Co., their correspondents at Calcutta, who had, from time to time, received the proceeds thereof, and had annually remitted the same to the house of the defendants, Sir C. Cockerell, Henry Trail, and their co-partners for the time being, to be by them applied for the benefit of the parties interested therein; and that it appeared, by the accounts transmitted by Palmer & Co., their correspondents, which they believed to be correct and true, that in the month of June, 1811, the trust funds amounted, in the whole, to the sum of 164,000 sicca rupees, which was then invested, at interest, upon the security of a note of the Bengal Government, bearing date the 30th of June, 1811, and carrying interest at the rate of 6 per cent., and which interest the defendants believed was payable half-yearly. Then they say that they believed that that note and security was then in the custody of Palmer & Co., but subject to the order and disposition of the trustees. This was the representation which was made at the time those gentlemen put in their answer in this suit. Mr. Silberschildt died in the month of August, 1827, and the suit so instituted by him was not prosecuted after his death. At the time of, and after the death of Mr. Silberschildt, Mrs. Munch and her sister Miss Silberschildt were resident at Copenhagen; and they always resided there, with the exception that Mrs. Munch, for a short time paid a visit to England, which does not affect the case at all. After the death of Mr. Silberschildt, a further application was made, to Messrs. Cockerell & Trail, on behalf of Mrs. Munch and her sister, for the

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purpose of obtaining a settlement of their rights with respect to the fund: and a great deal of correspondence was carried on between the parties and their respective solicitors, upon which nothing turns, at least, nothing in favor of the defendants. It appears, however, that the matter took this course; namely, that Mrs. Munch and her sister gave a power [*347] of attorney to Reid, Irving & Co., to receive their moiety of the fund, and, upon receiving it, to give a release and discharge to the trustees.

The correspondence evidently shows that there was a desire, on the part of Mrs. Munch and her sister, to continue, as they expressed themselves, the management of the fund in the same respectable hands, meaning the hands of Palmer & Co.

It appears, too, that a release was actually executed, to the trustees, by the parties having the power of attorney, but that release can produce no effect whatever on the question, because the power of attorney was not to be acted upon by the attorney, except upon receipt of what was due to the principals, and that receipt was never had. Moreover, throughout the correspondence, no representation was made either to Mrs. Munch or her sister, or to the agents acting for them, of the real position of the affairs of Palmer & Co. as far as they actually were within the knowledge of Sir C. Cockerell and Mr. Trail: and it distinctly appears, from their answer, that they must have been aware that the position in which Messrs. Palmer stood in 1827, was such as to make it rather an unsafe thing to let money remain in their hands: because it is represented, in their answer, that they had originally agreed to give credit to Palmer & Co. for 150,000*l.*; and that, nevertheless, Palmer & Co. had been continually increasing their drafts upon them until the debt amounted to 400,000*l.* It appears also that they had remonstrated with Messrs. Palmer, and had taken some steps for the purpose of procuring a diminution of the debt: notwithstanding which the correspondence was carried on without any mention being made of those facts; and, at last, a [*348] release was executed; and certain instruments were sent out to India, which, had they been duly acted upon, and had Messrs. Palmer & Co. been solvent, would have had the effect of releasing Messrs. Cockerell & Trail from all their liability as trustees. But the release was executed on the 8th of January, 1830, and the failure of Messrs. Palmer's house took place a few days before. *The answers which Sir C. Cockerell and Mr. Trail have put in to the original bill in this suit, would almost have afforded a case for a decree without any evidence at all; because it does most distinctly appear that, during all the time in which the correspondence to which I have alluded was going on, no statement was ever made of the position in which (as their answer shows) Messrs. Cockerell & Trail must have known that Messrs. Palmer & Co. really stood.* In my opinion, therefore, there is nothing like acquiescence which can bind Mrs. Munch or those who represent her.[1]

[1] Vide 3 Russ. 574, n. 1, and cases there cited. *Cockerell v. Cholmely*, 1 Russ. & M. 418, 425; 8 C. Taml. 435. *Flagg v. Mann*, 2 Sumn. 563. *Fish v. Miller*, 1 Hoff. Ch. Rep. 267.

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It was said by the counsel for Sir C. Cockerell and Mrs. Trail, that, after the death of Mr. Silberschildt, the ladies consented that the suit of *Silberschildt v. Cockerell* should be dismissed with costs; and so they did; but that suit was not a suit which at all raised the question which is raised in this suit. The principal question in it was respecting the interest of the plaintiff's moiety of the trust fund; and it appears, from the admissions in this cause, that the bill was filed without any privity or knowledge on the part either of Mr. and Mrs. Munch or Miss Silberschildt. The bill was certainly dismissed; but I do not think that much advantage could arise, to Messrs.

Cockerell & Trail, from that suit, considering that there was, in the [*349] answer they put in to it in 1820 and 1821, a representation that 'the 164,000 sicca rupees were under their order and disposition, though they might have been managed by Palmer & Co.

Messrs. Cockerell & Trail originally acted wrongly in not making the transfer which was ordered by the decree of 1809, in the cause of *Eyles v. Evelyn*; and though they might, with the concurrence of the tenants for life, have dealt with the fund in the way in which it was actually dealt with, yet no concurrence of the tenants for life, could, at all, bind or effect the interest of those entitled in remainder: and, in my opinion, it was the duty of Messrs. Cockerell & Trail, if they were willing to take a release at all, to state exactly those circumstances which were within their knowledge in regard to the house of Palmer & Co. They did not, however, do so. They took a release which, in fact, was no release at all; for no transfer was made according to the power of attorney which was sent out for that purpose; and therefore, I do not see how it is possible to abstain from making a decree, which will have the effect of making Messrs. Cockerell & Trail liable, to Mrs. Munch, for the amount of one moiety of the trust fund.

When this case was first brought before me, it was contended that the representatives of Evelyn and of Logan, and those persons also who represent, in point of interest, the Le Gros moiety of the fund, ought to have been parties to the suit; and I was of opinion that the objection was well founded; and, the consequence is, that all those parties have been brought before the court. Now, it is contended that Evelyn's estate is not liable; and I was very desirous, before I decided the point, to read over all the papers in *Eyles*

v. Evelyn, for the sake of seeing how, at the time when that cause [*350] was in progress, the court had treated Evelyn. When Evelyn put

in his answer in that cause, he represented that he had never acted in the trust since 1792; and it seems to me that, in the whole progress of that cause, including the proceedings before the Master, and adverting to the sort of answer put in to the bill by Messrs. Cockerell, Trail and Logan, Evelyn was virtually considered not as a trustee *de facto*, though he had been a trustee, in a sense perhaps, by allowing the funds to stand, to a certain extent, in his own name. Virtually, he was not considered as a trustee; he did not

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attend before the Master in taking the accounts. Those accounts were taken solely, as against Cockerell, Trail and Logan; and therefore it would be the height of injustice after the lapse of so many years since the final decree was made in *Eyles v. Evelyn*, to hold that Evelyn should be liable as a trustee; and, therefore, as against his representative, the bill must be dismissed with costs, to be paid by the plaintiffs; but those costs must be paid over again by the representatives of Sir C. Cockerell and Mr. Trail, for they it was who made the objection which had the effect of producing Evelyn's representative as a party to the record.

Next, with respect to Mr. Logan. Mr. Logan was a party to the cause of *Eyles v. Evelyn*, at the time when the decree of 1809 was pronounced; but I collect from a passage in the answer either of Sir C. Cockerell or Mr. Trail, that he was drowned in his homeward passage in that very year; and though he might be a party, *de facto*, to the cause, and so, in that sense, be bound by the decree of 1809; yet it would be extremely unjust to say that he should be made responsible for all that was consequent on that decree. The only liability he could come under would have arisen from non-compliance with that decree; but, in point of fact, he could not have executed it [*351] for he was dead at the time.

My opinion on the whole of this case is that, as to the relief which is substantially asked by the bill, the plaintiffs are entitled to an account of what is due in respect of the whole of the fund which was in the hands of Messrs. Palmer & Co. at the time of their failure, and also of what is due in respect of interest on that fund, after the rate of 5*l.* per cent. ;(a) and, if the representatives of Sir C. Cockerell and Mr. Trail admit assets, they will be liable to pay what may be found due; otherwise, an account must be taken of the assets possessed by them.(b)

*MATHER v. PRIESTMAN.

[*352]

1838: 27th July.—Insolvent Debtor; Construction of Insolvent Debtors' Act, 7 Geo. 4, c. 57, s. 20. Although the insolvent debtors' act (7 Geo. 4, c. 57, s. 20) directs the assignees to sell the insolvent's real estates by auction, yet, if they have tried to sell them by auction, and failed, a sale by private contract will be good.

THE plaintiffs were the assignees of an insolvent debtor; and, having made an ineffectual attempt, within the time prescribed by the insolvent debtor's act (7 Geo. 4, c. 57, sect. 20) to sell the insolvent's real estates by

(a) See *Hesthote v. Hulme*, 1 Jac. & Walk. 122.

(b) In HIL. term, 1840, the Lord Chancellor affirmed the above decision, so far as it related to the cash balance of 50,000 rupees; but reversed it so far as it related to the proceeds of the note for 114,000 rupees.

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auktion, they, after that time had expired, sold part of the estates to the defendant by private contract, having previously obtained the consent of the major part in value of the creditors present at a meeting duly convened for that purpose.

The bill was filed for a specific performance of the contract; and the question was whether, under the section of the act above referred to, the assignees were authorized to sell the estates otherwise than by public auction.

That section enacts, that the assignee or assignees of the estate and effects of any such prisoner shall, with all convenient speed after his or their accepting the conveyance and assignment of the prisoner's estate and effects from the provisional assignee, use his or their best endeavors to receive and get in the estate and effects of such prisoner, and shall, with all convenient speed, make sale of all such estate and effects; and if such prisoner shall be interested in or entitled to any real estate, either in possession, reversion, or expectancy, such real estate, within the space of six months after the conveyance and assignment made to such assignee or assignees in that behalf, or within such other time as the Insolvent Debtors' Court shall direct,

[*353] *shall be sold "by public auction,* in such manner and at such place or places as shall, thirty days before any such sale, be approved, in writing under their hands, by the major part in value of the creditors of such prisoner entitled to the benefit thereof, who shall meet together on notice of such meeting published fourteen days previous thereto in the London Gazette, and also in some daily newspaper printed and published in London, or within the bills of mortality, if the prisoner, before his or her going to prison, resided in London or within the bills of mortality, and if such prisoner resided elsewhere within the United Kingdom, then in some printed newspaper which shall be generally circulated in or near the place where such prisoner resided at the time aforesaid.

Mr. *Knight Bruce* and Mr. *Bethell*, for the plaintiffs, contended that the language of that part of the section which related to the sale of the insolvent's real estate, was affirmative and directory merely, and that it was nowhere enacted that, if the estates, were not sold by auction, the sale should be void. *The King v. The Justices of the Borough of Leicester*;(a) *The King v. The Inhabitants of Birmingham*:(b) that the language of the 24th section of the act was much stronger than the language of the 20th, for it enacted that no suit in equity should be commenced by the assignees without the consent in writing of the major part, in value, of the creditors; and yet it had been decided that a suit might be commenced by the assignees without such consent. *Piercy v. Roberts*;(c) *Casborne v. Barsham*.(d)

Mr. *Richards*, for the defendant, said that under the 20th section
[*354] of the act, the assignees could not sell "the insolvent's real estates otherwise than by auction; and if they could not sell them within

(a) 7 Barn. & Cress. 6. (b) 8 Barn. & Cress. 29. (c) 1 Myl. & Keen, 4. (d) Ante, vol. 6, p. 317.

1838.—*Hawkins v. Baldwin.*

the time mentioned in that section, they must apply to the Insolvent Debtor's court to appoint a further time. *Waldron v. Howell.*(a)

THE VICE-CHANCELLOR:—The objection raised by the defendant is unfounded.

The first part of the 20th section of the act contains a *general* direction, that the assignees shall make sale of *all* the insolvent's estate and effects. The section then proceeds to enact that, within a certain time, the assignees shall sell the insolvent's real estates by public auction; but the act nowhere enacts that they shall not be sold in any other manner than by public auction; therefore the general direction for sale in the previous part of the section still remains in force: consequently, if the scheme of selling by auction has been tried and failed, the assignees were justified in selling by private contract.

*HAWKES v. BALDWIN.

[*355]

1838; 30th July.—Will; Construction; Legacy.

Testatrix gave legacies to A. B. and C., and declared that if any of them should be dead at her decease, or should not then be heard of to be then living, or should not respectively claim their respective legacies within twelve months after her death, then the legacies given to such of them as should be dead at her decease, or as should neglect to claim the same within the time aforesaid, should sink into her residuary estate. Three years after the testatrix's death, C., who had not been heard of for upwards of twenty years, claimed her legacy. Held that she was entitled to it, although she had been ignorant, until a short time before, that her sister was dead.

MARY HAWKES, made her will, dated the 15th of January, 1834, as follows:

"I direct that all my just debts, funeral and testamentary expenses, be paid as soon as conveniently may be after my decease. I give and bequeath unto each of my servants, Charles Pratt, gardener, Susannah Gosling, Sarah Tiley, and Job Parker, one year's wages each, over and above what may be due to them respectively at the time of my decease, and also the sum of 3*l.* each in addition thereto, which I direct shall be paid within three months after my decease. I give and bequeath unto John Lovell Yeats, G. David Yeats, Eliza Julian Yeats, Charlotte Yeats, and Ellen Jane Patterson (late Yeats,) now the wife of Admiral Patterson, great nephews and nieces of John Lovell deceased, all of whom are mentioned in his will, the sum of 100*l.* each, absolutely. I give and bequeath unto my three nephews, John Musselwhite, William Musselwhite, and James Musselwhite, sons of my late sister, Ann Musselwhite, the sum of 500*l.* each, absolutely. I give and bequeath unto James Gannaway, and to his brother, whose name, I believe, is Thomas, sons of my late father's sister, the sum of 200*l.* each, provided they, or either of them, shall be living at the

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time of my decease. I give and bequeath unto my sister Betsey, if living at the time of my decease, the sum of 1000*l.* absolutely. I give and [*356] *bequeath all my wearing apparel and linen unto the said Eliza Julian Yeats, Charlotte Yeats, Ellen Jane Patterson, and my said sister Betsey, to be equally divided between them, share and share alike, as tenants in common. I give and bequeath unto William Baldwin, of Ringwood, in the county of Southampton, gentleman, my executor hereinafter named the sum of 300*l.* absolutely. And I do hereby declare that the several legacies by me hereinbefore given, or such of them as shall become payable, shall be paid to the said several legatees within twelve calendar months after my decease, free of legacy duty, and without any deduction whatsoever, and that the said several legacies given to my said nephews and sister Betsey, and to the said James Gannaway and his brother, shall carry interest at the rate of 3*l.* per cent. per annum from the time of my decease until such legacies shall be paid respectively. Provided always, and it is my will that, in case the said James Gannaway, his said brother, or my said sister Betsey, or any or either of them, shall be dead at the time of my decease, or shall not then be heard of to be then living, *or shall not respectively claim their respective legacies* within twelve calendar months next after my decease, then the legacies hereinbefore given to such of my respective legatees as shall be dead at the time of my decease, *or as shall neglect to claim the same* within the time aforesaid, shall sink into and form a part of my residuary personal estate for the benefit of my residuary legatees. I give and bequeath all the rest, residue and remainder of by moneys, securities for money, whether in the public funds or stocks or otherwise, and all other my personal and testamentary effects over which I have a disposing power, including in this bequest the legacies hereinbefore given to the said James Gannaway and to his [*357] said brother, and my said sister Betsey, in case such legacies *respectively, or any or either of them, shall become void in the events aforesaid, unto the said John Lovell Yeats and Ellen Jane Patterson, share and share alike, as tenants in common absolutely. But, in case the said Ellen Jane Patterson shall die in my lifetime, then I give and bequeath the share hereby intended for her, unto the daughter of the said Ellen Jane Patterson absolutely."

The testatrix died on the 17th of January, 1834. At the time of her death, her sister, Betsey Hawkes, as the answer stated, had not been heard of, by any of her relations or friends, for upwards of twenty years. After the testatrix's death, Mr. Baldwin made many inquiries, in order to ascertain whether Betsey Hawkes was living or dead, and, if living, where she was to be found. He also published advertisements, in several newspapers, offering a reward to any person who would give information respecting her; but all that he learnt was that, in 1814, she was seen on the quay at Southampton, in company with a soldier, about to embark for either Guernsey or Jersey. However, in August, 1837, she presented herself to Mr. Baldwin; and the account that

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be then gave of herself, was that, at the testatrix's death, she was and had been, for many years before, resident in the city of Norwich, in very humble circumstances; that, being in great distress, she had recently left Norwich for Christ church, her late sister's place of residence, in order to throw herself on the bounty of her sister; and that, on her journey, she heard, for the first time, that her sister was dead, and had left her a legacy of 1000*l.* Mr. Baldwin having refused to pay the legacy on the ground that Betsey Hawkes had not claimed it within the time prescribed by the will, the bill was filed by her, in *November, 1837, for payment of that legacy [*358] and one-fourth of the proceeds of the testatrix's wearing apparel and jewels, which Mr. Baldwin had sold.

Mr. *Wigram* and Mr. *Romilly*, for the plaintiff, said that, on the testatrix's death, the legacy of 1000*l.* vested in the plaintiff, subject to a conditional limitation over, depending on her being dead at the testatrix's death or neglecting to claim the legacy within a given time; that such conditions ought to be most strictly construed, and therefore, it was material to see whether the plaintiff's case came within the strict meaning of the words in the will: that, in the first branch of the proviso, three events were mentioned: first, being dead at the time of the testatrix's decease; second, not being heard of to be then living; and, third, not claiming the legacies within twelve months afterwards; but, in the second branch of the proviso, by which the legacies were given over to the residuary legatees, two events only were specified; namely, the being dead at the time of the testatrix's decease, and the neglecting to claim the legacies within twelve months afterwards, and, consequently, there was no gift over in the event of the legatees being alive but not being then heard of to be then living; and, moreover, the testatrix, when she described the events on which the gift over was to take place, did not say, as she had done in the former member of the sentence: "shall not claim their respective legacies;" but used a different expression, namely: "shall neglect to claim," &c.: that the two members of the sentence did not correspond with each other, three events being mentioned in the former, and only two in the latter, and one of those two differing, materially, from every one of the events mentioned in the former; for neglect pre-supposed knowledge of the act to be neglected, and a person could *not be said to [*359] have neglected to do an act which he never knew he was required to do; and, therefore, it was an impossible condition that a party should claim a legacy, which he never knew was given to him: that the executor ought to have given the plaintiff notice of the legacy and of the condition annexed to it, in which case it would have been the legatee's own fault if the gift over took effect: that the plaintiff, as one of the testatrix's next of kin, ought to have had notice given to her by the executor before he disposed of the assets; *David v. Frowd*; (a) that the present case was distinguishable

(a) 1 Myl. & Keene, 200. See 208, 209.

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from *Burgess v. Robinson*,^(a) and *Tulk v. Houlditch*;^(b) for, in both those cases, the legacies were given on conditions precedent.

Mr. Knight Bruce, Mr. Jacob, and Mr. Anderdon, for the defendant:—The word *or*, which precedes the words: “shall not respectively claim their respective legacies,” must be read as *and*. The expression: “shall neglect to claim,” means: “shall omit or fail to claim.” It is a short description of, or a compendious reference to what the testatrix had before said, namely: “shall not be heard of to be then living, or shall not respectively claim their respective legacies:” and, in this respect, this case is analogous to *Mackinnon v. Sewell*^(c) and *Murray v. Jones*.^(d) The residuary legatees were as much objects of the testatrix’s bounty as the particular legatee was.

The cases of *Burgess v. Robinson* and *Tulk v. Houlditch* show [*360] that it was not necessary for the executor to “advertise for the legatee or to take any other step in order to give her notice of the legacy.”

THE VICE-CHANCELLOR:—It seems to me, from the whole scope of the will, that the object which the testatrix had in view, was the speedy putting an end to her temporal affairs by the distribution of her property. She begins her will by directing her funeral and testamentary expenses and debts to be paid as soon as conveniently might be after her decease. She next gives legacies to her servants, and directs those legacies to be paid within three months after her decease. Then follow legacies to her nephews and several other persons, and, amongst them, to James Gannoway and his brother, provided they or either of them should be living at the time of her decease. She next bequeaths to her sister Betsey, if living at the time of her decease, the sum of 1000*l.* and a share of her wearing apparel and linen. Then, after giving a legacy of 300*l.* to Mr. Baldwin, her executor, she says: “And I do hereby declare that the said several legacies by me hereinbefore given, or such of them as shall become payable, shall be paid to the said several legatees, within twelve calendar months after my decease, free of legacy duty, and without any deduction whatsoever; and that the said several legacies given to my said nephews and sister Betsey, and to the said James Gannoway and his brother, shall carry interest at the rate of three pounds per cent. per annum, from the time of my decease, until such legacies shall be paid respectively. Provided always, and it is my will that, in case the said James Gannoway, his said brother, or my said sister Betsey, or any or either of them, shall be dead at the time of my decease, or shall not be heard [*361] of to be then living, or shall not respectively claim their “respective legacies within twelve calendar months next after my decease.”

I think that Mr. Jacob’s construction of this part of the sentence is correct; namely, that, in that member of it in which the testatrix says: “shall not be heard of to be then living, or shall not respectively claim their respective legacies,” the word *or* must be read as *and*: for it is plain that the expression: “shall not be heard of to be then living,” does include the not claim-

(a) 3 Mer. 7. (b) 1 Ves. & Beam. 248. (c) Ante, vol. 5, p. 78. (d) 2 Ves. & Beam. 313.

1838.—*Hawkes v. Baldwin.*

ing the legacies; for the legatees must have been heard of if they claimed their legacies; and, therefore, the testatrix must have meant: "shall not be heard of to be then living, *and* shall not respectively claim their respective legacies."^[1] In the next part of the sentence she says: "Then the legacies hereinbefore given to such of my respective legatees as shall be dead at the time of my decease, or as shall neglect to claim the same within the time aforesaid, shall sink into and form a part of my residuary personal estate for the benefit of my residuary legatees." My opinion upon this part of the will, is that the testatrix intended that the legacies given to her sister, and to James Gannoway and his brother, should sink into her residuary personal estate on failure of any one of the three events which she had before specified; for, although she has not repeated one of those events, namely, the not being heard of to be living at the time of her decease, yet she has, in substance, described all the events in which the legacies were to fail. What Mr. K. Bruce said, is correct, namely, that the residuary legatees were as much objects of the testatrix's bounty as her sister and James Gannoway and his brother were. If they were living at the time of her decease, and made a claim within twelve months after, they were to be entitled to their legacies; but, if not, their legacies *were to go to the residuary legatees. [362] Therefore, it is clear that, in the event that has happened, of one of those legatees having survived the testatrix but not having made a claim within the proper time, the legacy given to that legatee has lapsed; because, advertg to the language of this will, I must take it that the testatrix, when she used the expression: "shall neglect to claim," meant: "shall not claim." The result is that the residuary legatees are entitled to the legacy of 1000*l*.

[1] The following remarks of Wigram, V. C., as to the substitution of "and" for "or," are useful. The testator devised the house No. 4, &c. to his son Richard; "should he die without *heir or will*, the profits of the said No. 4 to be equally divided between all my grandchildren by the consent of his mother." The V. C. says: "The first question I shall consider is, whether the word '*or*' is to be read in its proper sense, or whether '*and*' is to be substituted for it. The testator by referring to the heir of his son (which in this case must of necessity mean issue) shows that the issue of his son are the objects of his care, and this consideration alone, according to the better authorities, seems generally to have determined courts of justice in substituting '*and*' for '*or*' in the construction of a will. The circumstance that '*or*' is, in common parlance, frequently used for '*and*' has apparently aided the courts in this departure from the very sound rule of construction which requires courts of justice to adhere to the proper sense of the words of a testator, except where, upon the will itself, or in the circumstances to which the will refers, there is evidence that the testator did not so use them. In this case, the remarkable inaccuracy of expression throughout the will shows that a critical observance of the words of the testator cannot safely be depended upon; and I could not avoid construing the word '*or*' as meaning '*and*' without attributing to him the most capricious intentions." The decision contains some valuable observations as to the effect of the limitation over; which, however, are not applicable to the present topic. *Green v. Harvey*, 1 Hare, 428. In *Van Vechten v. Pearson*, 5 Paige, 512, "*or*" was construed "*and*" whereby an indefinite failure of issue was created, and the intention of the testator, as to the ulterior limitations expressed in his will defeated. As to the transmutation of "*or*" into "*and*" and reciprocally; see further, *Roosevelt v. Thurman*, 1 Johns. Ch. Rep. 228; *Grimeshaw v. Pickup*, post, 591; *O'Brien v. Heeney*, 2 Edw. Ch. Rep. 242; *Stubbs v. Sargon*, 2 Keen, 255, 272 n. 1.

1838.—*Ingham v. Ingham.*

I do not see how I can separate the one-fourth of the wearing apparel and linen, from the legacy of 1000*l.* I admit that the expression, "to be paid," is not correctly applicable to those subjects: but the language of the will is general: "shall not respectively claim their respective *legacies*." Now what were their respective legacies? Why, the money legacy and the share of the wearing apparel and linen. Therefore, the word *legacies*, according to its natural meaning, must carry over the share of the wearing apparel and linen, as well as the legacy of 1000*l.*

Bill dismissed without costs.

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*INGHAM *v.* INGHAM.

1833; 38th July.—Practice; Debt

A defendant may put in a further answer pending exceptions to his first answer, although he thereby deprives the plaintiff of the benefit of obtaining the common injunction on the Master's reporting the first answer to be insufficient.

The case of *Russell v. Dight*, ante, vol. 6, p. 430, explained.

THE bill in this cause prayed (amongst other things) for the common injunction.

The defendant had put in his answer, to which the plaintiff excepted. Pending the exceptions, the defendant put in a further answer. The plaintiff now moved to take that answer off the file, on the ground that it was irregular to file a further answer before the Master had reported on the exceptions.

Mr. *Knight Bruce*, and Mr. *Elmsley*, in support of the motion, relied on *Russell v. Dight*,^(a) and said that the defendant, by filing his further answer before the Master had made his report, had deprived the plaintiff of the advantage, which he would otherwise have had, of obtaining the common injunction. They distinguished this case from *Knox v. Symmonds*,^(b) and *Wynne v. Jackson*,^(c) on the following grounds; namely, that, in *Knox v. Symmonds* the motion was to discharge the order which the defendant had obtained for dissolving the common injunction, but no application was made to take the further answer off the file: and, in *Wynne v. Jackson*, the order for the common injunction for want of answer, was clearly irregular, as there was an answer on the file, and no application was made to have that answer taken off the file.

Mr. *Jacob* and Mr. *Rogers*, for the defendant, relied on *Knox v. Symmonds* and *Wynne v. Jackson*.

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*THE VICE-CHANCELLOR :—This motion seems to me to be founded on an erroneous view of what fell from me in *Russell v. Dight*; namely, that in a case where the plaintiff may derive some benefit from the judgment of the Master, the defendant is not at liberty to put in a further answer until the Master has made his report as to the sufficiency of the first an-

(a) Ante, vol. 6, p. 430.

(b) 1 Ves. jun. 87.

(c) 2 Sim. & Stu. 226.

 1838 — *Frankland v. Overend*.

wer. The language is general, but it ought to be taken with reference to the subject matter. In that case, two insufficient answers had been put in, and then a third answer was filed, which was referred back upon the original exceptions; and, just as the Master was about to report that answer also to be insufficient, the defendant filed a fourth answer. Now Lord Lyndhurst's tenth order, [1] directs that, upon a third answer being reported insufficient, the defendant shall be examined, upon interrogatories, to the points reported insufficient, and shall stand committed until he shall have perfectly answered such interrogatories; and shall pay, in addition to the 4*l.* costs before paid, such further costs as the court shall think fit to award: so that the benefit which that order gives to the plaintiff, is absolute and unconditional, and does not depend on winning a race; and consequently, the defendants had no right to deprive the plaintiff of the benefit of that order, by putting in a fourth answer. In *Knor v. Symmonds*, the Master of the Rolls seems to consider that, where exceptions are taken to the first answer, and the injunction depends upon the report, it is competent to the parties to run the race. He says: "If the practice be that he may put it in at any time before the order, he might have had it ready and have filed it as soon as he heard the Master's opinion was against him on the exceptions, even before the report; and then there is nothing supposing that he waited till after the last seal 'before Christmas to do it. It is a kind of race to be run between [*365] plaintiff and defendant." So that in a case like the present, where the obtaining of the common injunction is the only benefit which the plaintiff is entitled to on the answer being reported insufficient, it is competent, to the defendant, to deprive the plaintiff of that benefit, by putting in a further answer before the Master has made his report: and my opinion, therefore, is that this motion must be refused with costs.

 FRANKLAND v. OVEREND.

1838: 31st July.—Defendant; Supplemental Answer.

Leave given to a defendant to file a supplemental answer for the purpose of correcting a mistake, in his former answer, as to the custom of a manor, which was one of the facts in issue in the case.

THE defendant, in his answer, said that, to the best of his belief, the custom of a manor (which was one of the facts in issue in the cause) was as the bill alleged it to be.

After rules had been given to pass publication, the defendant moved for leave to file a supplemental answer for the purpose of correcting the statement, in his answer, as to the custom of the manor. The motion was supported by an affidavit alleging that, when the defendant put in his answer, he was not fully informed as to the custom of the manor, and that he had since

[1] Vide 2 Russ. 641.

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learnt that the statement in his answer was incorrect, and that the custom was as thereafter mentioned.

Mr. *Sidebottom*, in support of the motion.

Mr. *Ellis*, contra, said that the bill was filed in December, 1836, [*366] and that the answer was put in in *March, 1837, and, therefore, the defendant had been a considerable time in discovering his mistake.

The Vice-Chancellor said that the defendant did not, in his answer, speak of the custom of the manor, as a fact that was within his own knowledge; that, since putting in his answer, he had acquired further knowledge on the subject; that the allegation as to the custom contained in the affidavit, was not contradicted by any affidavit on the part of the plaintiff; and that, if the plaintiff disputed that allegation, he might examine the steward of the manor as a witness in the cause.

Motion granted.

LEWIS v. JOHN.

1838: 1st August.—Mortgagor and Mortgagee; Costs.

A mortgagee is not entitled, as against the devisees of the mortgaged estate, to be paid the costs of an action on the mortgagor's bond, brought by him against the executrix of the mortgagor.

DAVID JOHN, being indebted to the plaintiff in 120*l.*, executed a bond, and, subsequently, made an equitable mortgage of a copyhold estate, to the plaintiff, for securing that sum. He, afterwards, died, having devised the estate to his widow for life, with remainder to his children, and appointed the widow his executrix. After John's death, the plaintiff brought an action on the bond against the widow; but, upon her pleading *plene administravit*, he abandoned it. He then filed the bill in this cause, against the widow and children, for the purpose of having the estate sold and the proceeds applied in paying his principal and interest and his costs of this suit and at law. [*367] *At the hearing of the cause, the question was whether the plaintiff was entitled to be paid his costs of the action, out of the proceeds of the estate.

Mr. *K. Bruce* and Mr. *Spurrier*, for the plaintiff.

Mr. *Cooper* and Mr. *Wilbraham*, for the defendants.

The Vice-Chancellor said that the plaintiff was entitled to the same costs as a legal mortgagee was; and that, if a legal mortgagee had brought an ejectment for the purpose of recovering the mortgaged estate, he would have been entitled to have the costs of that action taxed and added to his debt; but that the mortgagee was not entitled, as against the devisees of the estate, to be paid the costs of an action brought by him, against the executrix of the mortgagor, for the recovery of the money due to him, out of the mortgagor's personal estate.(a)

(a) See C. P. Cooper's Rep. 8.

1838.—Hustler v. Tillbrook.

HUSTLER v. TILLBROOK.

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839: 3d August.—Will; Construction.

Testator bequeathed a sum of stock to his wife for life, and, after her decease, to his three sons equally to be divided amongst them, if they should be all living at the decease of his wife; but, if any or either of them should happen to die in the lifetime of his wife, and should leave any child or children, his will was that such child or children who should be living at the time of his wife's death, should be substituted in the place of such of his said sons who should so happen to die, and take his, her, or their parent's share. All the sons died in the wife's lifetime. Two of them left children, who were living at the wife's death. The third son died a bachelor. Held that one-third of the stock fell into the residue.

JOHN TILLBROOK, by his will dated the 23d of January, 1808, bequeathed as follows:—"I give and bequeath the sum of 4475*l.* stock, now standing in my own name in the books of the Governor and Company of the Bank of England, in the capital stock there, called the three per cent. reduced bank annuities, or so much and such part thereof as shall be remaining in said stock or fund at the time of my decease, and the dividends and interest thereof, unto my dear wife, Elizabeth Tillbrook and her assigns, for and during the term of her natural life; and, from and immediately after her decease, my will and mind is, and I do give the before mentioned three per cent. reduced bank annuities, and all the dividends and interest from thenceforth to grow and become due, unto my three sons, Robert Clee Tillbrook, Samuel Tillbrook, and James Tillbrook, to be equally divided between or amongst them, *if they shall be all living at the time of the decease of my said wife*; but if any or either of them shall happen to depart this life in the lifetime of my said wife, and shall leave any child or children of his or their body or bodies lawfully belonging, then I will and desire that such child or children who shall or may be living at the time of my said wife's decease, shall be substituted in the place and stead of such of my said sons who shall so happen to die, and take his, her or their parent or parents' share: and I do hereby, in such case, give and bequeath [*369] unto such child or children his, her or their respective parents' share, equally to be divided between such children, if more than one, and, if but one, to that one only." The testator disposed of his residuary estate in the following words: "And I give, devise and bequeath my book-debts, and all and every the rest, residue and remainder of my estate and effects whatsoever and wheresoever, as well real as personal, and of every nature or kind, unto and between my said three sons, Robert Clee, Samuel, and James Tillbrook, their heirs, executors and administrators, equally to be divided between them, share and share alike:" and he appointed his wife and his three sons executors of his will.

The testator died in July, 1810, leaving his wife and three sons surviving. The sons all died in the widow's lifetime. Robert Clee Tillbrook and Samuel Tillbrook left children, all of whom survived the widow; but James Tillbrook died a bachelor. The testator's widow died in July, 1835.

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The plaintiffs were the personal representatives of Samuel and James Tillbrook. The defendant, Sarah Tillbrook, was the personal representative of the testator, and also of R. C. Tillbrook.

The bill alleged that the 4475*l.* stock having, upon the death of the widow, become divisible under the will, the plaintiffs had been advised that in the events which had happened, the same had become divisible into three equal parts, of which the children of R. C. Tillbrook became entitled to one-third, the children of Samuel Tillbrook to one other third, in substitution for their respective fathers who died in the widow's lifetime, and [370] *"that the remaining third vested absolutely in James Tillbrook, notwithstanding his decease in the widow's lifetime, and that the plaintiffs as his personal representatives, were entitled thereto: but that the defendant alleged that she was advised that such third, by reason of the decease of James Tillbrook in the widow's lifetime and of his death without leaving issue, did not vest in him, but fell into the residue, and, consequently, that the plaintiffs, as the personal representatives of James Tillbrook, were entitled only to one-third of such third part, and that one other third was payable to the plaintiffs as the personal representatives of Samuel Tillbrook, and that the defendant, as the personal representative of R. C. Tillbrook, was entitled to the remaining third.*

The *Solicitor General*, for the plaintiffs, contended that the testator had given the stock to his three sons, equally to be divided amongst them; but, if they died in the widow's lifetime their shares were to go over to their children, if they left any, but not otherwise; and, consequently, that James Tillbrook took a vested interest in one-third of the stock, and, notwithstanding he died in the widow's lifetime, yet as he left no issue, the plaintiffs, as his personal representatives, were entitled to that third.

Mr. *K. Bruce* and Mr. *Koe* appeared for the defendant; but

The Vice-Chancellor, after hearing the *Solicitor General*, said:—I do not think that that is the true construction of the bequest. There is no gift, in the first instance, to any son unless he survives the wife.

[371] *"The words: "if they shall be all living at the time of the decease of my said wife," are to be taken disjunctively, not conjunctively. The testator meant to give the fund to such of his sons as should survive his wife; but if any son did not survive her, that son was not to take any share of the fund; but his children, if he left any, were to take by way of substitution for him. But, if he neither survived the testator's wife, nor left any child, there is no gift.*

Declare that James Tillbrook, having died in the lifetime of the testator's widow, without leaving a child, one-third of the stock fell into the residue.^[1]

[1] "Substitution assumes that the party dying was an object of the gift." Lord Cottenham, *Wordsworth v. Wood*, 5 Myl. & Cr. 644. "The rule is, that where an interest is given to one for life, and after his death to his surviving children, those only can take who are alive, at the time the distribution takes place." Lord Langdale, M. R., S. C. 2 Beav. 29. As to substituted legates

1838.—*Peel v. Catlow.*

*PEEL v. CATLOW.

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1838; 3d August.—Will; Construction.

Testator bequeathed one-sixth part of his residuary estate amongst the children of his late sister J. T., and directed that their shares should be paid to them at twenty-one; and that in case any of them should die under that age leaving issue, their shares should be paid to their issue as soon as such issue could give a legal discharge for the same; but, if any of the children should die without leaving issue, their shares should be paid to the surviving children, and the issue of such of them as should be then dead, such issue taking no greater share than their deceased parents would have been entitled to, if living: and he bequeathed another sixth part to his sister, M. C. for life, and after her death, unto and amongst her issue, and to be payable at the like times and with the like benefit of survivorship, and in like manner as was thereinbefore expressed concerning the sixth part thereinbefore given to the children of J. T. M. C. had six children living at the testator's death; and she had had another child, who died before the date of the will.

Held, that as the latter clause of the will referred to the former, the word *issue* in it must be taken to mean children. Held also, that, under the former clause, no grandchild of J. T. could take except by way of substitution for its parent, and, therefore under the latter clause, no grandchild of M. C. would take, except by way of substitution for its parent.

JONATHAN PEEL, by his will, dated the 14th of May, 1824, gave and devised his real and personal estate to trustees in trust to sell the same; and directed that the proceeds should be divided into six equal parts; and, after disposing of two of those parts, the testator expressed himself as follows: "And, as to one other part thereof, I give and bequeath the same unto and amongst all and every the children of my late sister, Jane Taylor, equally to be divided amongst them, share and share alike; and, if there shall be but one such child, then to such only child, to and for their, his or her own use respectively, the said sixth share, or the parts or shares thereof, to be paid to such children or child at their, his or her respective ages of twenty-one years; and, in case any such child or children shall die under the age of twenty-one years, leaving issue of his, her or their body or respective bodies living at the time or respective times, of his, her or their decease, the part or share, 'parts or shares of such of them as shall die under the age of twenty-one years, so leaving issue as aforesaid, shall be paid to the issue of such child or children respectively, as soon as such issue respectively, can give a legal discharge for the same; and if any such child or children shall happen to depart this life under the age of twenty-one years, and shall leave no issue of his, her or their body or respective bodies living at the time or respective times of his, her or their decease, then the part or share of him, her or them so dying, shall go and be paid to the survivors or survivor of them, and the issue of such of the deceased children as shall have died, so leaving issue as aforesaid, (such issue, nevertheless, to take no greater

see further, the next case. *Gittings v. McDermott*, 2 Myl. & K. 69. *Wordsworth v. Wood*, 4 Myl. & Cr. 641. S. C. 2 Beav. 25. *Mowatt v. Carow*, 7 Paige, 337. *Bebb v. Beckwith*, 2 Beav. 366. *Gray v. Gorman*, 2 Hare, 268; stated post, 377, n. *Drake v. Pell*, 3 Edw. Ch. Rep. 268. *Terry v. Shaw*, id. 360. *Stewart v. Vail*, id. 511. *Le Jeune v. Le Jeune*, 2 Keen, 701, 703, n. 1.

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share than his, her or their parent or respective parents, would have been entitled to, in case such parent or parents respectively, had been living,) at such time or respective times, as his, her or their original share or shares shall become payable, or as soon afterwards as circumstances will admit. And, as to one other sixth part or share of such trust moneys, I direct, that they, my said trustees, and the survivor of them, and the executors and administrators of such survivor, do and shall place out the same at interest, on good real security, in the names or name of them, my said trustees, or the survivor of them, and do and shall pay, apply and dispose of the interest, dividends and proceeds thereof, unto such person or persons, and for such uses, intents and purposes, and in such parts, shares and proportions, manner and form, as my sister Mary Catlow, wife of George Catlow, shall notwithstanding her present or any future coverture, by any note in writing, under her hand, direct or appoint, and, in default of appointment, then, into the proper hands of my said sister; and, from and after the decease of my said sister.

[*374] upon trust *that they, my said trustees, or the survivor of them, or the executors or administrators of such survivor, do and shall call in the said last mentioned part or share of the said trust moneys, or make sale and dispose of the securities whereon the same shall be then invested, and do and shall pay and apply the same unto and among her issue, and to be payable at the like times, and with the like benefit of survivorship and accruer, *and in like manner as is hereinbefore expressed and declared of and concerning the sixth part of the last mentioned moneys hereinbefore given by me to the children of my said late sister, Jane Taylor.* And in case my said sister Mary Catlow, shall depart this life without leaving issue of her body living at the time of my decease, or leaving any, they shall respectively depart this life under the age of twenty-one years, and shall leave no issue of his, her or their body or respective bodies living at the time or respective times of his, her or their decease, then upon trust that my said trustees, or the survivor of them, or the executors or administrators of such survivor, do and shall pay and apply, and dispose of the share or shares of him, her or them so dying, to such person and persons, and in such manner, and at such time or times, and in such parts, shares and proportions as are hereinbefore directed concerning the surviving shares of the said trust moneys, and the interest and proceeds thereof, or as near thereto as the deaths of parties and other circumstances will admit."

The testator died in May, 1824. Mary Catlow died after him. At the date of his will and at his death, she had six children living, and she had had two other children, both of whom were dead at the date of the [*375] will. One of them left a daughter, the defendant Mary *Maddougall.

The question was whether Mary Maddougall was entitled to a share of the sixth part of the trust fund which was given in trust for Mrs. Catlow for life.

*Mr. Lowndes appeared for the plaintiffs, the trustees of the will.

1838.—Peel v. Catlow.

Mr. *Sharpe*, for Mary Macdougall, said that, as one-sixth of the trust fund was directed to be paid, after Mrs. Catlow's death, unto and amongst her issue, her grand-child, Mary Macdougall, was clearly entitled to a share of that sixth part; that it would be contended, by the counsel for the surviving children of Mrs. Catlow, that the sixth part in question was to be held, after Mrs. Catlow's decease, upon the like trusts as the part in which Mrs. Taylor's children were interested; and therefore Miss Macdougall's claim could not be maintained, as her mother never became entitled to any share of that sixth part; and that the cases of *Christopherson v. Naylor*,^(a) and *Waugh v. Waugh*,^(b) would be cited in support of that argument: that, in those cases, nothing was given to the issue of the original legatees, except by way of substitution for their parents; but, in the present case, the will declared that, on the death of Mrs. Catlow, her issue were to take, and therefore, Miss Macdougall did not claim by way of substitution for her mother: that, in *Waugh v. Waugh*, Sir John Leach, Master of the Rolls, said: "It is plain that the words used in the first part of the bequest, would comprise Eleanor Waugh; for she was the child of Alexander Waugh, a brother of John; but, by the subsequent part of the gift, it is expressed that the children of a deceased brother of John, are to take only the share "which their [376] parent would have taken, if living." So that his Honor decided that, if the words had been only such as are used in this cause, Eleanor Waugh would have taken; that, in *Humphreys v. Howes*,^(c) a decision was made conformable, in principle, to that now contended for; and that *Tytherleigh v. Harbin*,^(d) was a decision to the same effect: in that case, as in this, there was an original, substantive gift to the issue of deceased children.

Mr. *Follett* and Mr. *Reynolds* appeared for the surviving children of Mrs. Catlow; but

THE VICE-CHANCELLOR, without hearing them, said:—The question first to be decided is whether, in the clause under which alone the issue of Mrs. Catlow can take, the word *issue* must not be taken to mean *children*.

In that clause the testator refers to the trusts declared by the preceding clause. He says: "And, from and after the decease of my said sister, upon trust that they, my said trustees, do and shall call in the said last mentioned part of the said trust moneys, and do and shall pay and apply the same unto and amongst her issue, and to be payable at the like times, and with the like benefit of survivorship and accruer, and in like manner as is hereinbefore expressed and declared of and concerning the sixth part of the said last mentioned moneys hereinbefore given by me to the children of my said late sister Jane Taylor." My opinion, therefore, is that the word *issue* in this clause, must, of necessity, be taken to mean children: [1] and as, under the trusts declared by the [377]

(a) 1 Mer. 320. (b) 2 Myl. & Keen, 41. (c) 1 Rumm. & Myl. 639. (d) Ante, vol. 6, p. 329.

[1] There is a later decision (1840) of Sir L. Shadwell, V. C., as to restricting the word *issue* to children. The testator bequeathed the residue from certain sources mentioned in his will, to the

1838.—Peel v. Catlow.

preceding clause, no grandchild of Mrs. Taylor could take except by way of substitution for its parent: so, under this clause of reference, no child of a deceased child of Mrs. Catlow can take except by way of substitution for its parent: and as Miss Macdougall's mother died in the testator's lifetime, and, therefore, never became entitled to take, Miss Macdougall, herself, does not sustain that character which will entitle her to take.[1]

children then living of T. B. and W. C., and the lawful issue then living of such of their children as were dead, as tenants in common, so nevertheless that such issue should as amongst themselves take as tenants in common, and *per stirpes* and not *per capita*, it being his intention that such issue should have only the shares which their respective parents would have been entitled to if living: it was held that the word "issue" must be taken in the restricted sense of "children." The Vice-Chancellor said: "I am of opinion that if there be nothing more, in a will or other written instrument whereby to construe the term 'issue,' than a direction that the issue are to take the shares of their parents, that is enough to confine the general meaning of the word 'issue' to the particular meaning of 'children' of that parent; and it was so held in *Leigh v. Norbury*, (13 Ves. 340.) In *Sibley v. Perry*, (7 Ves. 522,) Lord Eldon put the same construction on the word 'issue,' because he found that, in a particular clause, the use of the word 'parent,' restricted the meaning of the word 'issue.' And the same construction was adopted in a case which came before Sir William Grant at the Rolls, on the 2d of March, 1814. (*Harrington v. Lawrence*, not reported.) There, by an indenture, a fund was declared to be in trust for the children of a marriage living at the death of the husband and wife: and the deed then provided that, if any should die in the lifetime of the husband and wife, leaving issue, such issue should take such share as their parent would have been entitled to in case he or she had survived the husband and wife. A grandchild of a child of the marriage was excluded. Therefore, I have always considered it settled that, in a will, or in a deed, if it is a question whether the word 'issue' shall be taken generally or in a restricted sense, a direction that the issue shall take only the shares which their parents would have taken if living, must be taken to show that the word 'issue' was used in its restricted sense." *Pruett v. Osborne*, 11 Sim. 132, 137, and see *Radford v. Radford*, 1 Keen, 486. *Lang v. Pugh*, 1 Yo. & Coll. C. C. 724. *Barnes v. Grenzbach*, 1 Edw. Ch. Rep. 41.

[1] A testator gave his real and personal estate to his wife for her life, and the residue to be equally divided between her brothers and sisters, and in case any of them should be dead at the time of her decease, leaving issue, such issue, to stand in their parent's place; it was held;—first, that no brother or sister, who died before the date of the will, was capable of taking under the bequest, and therefore the issue of any brother or sister, who was dead before the date of the will, could not take by substitution;—secondly, that it was an original and substantive gift to the issue of those brothers and sisters who were dead at the death of the wife; and thirdly, that the brothers and sisters who survived the testator, and afterwards died without issue in the lifetime of the wife, were entitled to shares in the residue. *Gray v. Garman*, 2 Hare, 268. In that case, Wigram, V. C., says, p. 271. "It has, indeed, been made a question, whether the capacity of the primary legatee, (at the date of the will, to take the legacy was alone sufficient. Whether such legatee must not survive the testator and become a legatee *in esse*, and not have been a legatee *in posse* only, to entitle his issue to claim in substitution. *Thornhill v. Thornhill*, (4 Madd. 377.) But later cases appear to sanction a more liberal, though still a literal, construction of language like that I am considering. And it has been held, that the issue of a person primarily pointed out as the object of a testator's bounty, and living at the date of the will may take by substitution for the party dying in the lifetime of the testator. *Smith v. Smith*, (8 Sim. 353.) *Collins v. Jackson*, (Sel. 356, n.) *Le Jeune v. Le Jeune*, (2 Keen, 701.) A construction which is certainly fortified by very important analogies. *Humphreys v. Howes*, 1 Russ. & M. 639. No such question arises here, &c." And see the previous case, *Turner v. Capel*, ante, 158. *Jarvis v. Pond*, post, 549.

 1838.—Cochrane v. Robinson.

COCHRANE v. ROBINSON.

1838: 4th August.—Supplemental suit.

An executor died insolvent after a sum had been reported due from him, to his testator's estate, in a suit instituted by the residuary legatees. A supplemental suit was then instituted against his personal representative. Held that the decree in that suit, ought not to be confined to the payment of the sum reported due, but ought to embrace the general administration of the executor's estate.

THE bill in this cause was filed, by the residuary legatees, against the executors of a testator, praying the usual relief in like cases.

THE Master, by his report made in pursuance of the decree, found the sum of 2600*l.* to be due, to the testator's estate, from the defendant Robinson. Robinson afterwards died *insolvent*: whereupon a bill of revivor and supplement was filed, against his personal representatives, praying that they might admit assets sufficient to pay the 2600*l.*, or that an account might be taken of his estate; and, on the hearing of the supplemental suit, the Registrar was of opinion, that the decree ought to be drawn up in the same terms.

Mr. Purvis, however, contended that the decree ought not to be so limited, but ought to direct the Master to advertise for Robinson's creditors in general, and to order his estate to be applied in payment of what should be found due to them as well as the 2600*l.* found due to the testator's estate. And

THE VICE-CHANCELLOR so ruled.

Mr. Knight Bruce and Mr. Stuart also were counsel in the cause.

— v. THE BRIDGEWATER CANAL COMPANY.

1838: 4th August.—Practice; Demurrer.

Presenting a notice of motion for a special injunction, the defendant put in a demurrer. Held that the demurrer must be set down and argued *instantly*.

AFTER the plaintiff had served the defendants with notice of a motion for a special injunction, the defendants filed a demurrer to the bill.

THE VICE-CHANCELLOR ruled that, under these circumstances, the demurrer must be set down and argued *instantly*.

*THE ATTORNEY GENERAL v. COOPER.

[*379]

1838: 2d and 7th November.—Dismissal of Bill; Costs.

A plaintiff, after being served with a notice of motion to dismiss, filed a replication and informed the defendant that he had done so, but did not tender the costs of preparing and serving the notice of motion. Held that the defendant was entitled to the costs of the motion.

THE defendant served the relators with notice of a motion to dismiss the information for want of prosecution. On the day on which the notice was

1838.—*Boddington v. Woodley.*

served, but after the service, the relators filed a replication ; and, shortly afterwards, informed the defendant that they had done so, but did not tender to him the costs of preparing and serving the notice of motion.

On the motion being made by Mr. *K. Bruce*, the question was whether the defendant was entitled to the costs of it.

Mr. *Blunt*, for the relators, contended that, as the defendant had persisted in making the motion after he had notice that a replication had been filed, he was not entitled to the costs. *Reynolds v. Nelson.*(a)

Mr. *Knight Bruce* said that he could not obtain the costs, without bringing on the motion.

THE VICE-CHANCELLOR said that, as the relators had not tendered, to the defendant, the costs of preparing and serving the notice, they must pay the costs of the motion.[1]

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*BODDINGTON v. WOODLEY.

1838: 6th November.—Practice ; Amendment.

Where a plaintiff wishes to amend his bill but does not require a further answer, the order ought to contain a recital to that effect, otherwise it is irregular.

ON the 5th of March, the plaintiff obtained, by petition at the Rolls, an order to amend his bill on payment of 20s. costs ; and, afterwards, served the order on the defendant's clerk in court and paid the 20s. costs. On the 8th of March the amended bill was filed. On the 19th, the plaintiff filed a replication. On the 21st of May the defendant served the plaintiff with notice of a motion that the replication might be taken off the file, and that he might be at liberty to answer the amended bill.

The motion was now made by Mr. *Jacob* and Mr. *Hislop Clarke*. They said that the defendant had suffered the time allowed for answering the amended bill to elapse,(a) in consequence of the order to amend not having stated, as it ought to have done, that the plaintiff did not require a further answer ; whereby the defendant was misled, and was induced to expect that he should be served with a subpoena to appear to and answer the amended bill : and they referred to the forms of orders to amend in Hand's Practice 75, *et seq.*

Mr. *Knight Bruce*, for the plaintiff, said that the petition at the Rolls, on which the order to amend was obtained, stated that no further answer was required : that the order was drawn up, by the secretary at the Rolls, in the usual form in like cases ; that, if there was any irregularity in the [381] order, the defendant had waived his right to object to it, by accept-

(a) 5 Madd. 60.

(b) See Lord Brougham's 10th and 14th Orders. [1 Myl. & K. Appendix, vii, viii.]

[1] Vide *The Corporation of Dartmouth v. Holdsworth*, post, 383.

1838.—Boddington v. Woodley.

ing the 20s. costs; and, that at all events, the indulgence sought for might not be granted, unless the defendant made an affidavit showing that justice would not be done to him, unless he was permitted to file a further answer.

THE VICE-CHANCELLOR:—I think that the order to amend is informal.

It is plain that the orders in Hand's Practice which have been referred to, show, on the face of them, whether the plaintiff does or does not require a further answer: but this order omits what it is most material for the defendant to know, namely, that the plaintiff does not require a further answer:[1] and the objection is not got rid of by saying that the defendant might have seen the petition on which the order was obtained.

The order, in my opinion, is one by which any practitioner might have been fairly misled: and, as the defendant tells me that he wishes to put in a further answer, I think that I ought to give him liberty so to do; but it must be done with as little prejudice to the plaintiff as possible.

This is not a case in which a defendant seeks to vary or falsify a statement contained in his former answer; and, therefore, I do not think that I ought to require him to state the substance of the answer which he wishes to put in.

The order which I shall make, is that the defendant be at liberty to put in an answer to the amended bill, and that he be allowed six weeks time for that purpose; the answer, when filed, to be without prejudice to the replication and the other proceedings in the cause, which have been [*382] taken by consent; and, as the mistake was made by the officer who drew up the order and not by either of the parties in the cause, I shall make no order as to costs.[2]

[1] *Vide The Trust and Fire Ins. Co. v. Jenkins*, 8 Paige, 589. If an answer to the amendments is required, the order should contain the usual directions requiring the defendant to answer, or that the bill as amended be taken as confessed; or where a further discovery is necessary, that an attachment may issue, &c. *Ibid*, 595. And see Rules of Chancery of State of New York. Rule 43.

[2] Where the plaintiff amends his bill after answer, the defendant has a right in all cases to put in a further answer, or even a new defence to the amended bill, if he thinks proper to do so: but where he waives the putting in of a further answer to the amended bill, the defendant will not, upon a mere formal amendment, which in fact requires no further answer to protect his rights, be allowed costs of putting in a new answer to the amendments; and if he elects to put in an entirely new defence to the bill, the costs of such new defence must abide the event of the suit. If no answer, plea or demurrer to the amended bill has been put in, the defendant is considered as having elected to have his former answer stand as the answer to the bill as amended: after that, the plaintiff must file his replication, within the time allowed by the rules of the court for that purpose, or the defendant may apply to dismiss the bill for want of prosecution, as in other cases. But in all cases of amendment, the plaintiff has a right to file a replication within the usual time after the amended bill is deemed to be fully answered, whether in fact a further answer is put in, or the defendant, upon the plaintiff's waiver of a further answer, elects to let his original answer stand as an answer to the bill as amended, unless the order of the court allowing him to amend has in terms, or by necessary implication, deprived him of that right. *The Trust and Fire Ins. Co. v. Jenkins*, 8 Paige, 589. If after a demurrer overruled, the plaintiff amend, the defendant may demur to the amended bill; for, if, after a defendant has answered a bill, and any amendment how-

1838.—The Corporation of Dartmouth v. Holdsworth.

The practice with respect to amended bills, was certified to the Vice-Chancellor by Mr. Collis, the Registrar, to be as follows:

The eight days (allowed by Lord Brougham's 14th order) commence after the amended bill filed. If the plaintiff requires an answer, a subpoena is to be served; otherwise not. The plaintiff cannot reply until the eight days expire. If the plaintiff requires a further answer, the order is on payment of 20s. costs. If no answer is required, without costs, amending defendant's office copy, unless a new engrossment is necessary, and then on payment of 20s. costs. If the defendant is desirous of putting in an answer to the amended bill, he must take out a warrant within the eighty days.

[*383] *THE CORPORATION OF DARTMOUTH v. HOLDSWORTH.

1839: 6th November.—Practice; Dismissal.

Where a plaintiff files a replication after being served with notice of a motion to dismiss but before the motion is made, no order ought to be made on the motion, except for the plaintiff to pay the costs of it.

AFTER a notice of motion to dismiss the bill for want of prosecution had been served, but before the motion was made, the plaintiff filed a replication; and, on the motion being made, the plaintiff's counsel stated that that step had been taken; upon which it was understood that the usual order in like cases should be made. The order, however, as drawn up by the Registrar, directed the plaintiff to file a subpoena to rejoin and to take the other steps pointed out by the 16th amended order,[1] and also to pay to the defendant the costs of the motion.

Mr. Teed, for the plaintiff, now moved to discharge that order for irregularity, except so far as it directed the plaintiff to pay the costs of the motion.

Mr. Knight Bruce for the defendant, said that, although the plaintiff had taken one of the proceedings required by the 16th order before the motion to dismiss was made, he was bound to take the others also.

The Vice-Chancellor said that, where a plaintiff, on being served with a notice of motion to dismiss, filed a replication before the motion was made, the uniform course of practice, for the last seven years, had been to order him merely to pay the costs of the motion; which was exactly consonant to what he had decided in *Williams v. Janaway*,^(a) on the 17th order.

[Motion granted.]

ever trifling be made in it, it be competent to the defendant to put in another answer, and to make an entirely new defence, the same rule should apply to a demurrer. *Bosapquist v. Marsham*,⁴ Sim. 573. Where the plaintiff amends after answer, although waiving an answer to the amendments, it is irregular to file a replication to the first answer, until the time for answering the amendments has expired. *Richardson v. Richardson*, 5 Paige, 58.

[1] Vide 1 Russ. & M. 770.

(a) Ante, vol. 6, p. 77. See *The Attorney General v. Cooper*, ante, p. 379.

1838.—*Eales v. the Earl of Cardigan.*

*EALLES v. THE EARL OF CARDIGAN.

[*384]

38: 16th November.—Will; Construction.

testatrix gave to her servants, Samuel Eales, and Charlotte, his wife, an annuity of 200*l.* a year each, for their lives and the life of the survivor. Held that each of the legatees was entitled to an annuity of 200*l.* during their joint lives and the life of the survivor of them.

THE testatrix in this cause, after giving legacies of sums in gross and annuities to several persons, proceeded thus:

"I give, unto my servants, Samuel Eales and Charlotte his wife, an annuity of 200*l.* each for their lives and the life of the survivor, to commence from the time of my decease and to be paid by equal quarterly payments." By a codicil, after reciting that she had, by her will, given annuities to S. Eales and Charlotte his wife, she charged her real and personal estate with the payment of the annuities given to them and the other annuitants named in her will.

Samuel Eales died, leaving his wife surviving.

Mr. *Spence* and Mr. *Wilbraham*, for the plaintiff, Charlotte Eales, contended that two annuities of 200*l.* were given by the will, and that Mrs. Eales, having survived her husband, had become entitled to both the annuities, that is, to an annuity of 400*l.*

Mr. *Coleridge*, for the personal representative of Samuel Eales, said that the husband and wife took, each, an annuity of 200*l.* for their joint lives and the life of the survivor. *Jones v. Randall.*(a)

Mr. *Knight Bruce*, Mr. *Barber*, and Mr. *Pole*, for "the parties interested in the testatrix's estate, said that, considering that the annuitants had been servants to the testatrix, and that they were living together as man and wife, it was impossible to imagine that the testatrix meant to give them more than one annuity of 200*l.* ; that she intended only a personal benefit to them, and could not have entertained a notion of an annuity going to the executors of an old servant: that, after having given to S. Eales and his wife an annuity of 200*l.* each, for their lives, it occurred to the testatrix that that might mean for their joint lives, and, by way of precaution, she added the words, "and for the life of the survivor," in order to prevent the annuity from ceasing on the death of one of them.

THE VICE-CHANCELLOR:—This is the simplest case possible. The words of the bequest are perfectly plain, and the construction which they ought to receive is free from doubt.

The testatrix says: "I give unto my servants Samuel Eales and Charlotte his wife, an annuity of 200*l.* a year, each." If the bequest stopped there, each would have been entitled to an annuity of 200*l.* ; for, if a testator gives to his sons John and Richard, a horse each, the bequest would not be satisfied by the delivery of one horse to the two legatees ; but each of them must have a horse: and that this testatrix knew that she had given two annuities, appears, to me to be manifest from the recital in the codicil: "Whereas I have, by my will, given annuities to Samuel Eales and Charlotte his wife, &c."

(a) 1 Jac. & Walk. 100.

 1838.—*Slade v. Fooks*.

The testatrix then proceeds to point out the time during which [386] the annuities were to continue; and, for that purpose, she uses the words, "for their lives and the life of the survivor." In my opinion therefore, there can be no doubt that the husband was entitled to an annuity of 200*l.* a year, during the joint lives of himself and his wife, and the life of the survivor of them, and that the wife was entitled to an annuity of the same amount during the joint lives of herself and her husband, and the life of the survivor of them; and the consequence is, that the representatives of the husband are entitled to an annuity of 200*l.* a year during the life of the wife.

SLADE v. FOOKS.

1838; 16th November.—Will; Construction; Second Cousins.

Testatrix bequeathed her residue to her second cousins of the name of S., and the issue of such of them as were dead. She had no second cousins, but she had three first cousins once removed of that name, two of whom were living at her death, and had children, but the third was then dead leaving children. Held, that the two surviving first cousins once removed, and the children of the one who was dead, were entitled to the residue, to the exclusion of the children of the former, although they were in the same degree of relationship to the testatrix as her second cousins would have been, had she any.

THE testatrix in the cause, directed the residue of her property to be paid to and equally divided between all her *second* cousins of the name of Slade; and, if any of them should have died leaving issue, that their shares should go to their issue.

It appeared by the Master's report made in pursuance of the decree, that the testatrix *had no second cousins*, but that she had three first cousins once removed, of the name of Slade, two of whom were living and had children, and that the third had died leaving children.

Mr. *Jacob*, and Mr. *Thomas Turner*, for the plaintiffs, the surviving first cousins once removed, and the children *of the one who [387] had died, contended that, as the testatrix had no second cousins, she meant to designate, by that expression, her first cousins once removed, and therefore, that the two who were living and the children of the one who had died, were entitled to the residue.

Mr. *Knight Bryce*, for the children of the surviving first cousins once removed, said that the term *second cousins* was no more applicable to first cousins once removed, than it was to first cousins twice removed: that the latter stood in the same degree of relationship to the testatrix as her second cousins would have done, if she had had any, and, consequently, the court must hold the children of the two surviving first cousins once removed to be included in the bequest.

Mr. *Hayter* appeared for the executors of the testatrix.

1838 — *Parkes v. Bott.*

The Vice-Chancellor said that, in disposing of her residuary estate, the testatrix had only two generations of persons in her contemplation, namely, those whom she called her second cousins and the issue of such of them as were dead; that it was very common for persons to call the children of their first cousins, their second cousins; and, therefore, he must hold that two surviving first cousins once removed and the children of the one who was dead, were alone entitled to the residue; the two survivors taking one-third each, and the children of the deceased, the remaining third.[1]

**PARKES v. BOTT.*

[*388]

1838: 23d November.—Deed; Construction; Policy of Insurance; Bonus.

A marriage settlement recited that it had been agreed, on the treaty for the marriage that the intended husband should insure his life in the Rock Insurance Office, in the names of trustees, in the sum of 3000*l.*: that the dividends of certain canal shares should be applied in keeping the policy on foot: that *the said sum of 3000*l.** under the policy, should be settled in manner thereafter mentioned; and that, in pursuance of the agreement, the intended husband had made an insurance on his life in the Rock Office, in the sum of 3000*l.* in the names of the trustees of the deed: and it was declared that the trustees should stand possessed of *the policy*, in trust for the intended husband, until the marriage, and that, upon the solemnization thereof, they should stand possessed of *the said sum of 3000*l.**, when received under the policy, upon certain trusts for the benefit of the intended wife and the children of the marriage. The husband became bankrupt and afterwards died. On his death, a considerable bonus was payable on the 3000*l.* Held that the husband's assignees were not entitled to the bonus, but that that sum, as well as the 3000*l.*, belonged to the trustees of the settlement.

By the settlement on the marriage of John Parkes, the younger, son of John Parkes, the elder, with Anna Maria Rees, bearing date the 28th of March, 1817. after reciting that it was agreed, on the treaty for the marriage, that John Parkes, the elder, should settle, in the manner therein mentioned, thirteen shares in the Warwick and Napton Canal Navigation, and that John Parkes, the younger, should insure his life in the Rock Insurance Office, in Bridge street, Blackfriars, London, in the names of trustees, in the sum of 3000*l.*; for keeping which policy on foot, if the interest and dividends of the canal shares should at any time be insufficient for that purpose, his father should join with him as security; and further that, John Parkes, the younger, should by his bond, secure, to trustees, the transfer by his heirs, executors or administrators, within three calendar months next after his decease, of 4400*l.* consols, into the names of such trustees, to the intent that the same, together with *the said sum of 3000*l.**, under the policy, might be [*389] come settled in the manner thereafter mentioned; and that, in part pursuance of the agreement, John Parkes, the younger, had made an insurance, in the said assurance office, in the sum of 3000*l.* for his life, in the names of the plaintiffs, and that he had also executed a bond to the plaintiffs

[1] *Vide Caldecott v. Harrison*, post, 457

[1838.—*Parkes v. Bott.*]

for securing the transfer, into their names, of the 4400*l.* consols, upon the trusts of the settlement: it was witnessed that John Parkes, the elder, assigned the canal shares to the plaintiffs; and it was declared that they should stand possessed thereof, in trust for John Parkes the elder, his executors, &c. until the marriage should take effect, and of the policy of assurance, in trust for John Parkes, the younger, his executors, &c., until the marriage should take effect; and, upon the solemnization thereof, that they should stand possessed of the canal shares, and of *the said sum of 3000*l.**, when received under the policy, and the 4400*l.* consols, when transferred into their names, upon the trusts after expressed, (that is to say) as to the canal shares, upon trust, out of the interest and dividends thereof, to pay the premiums, duty and other charges and expenses payable upon the policy, in order that the same might be kept on foot so long as the purposes of the settlement might require, and, subject thereto, to pay such interest or dividends to John Parkes, the younger, for his life; and, upon his decease, upon trust, to invest *the said sum of 3000*l.**, when received under the policy, in the purchase of reduced three per cent. annuities in the names of the then trustees of the settlement, and to stand possessed as well of the reduced three per cent. annuities so to be purchased as also of the 4400*l.* consols and the canal shares, upon trust to pay to Anna Maria Rees the interest and dividends thereof, for the [*390] then remainder of her *life, and, after the decease of the survivor of John Parkes, the younger, and Anna Maria Rees, upon trust to transfer and assign the bank annuities then standing in the names of the trustees, and the canal shares, to the children of the marriage: and in case there should be no such child, upon trust to transfer the bank reduced three per cent. annuities, being the fund in which *the said sum of 3000*l.**, was to be so laid out as aforesaid, to the executors, administrators, and assigns of John Parkes, the younger; and to assign and transfer the canal shares and the 4400*l.* consols, to such person and persons, &c. as Anna Maria Rees should appoint, and, in default of such appointment, to her, her executors and administrators: and John Parkes, the elder, and John Parkes, the younger, covenanted, with the plaintiffs, that, if the interest and dividends of the canal shares should at any time be insufficient for that purpose, they would discharge the premiums, duty and other charges payable upon the policy, in order that the same might be kept on foot so long as the purposes of the settlement might require.

In 1828 John Parkes, the younger, became bankrupt, and the defendant, Bott, was chosen his assignee. In 1836 he died, leaving his wife and three children surviving. On his death the Rock Assurance Company paid the trustees of the settlement 3885*l.*, being the amount of the sum insured by the policy and three bonuses thereon. Bott having claimed the 885*l.* on the ground that it was a separate sum from the 3000*l.* secured by the policy, and, therefore, was not subject to the trusts of the settlement, but belonged to the estate of J. Parkes, the younger, the bill was filed by the trustees against Bott

1838.—Parkes v. Bots.

and Mrs. Parkes and her children, *praying that the rights and in- [391]
terests of all parties in the 885*l.* might be declared by the court.

Mr. *Sharpe*, appeared for the plaintiffs, the trustees of the settlement.

Mr. *Jacob* and Mr. *Neate*, for the assignee of John Parkes, the younger, contended that nothing passed, to the trustees of the settlement, except the sum for which the policy was effected, as was evident from the expression, used throughout the deed, of the said sum of 3000*l.*

Mr. *Knight Bruce*, and Mr. *Loftus Wigram*, for the *costuique trusts* under the settlement, argued that the bonuses, as well as the sum originally insured, were subject to the trusts of the settlement: and they cited *Courtney v. Ferrers*.(a)

The Vice-Chancellor, having referred, during the argument, to the prospectus of the Rock Life Assurance Company, said:—If the parties to the settlement had meant that the husband should take the bonuses, as separate and distinct from the sum insured, they would have said so; but their meaning was that *the policy* should be settled.

The recital is that it was agreed that John Parkes, the younger, should insure his life, in the Rock Insurance Office, in the names of trustees, for keeping *which policy* on foot, if the interest and dividends of the canal shares should, at any time, be insufficient for *that purpose, [392] his father should join with him as security; and, further, that he should, by his bond, secure, unto trustees, the transfer, by his heirs, executors or administrators, within three calendar months next after his decease, of 4400*l.* consols, into the names of such trustees, to the intent that the same, together with the said sum of 3000*l.* under the said policy, might become vested in manner thereafter mentioned; and that, in part pursuance of the said agreement, the said John Parkes, the younger, had, on the 13th day of the then instant month, made an insurance, in the said Assurance Office, in the said sum of 3000*l.* for his life, in the names of the trustees: and then it is declared that, until the marriage should take effect, the trustees should, stand possessed of the canal shares in trust for John Parkes, the elder, and, of the *policy of assurance*, in trust for John Parkes, the younger; and that, upon the solemnization of the marriage, the trustees should stand possessed of the canal shares upon trust, by and out of the interest or dividends thereof, from time to time, to pay and defray the premiums, duty and other charges and expenses (if any there should be) for the time being payable upon *the said policy* of assurance, in order that *such policy* might be kept on foot so long as the purposes of the settlement might require, and to pay over the residue or surplus of such interest or dividends, from time to time, to the said John Parkes, the younger, so long as the expenses of keeping *the said policy* on foot, should be borne out of the said trust fund. Then, in the subsequent part of the settlement, we find these words: "And, upon the decease of the

(a) Ante, vol. 1, p. 137.

1838.—*Baldwin v. Society for Diffusing Useful Knowledge.*

said John Parkes, the younger, upon trust to lay out and invest the said sum of 3000*l.*, when received under the said policy of insurance, in the purchase of bank reduced 3 per cent. annuities."

Therefore, one of the subjects of the settlement was the policy of [*393] insurance. And it is to be observed that no trust is declared, in any part of the deed, as to any increase on the sum for which the policy was effected. My opinion, therefore, is that it was the intention of the parties to settle, not merely a sum of 3000*l.*, but the full benefit of the policy.

Declare that the sum of 885*l.*, the amount of the bonuses, is subject to the trusts of the settlement. No order made as to the costs of the assignee. [1]

BALDWIN v. THE SOCIETY FOR THE DIFFUSION OF USEFUL KNOWLEDGE.

1838: 19th November.—Agreement; Specific Performance; Injunction.

By an agreement between the plaintiffs and the defendants, the former, in consideration of certain payments to be made by them to the latter, were to have the exclusive right of engraving and publishing a series of maps from drawings to be furnished to them, from time to time, by the latter. The court refused to restrain the defendants from acting in violation of the agreement, as it could not compel the defendants to furnish the drawings; and therefore, could not decree a specific performance of the agreement.

THE bill stated an agreement between Mrs. Baldwin & Cradock, book-sellers and publishers, and the defendants, by which it was agreed that a series of maps, forming a complete atlas of ancient and modern geography, should be published, by Baldwin & Cradock, from drawings to be furnished by the defendants; that the sole and exclusive right of publishing and selling the maps, should belong to Baldwin & Cradock: that they should pay the expense of engraving the plates of the maps; that the maps should be sold in numbers consisting of two maps each; and that Baldwin & Cradock [*394] *should pay a certain sum to the defendants for every 1000 numbers sold over and above 3000.

Baldwin & Cradock, after having published seventy numbers of maps under this agreement, became embarrassed in their circumstances, and made an assignment of their stock and effects to trustees for the benefit of their creditors. The insolvency of Baldwin & Cradock having, as the defendants conceived, put an end to the agreement, they published the three subsequent numbers of the maps at their office in Lincoln's Inn Fields, upon which the bill was filed, by Baldwin & Cradock and their trustees, praying that an account might be taken of all sums of money received, or which should be received by the defendants or any person on their behalf, in respect of numbers 71, 72 and 73, of the publication, or any other numbers that they might there-

[1] Vide *Lucas v. Bond*, 2 Keen, 136.

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r, publish or cause to be published, otherwise than by or through the plaintiffs as the publishers thereof under the agreement; and that they might be ordered to pay over, to the plaintiffs, what should be found due on the said account, the plaintiffs offering to make to the defendants all the payments which would have been made, or would thereafter be made, by Baldwin & Cradock, in the due execution of the agreement, and otherwise fully to perform the same on their parts: and that the defendants might be ordered to deliver up, to the plaintiffs, all the copies of the maps contained in the said series numbers, or which should be contained in any future numbers of the publication, which they might thereafter publish or cause to be published otherwise than through or by the plaintiffs as the publishers thereof under the agreement, and also the engraved plates used or to be used for printing the said maps, or any maps being part of the before mentioned series; and that the rights and interests of the plaintiffs, under the agreement, might be declared, protected and enforced; and that, in the meantime, the defendants might be restrained from selling or exposing to sale, or otherwise disposing of numbers 71, 72 and 73; and from causing to be printed, and selling or exposing to sale any other numbers which should be numbered or described, or be published in such a form as to purport to be a continuation of the work of which the first seventy numbers had been published by the plaintiffs: and that they might be also restrained from printing or causing to be printed, and from selling or exposing to sale any of the maps being part of the intended series of maps before mentioned.

Mr. Wigram and Mr. James Russell now moved for the injunction. They cited *Hogg v. Kirby*.(a)

Mr. Knight Bruce, Mr. Jacob, and Mr. Booth, for the defendants, cited *Clarke v. Price*,(b) *Kemble v. Kean*,(c) and *Kimberley v. Jennings*.(d)

THE VICE-CHANCELLOR, after stating other grounds for refusing the motion said:—How can I compel the Society for the Diffusion of Useful Knowledge, to furnish the plaintiffs with drawings of maps, from the engraving and publishing of which they are to derive a profit? If I cannot do so, the principle which Lord Eldon adopted in *Clarke v. Price*[1] applies: and, as I am unable to compel a specific performance of the agreement between Messrs. Baldwin & Cradock and the Society, I cannot grant the injunction, which is merely ancillary to what the court may do at the hearing of the case.[2]

(a) 8 Ves. 215. (b) J. Wilson's C. C. 157. (c) Ante, vol. 6, p. 333. (d) Ibid. 340.

[1] The reader will find a statement of that case by McCoun, V. C. in *Hamblin v. Dinneford*, 2 Edw. Ch. Rep. 532, who has followed out the principle of the case in the text, which was subsequent to his decision, and of the two cases in the sixth volume of Simons of which he was not aware at the time of his decision.

[2] That, in general, the performance of a mere personal act will not be enforced in equity, but that the parties will be left to their remedy at law, see besides the cases cited in the text, *De Rinfret v. Corsetti*, 4 Paige, 264. *Hamblin v. Dinneford*, 2 Edw. Ch. Rep. 529. *Thornbury v.*

1840.—*Crowfoot v. Mander.*

[*396]

**CROWFOOT v. MANDER.*

1840: 16th June.—Pleading.

Where a person named as a defendant, dies before appearance, an original bill, and not a bill of revivor, ought to be filed against his personal representative.

A PERSON named as a defendant, died before appearance: upon which the plaintiffs filed a bill of revivor against his personal representative.

The Vice-Chancellor said that his attention had been often called to the point when he was at the bar, and that he had always considered it to be

Bewill, 1 Yo. & Coll. C. C. 554. *Brough v. Oddy*, 1 Rnm. & M. 55. *Hooper v. Broderick*, 11 Sim. 47. But the general rule seems to be subject to some pretty broad exceptions, which almost destroy its character as a rule. Thus, a specific performance was decreed of a covenant by which the defendants were "to construct and forever thereafter maintain one neat archway, sufficient to permit a loaded carriage of hay to pass under the archway, at such place as the plaintiff, his lessee and assigns, should think most convenient in his pleasure grounds, and should form and complete the approaches to such archway." Knight Bruce, V. C. says; Consistently with the principle of the case of *Flint v. Brandon*, (8 Ves. 162,) with which I agree, it is competent to this court to interfere to enforce the specific performance of a contract by a defendant to do defined work upon his property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages. The defendants having purchased land intersecting the plaintiff's land, contracted to make a communication for carriages, through the land thus acquired by them, for the plaintiff, from one side to the other. The defendants have acquired property under that contract, and its performance is now resisted; for what reason it does not on the pleadings plainly appear. Damages would not be an adequate compensation. In my opinion, the plaintiff has a right to specific performance, and it is competent to this court to say that the writ shall be properly done. The company seem to think, that the court might deal more leniently with them than a jury; in that they are probably right, for this would possibly be a case for very heavy damages. There is no difficulty in enforcing such a decree. The court has to order the thing to be done, and then it is a question capable of solution whether the order has been obeyed. The company is bound to perform the agreement; but on the other hand the plaintiff must give the company every facility for making the approaches, and must put them, as I understand he undertakes to do, into possession of the land necessary for such approaches. Though this is not a judgment after all the deliberation which, under other circumstances, I should have bestowed on the case, yet my present opinion is clearly as I have stated." *Storer v. Great Western Railway Company*, 2 Yo. & Coll. C. C. 48. The reasoning of the Vice-Chancellor in the last cited case cannot easily be restricted to cases, "such as relate to property of some kind; and not where personal services are sought to be compelled." *Hamblin v. Dinneford*, 2 Edw. Ch. Rep. 531. In *Morris v. Colman*, 18 Ves. 437, an author who had covenanted not to write any dramatic performance for another theatre, was, by injunction, restrained from violating the covenant. (See a statement of that case, 2 Edw. Ch. Rep. 532.) So, an author, who had sold his copyright in a work, and covenanted not to publish any other to its prejudice, was restrained by injunction from so doing. *Beafield v. Nicholson*, 2 Sim. & Stu. 1. In *Kemble v. Kean*, 6 Sim. 333, the proprietors of Covent Garden Theatre had agreed with an actor, that he should act for twenty-four nights, during a certain period of time, at their theatre, and that in the meantime, he should not act at any other place in London. Shadwell, V. C., held that the court could not enforce the positive part of the contract, and therefore it would not restrain by injunction a breach of the negative part. Mr. J. Story, after stating the case of *Kemble v. Kean*, observes; "In his judgment the Vice-Chancellor commented at large upon the cases of *Morris v. Colman*, and *Clark v. Price*, from which he laboured to distinguish the case before him. His reasoning, it must be confessed, has not relieved the subject from all doubt." 2 Equity Jurisprudence, § 958, n. 1. And see *Hill v. Gomme*, 1 Bear. 54. *Champion v. Brown*, 6 Johns. Ch. Rep. 405, et seq.

1840.—Thompson v. Kendall.

ruled rule that, in such a case, a bill ought to be filed, against the personal representative of the deceased, which would be an original bill as far as respected the defendant, but a supplemental bill with respect to the suit; and the Honor ordered the cause to stand over in order that such a bill might be filed.

Mr. *Knight Bruce*, Mr. *Spence*, Mr. *Jacob*, Mr. *Temple*, Mr. *Jeremy*, Mr. *Barry*, Mr. *Bazalgette*, Mr. *Rogers*, and Mr. *Norris*, appeared for the different parties.

*THOMPSON v. KENDALL.

[*397]

40: 16th, 19th, and 20th June.—Insolvent; Costs; Foreclosure.

The assignee of an insolvent mortgagor, who, by his answer to a bill of foreclosure, disclaimed, and, before the bill was filed, had consented to join in conveying the estate to the mortgagee and had distributed the insolvent's estate amongst the creditors, was ordered, at the hearing to be paid his costs of the suit, by the plaintiff.

THIS was a foreclosure suit.

About three years after the mortgage had been made, the defendant Kendall, the mortgagor, took the benefit of the insolvent debtors' act, and the defendant Kitching was the assignee of his estate. Kitching, in his answer, said that he did not claim any estate, right or interest in or to the mortgaged premises which passed to him as assignee, he believing that the same were mortgaged for considerably more than they were worth: that in July, 1838, the plaintiff's solicitors informed him that Kendall was ready to convey the premises to the plaintiff, and that he was a necessary party to the conveyance, as assignee, and desired him to inform them to whom they were to send the draft for perusal on his behalf: that he directed the draft to be sent to his solicitor, and the same was afterwards sent to and approved of by his solicitor, and then returned to the plaintiff's solicitors: after which time no communication whatever was made, by the plaintiff or her solicitors, to the defendant or his solicitor, until he was served with the subpoena: that he had duly distributed all the assets of the insolvent, which had come to his hands, amongst the creditors; and, under the circumstances aforesaid, he disclaimed all estates, right, title and interest in and to the mortgaged premises, and claimed to be paid his costs of the suit, by the plaintiff.

*Mr. *Wigram* and Mr. *Solomon Atkinson* for the plaintiff. [*398]

Mr. *Wray* for the defendant Kitching.

Mr. *Simons* for the defendant Walker, a mortgagee prior to the plaintiff.

The defendants Kendall and wife did not appear at the hearing.

The plaintiff's counsel proposed to dismiss the bill, as against the defendant Walker, with costs, and, as against the defendant Kitching, without costs; and to take a decree of foreclosure against Kendall and wife only.

1840.—*Thompson v. Kendall.*

Mr. *Wray* contended that, as *Kitching* disclaimed, and had disposed of the insolvent's assets, and as, before the bill was filed, he had consented to join in conveying the mortgaged premises to the plaintiff, he ought to be paid his costs.

Mr. *Wigram* and Mr. *S. Atkinson* contended that *Kitching* was not entitled to his costs; and cited *Collins v. Shirley*,^(a) *Barry v. Wray*,^(b) *Mountford v. Scott*,^(c) *Woodward v. Hadden*.^(d)

THE VICE-CHANCELLOR :—You have unnecessarily thrown, upon [*399] the assignee, *the expense of coming to the hearing, in a case where he says, by his answer, that she disclaims all interest in the mortgaged estate, and that he has distributed the assets of the insolvent amongst the creditors. It seems very hard that, in such a case, the assignee is not to have his costs.

Before I decide the point, I must look to see how the case of *Collins v. Shirley*, stands in Reg. Lib.

20th June.—THE VICE-CHANCELLOR :—I have examined the case of *Collins v. Shirley*, in Reg. Lib. A. 1829, fo. 2325, B. ; and I find that the statement in the printed report, that the assignees said they would have released the equity of redemption, if any application for that purpose had been made to them, does not appear, from the Registrar's book, to have been in their answer; but they said that all the real and personal estate of the insolvent, had been and then was vested in them; and then they disclaimed all interest in the mortgaged premises and the equity of redemption thereof; so that they admitted that they had the interest and then disclaimed it, and that admission not only made it necessary to bring them to the hearing, but also showed that they had a fund to answer all the costs to which they might be subjected by being brought to the hearing.

Here the assignee disclaims, and also states that he was ready to join, with the mortgagors, in conveying the mortgaged estate to the plaintiff. [*400] and that all the estate *of the insolvent which has come to his hands, has been distributed amongst the creditors: so that there is no fund applicable to answer the costs of bringing him before the court: and, under these circumstances, I think that the plaintiff ought to pay the costs of bringing the assignee before the court.[1]

(a) 1 Russ. & Myl. 638. (b) Beames on Costs, 392. (c) 3 Madd. 34. (d) Ante, vol 4 p. 68.

[1] The above is a case in which *exceptio probat regulam*. The assignees of an insolvent, or bankrupt mortgagor, cannot place themselves in a better situation, as regards costs, than the insolvent or bankrupt whom they represent. The value of the security of the mortgagee is not to be diminished by any proceeding of the mortgagor, or those who immediately represent him. So, the provisional assignee of the Insolvent Court, made a defendant in a cause, in respect of his interest in the property of an insolvent debtor, assigned under the stat. 1 and 2 Vict. c. 110, is in the same situation with respect to costs, as the insolvent himself would have been; and, therefore, on a bill of foreclosure, the mortgagor being an insolvent debtor, and the equity of redemption vested in the provisional assignee, the provisional assignee is not entitled to his costs of putting in an answer. *Wigram, V. C.* says: "This is a bill by a mortgagee, for foreclosure against an insolvent mortgagee."

1840.—Williams v. Macdonnell.

WILLIAMS v. MACDONNELL.

1840 : 17th and 19th June.—New Orders ; Construction of the 17th amended Order.

The words, " the second term then next following," in the 17th amended order, mean at the second term following the undertaking to speed, but following the day on which the order for the commission to examine witnesses, is served.

THE 16th amended order[1] requires that a plaintiff, in order to prevent his bill from being dismissed for want of prosecution, shall appear upon the motion to dismiss, and give an undertaking to file a replication, and serve a subpoena to rejoin ; and, in case he requires a commission to examine witnesses, shall obtain and serve an order for such commission within three weeks from the date of the undertaking : and that, in case the plaintiff do appear upon the motion to dismiss and give the undertaking, then all the rules and regulations, with respect to the commission and the return thereof, &c. expressed in the next order, shall apply to all cases under the 16th order. The 19th order[2] directs, that the commission to examine witnesses, shall, at the latest, be returnable on the first return of the second term *then next following* ; and, that the plaintiff shall give his rules to produce witnesses and pass publication, at the latest, in the same term, and shall set down his cause for hearing, and duly serve the subpoena to hear judgment in the succeeding term.

now, whose interest has become vested in the defendant, Sturgis, the provisional assignee. It is admitted, that a decree of foreclosure must be made ; and the only question is, whether the costs of the provisional assignee are to be paid by the mortgagee, he being allowed to add them to his debt ? The provisional assignee has not disclaimed, but has filed an answer ; and that answer made it indispensably necessary that the plaintiff should bring the cause to a hearing against him, &c. Now, in principle, there can be no doubt as to the decree I ought to make. The estate at law belongs to the mortgagee, notwithstanding the insolvency. In this court, it would belong to the mortgagor, if solvent, but only upon terms of his paying to the mortgagee his principal, interest and costs. It is clear that the mortgagor, if solvent, could not compel the mortgagee to do that which the provisional assignee asks, nor could an assignee for value, nor could an assignee in bankruptcy, although in that case the proceeding is *in invitum*. Upon what principle then, can the mortgagor by a voluntary proceeding of his own, in claiming the benefit of the insolvent debtor's act, vary the ordinary rights of the mortgagee, by requiring him, in effect, to make a further advance upon the security, in the shape of a payment in respect of the costs of the provisional assignee ? How could such a principle as that which is insisted upon be applied, if, as might happen, the mortgagee was also insolvent ? On principle, I am satisfied that I cannot give the provisional assignee the costs which he claims. I do not think the sufficiency or insufficiency of the assets of the insolvent, to reimburse the provisional assignee his costs of the suit, ought to make any difference in the case. The ground of my decision, founded on *Hunter v. Pugh*, (1 Hare, 307, note,) is, that the provisional assignee stands in the same position as the insolvent ; neither can have a right to impair the security of the creditor by increasing the charge upon the property." *Appleby v. Duke*, 1 Hare, 303. And see *Hunter v. Pugh*, before Lord Cottenham, id. 307, note. *Cash v. Belcher*, id. 310. *Massey v. Mos*, id. 320. *Bray v. West*, post, 429. *Tipping v. Power*, 1 Hare, 408. 1 Russ. & M. 638, note, An. ed.

[1] Vide 1 Russ. & M. 770.

[2] Vide 1 Russ. & M. 771.

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[*401] *In this case, the defendants Macdonnell and wife moved to dismiss on the 25th of March. The plaintiff appeared on the motion and undertook to speed; and, in pursuance of that undertaking, he filed a replication on the 14th of April, and on the following day, which was *the first day of Easter term*, he served a subpoena to rejoin and obtained and served an order for a commission to examine witnesses.

The order which was drawn up on the undertaking to speed, required the plaintiff to give his rules to produce witnesses and pass publication in Trinity term, and to set down the cause for hearing, and serve a subpoena to hear judgment, returnable in Michaelmas term.

On a motion being made, by the plaintiff, to discharge this order, on the ground that Michaelmas term ought to have been mentioned in it instead of Trinity, and Hilary instead of Michaelmas;

The Vice-Chancellor, after consulting Mr. Colville, the Registrar, held that the objection was well founded, the words; "then next following," in the 17th order, being referrible, not to the date of the order made on the undertaking to speed, but to the day on which the order for the commission to examine witnesses is served; and, as, in this case, the order for the commission was served in Easter term, the order on the undertaking to speed ought not to have required the plaintiff to give rules to produce witnesses and pass publication until Michaelmas term, or to set down the cause and serve the subpoena to hear judgment, until Hilary term.

[*402] *Mr. *Knight Bruce* and Mr. *Rolt* appeared in support of the motion.

Mr. *Jacob* and Mr. *Campbell* opposed it.(a)

(a) The following is the form of the order on the undertaking to speed, as contained in Mr. Daniell's Treat. on Practice, vol. 2, p. 375, b: "That the plaintiff do file a replication and serve subpoenas to rejoin, and obtain and serve an order for a commission to examine witnesses, if he requires such commission, within three weeks from this time, and give rules to produce witnesses and pass publication in term (*the term next but one after the order*) and set down the cause for hearing, and serve subpoenas to hear judgment in term next (*the third term after the date of the order*) or, in default thereof, that the plaintiff's bill do stand dismissed out of the court with costs, the plaintiff to pay to the defendant the costs of this application, to be taxed by the Master in rotation, in case the parties differ."

1838.—*Clowes v. Clowes.*

CLOWES v. CLOWES.

[*403]

1838 ; 23d November.—Will ; Construction.

Testator commenced his will as follows : " All my property in the several public funds, excepting that in the three per cent. consols, is to be sold out, and, after defraying, from the produce thereof, my funeral expenses and debts, the remainder is to be placed in the three per cent. consols, in which fund I now stand possessed of 3700*l.* capital stock. The annual dividends I leave in trust to my executor and executrix, to be by them paid, as the dividends shall become due, to the persons under-mentioned during their natural lives, namely, 30*l.* per annum to my niece H., and 20*l.* per annum to my niece S." The testator, in a subsequent part of his will, gave all his household furniture and all his property of every kind, *not specified above*, to his wife. Held that the capital producing the two yearly sums of 30*l.* and 20*l.* passed to the wife, subject to the payment of those sums.

JAMES COBB, by his will dated the 14th of December, 1807, disposed of his property in the following words :—" All my property in the several public funds, excepting that in the three per cent. consolidated annuities, is to be sold out, and, after defraying, from the produce thereof, my funeral expenses and my just debts, and paying therefrom the sum of 190*l.*, which I bequeath to my dear brother John B. Cobb, the remainder is to be placed, as soon as conveniently may be, in the three per cent. consolidated annuities, in which fund I now stand possessed of 3700*l.* capital stock. The annual dividends upon the aggregate stock, which I compute altogether at 300*l.* per annum, I leave in trust to my executrix and executor hereinafter named, to be by them paid, as the said dividends shall become due, to the persons under-mentioned, during their natural lives, viz. :—

130*l.* per annum to my dear wife Mary Cobb ; at her death, 30*l.* per [*404]

annum to my niece Harriet Cobb, and 20*l.* per annum to my niece Sophia Cobb : the remaining 100*l.* per annum, and the stock producing the same, to be bequeathed, by my wife, in full property, to any of the parties named in this my last will and testament, in such manner as she may think proper : or, if she should die intestate, then the said 100*l.* per annum to go to the survivor or to the survivors of my five nieces named in this my last will, in equal shares, and she or they shall thenceforth possess, in full property, the stock producing such annual dividend of 100*l.* per annum.

50 to my sister, Ann Crawford Drew, during her life ; at her decease, to my wife, and, at the decease of my wife, the stock producing the said dividend to the survivor or survivors of my five nieces, in full property and in equal shares, as above mentioned.

50 to my niece Ann Drew.

30 to my niece, Elizabeth Drew.

20 to my niece, Sophia Browne.

£300 per annum."

"Of the three last mentioned bequests, the share of the party who may

1838.—*Clowes v. Clowes.*

die first, shall, at her death, go to the survivors in equal proportions, and the last survivor shall possess the whole, and also, in full property, the stock producing the said dividend or dividends. If circumstances should [*405] occur to increase or diminish the *amount of capital stock in any public funds whereof I now stand possessed, the amount of every bequest above mentioned, excepting that of 100*l.* to my brother, is to be proportionably increased or diminished. I bequeath all my books, manuscripts and music, and my piano forte to my brother. I bequeath all my household furniture *and all my property of every kind soever not specified above*, to my dear wife. I nominate and appoint my said wife and my brother as executrix and executor of this my last will."

The *Solicitor General* and Mr. *G. L. Russell*, for the plaintiffs, who claimed under the testator's widow. There is no mention, in the will, of the capital stock producing the two sums of 30*l.* and 20*l.* a year given to the testator's nieces, Harriet Cobb and Sophia Cobb; but the capital producing each of the other yearly sums, is mentioned. The court never holds that there is an intestacy unless there is an absolute necessity for it; and we say that the capital of those two yearly sums, was part of the residue, and passed, as such, to the testator's widow.

Mr. *Kinglake* appeared for the surviving executor.

Mr. *Knight Bruce* and Mr. *Prior*, for the other defendants, contended that the capital of the two sums of 30*l.* and 20*l.* a year, either passed, by the will, to the two nieces absolutely, or was undisposed of. They said that the word "specified," meant "mentioned," and could not receive the same construction as "given or bequeathed;" and that the testator had specified [*406] the *capital of the two sums, though he had not disposed of it

Davers v. Dewes.(a)

THE VICE-CHANCELLOR:—It is plain that the testator was not skilled in professional language: but it seems to me to be perfectly plain that he intended his nieces, Harriet and Sophia Cobb, to take only life interests in the sums bequeathed to them: for, in every case in which he intended to give an absolute interest, he has used the expression, "in full property." Besides, in the preceding part of his will, the testator says: "The annual dividends upon the aggregate stock, which I compute, altogether, at 300*l.* per annum, I leave in trust to my executrix and executor hereinafter named, to be by them paid, as the dividends shall become due, to the persons under-mentioned, during their natural lives:" now Harriet Cobb and Sophia Cobb are two of the persons under-mentioned; and, therefore, the question does not admit of doubt.

The next question is whether the capital of the sums given to those two ladies for their lives passed to the widow as a part of the residue, or whether it is undisposed of. I think that the testator, when he used the expression;

1838.—*Vigers v. Lord Audley.*

all my property of every kind soever not specified above," meant interest not bequeathed in property which he might have before mentioned.

In *Davers v. Dewes*, the testator, after giving his goods and furniture in Cheeverly house to his wife, for her life, declared that he would dispose of those articles, after his wife's death, by a codicil; and then he bequeathed the residue of his personal estate, not before disposed of or reserved to be disposed of by his codicil, to his wife. So that he did not give to her all the property which he had not disposed of by his will or which he might not dispose of by his codicil; but expressly excepted, out of the residuary bequest, the property reserved to be disposed of by his codicil: and, consequently, his wife could not be entitled to the goods and furniture absolutely, notwithstanding he made no disposition of those articles by either of the codicils to his will. But, in this case, I think that the testator meant to include, in the residuary bequest, the interests which he had not before disposed of in the stock which he had before mentioned.

Declare that the stock producing the 30*l.* and 20*l.* per annum, given to the testator's nieces, Harriet Cobb and Sophia Cobb, passed by the residuary gift, subject to their life interests, to the testator's widow.

VIGERS v. LORD AUDLEY.

[*408]

1838; 27th and 28th November.—Practice; Process; Peer.

Where a peer is a defendant to a supplemental bill, which prays that he may answer that bill and also the original bill, he ought to be served with office copies of both bills.

THE original bill was filed against the late Lord Audley, who died before he had answered it, leaving the present defendant, his son and heir. A bill of revivor and supplement was then filed, against the present defendant, praying that he might answer the original bill as well as the supplemental matter. The plaintiff, however, when he served the defendant with the letter missive, left an office copy of the bill of revivor and supplement only. The defendant, not having appeared, the plaintiff served him with a subpoena, and, afterwards, obtained an order for a sequestration *nisi* against him.

Mr. *Jacob* and Mr. *Toller*, for the defendant, now moved to discharge that order for irregularity; on the ground that, as the defendant was required to answer the original bill as well as the bill of revivor and supplement, office copies of both bills ought to have been delivered to him with the letter missive.

Mr. *Knight Bruce*, Mr. *Wakefield*, and Mr. *Rogers* for the plaintiff, said that, by the subpoena, the defendant was called upon to answer the supplemental bill only, and that a peer could require no office copy, except of that particular pleading which the subpoena required him to answer. *Sayle v. Graham.*(a) *Beckford v. Wildman.*(b)

(a) *Ante*, vol. 5, p. 8(b) 11th Feb. 1818, cited by Mr. *Wakefield*, from his MSS. notes,

 1838.—Woodroffe v. Daniel.

18th November.—THE VICE-CHANCELLOR:—I have been attended by Mr. Turton and another gentleman from the Six Clerks Office, [*409] and I find that *the fact is this, namely, that there is no such order in *Beekford v. Wildman*, as that which was referred to yesterday, and that there never has been any such order.

When a bill of revivor and supplement is filed against a person who represents a defendant to the original bill, and that defendant has appeared to but not answered the original bill, and the bill of revivor and supplement prays that the representative of the deceased defendant, may answer both bills, he is bound so to do, although the subpoena taken out, is a subpoena that requires him to answer the bill of revivor and supplement only; and the answer, in such a case, is headed as the answer of that defendant to the bill of revivor and supplement, and also to the original bill. And if, in the case put, a mere bill of revivor is filed, which asks that the defendant may answer the original bill, an attachment will issue against the defendant, if he do not answer the original bill.

In this case the process is wrong; for, as Lord Audley would have had to answer the original bill as well as the bill of revivor and supplement, the plaintiff ought to have served Lord Audley with an office copy of the original bill as well as of the bill of revivor and supplement; and, consequently, the whole proceeding is wrong.

[*410]

*WOODROFFE v. DANIEL.

1838: 27th November.—Practice; Amendment.

After an injunction had been continued on merits, the plaintiff moved to amend without prejudice to the injunction. Held that, in such a case, the amendment could not prejudice the injunction, and therefore, the motion was a simple application to amend, and ought to have been made before the Master.

In this case, the common injunction had been continued on the merits. The plaintiff, afterwards, moved to amend *without prejudice to the injunction*.

The Vice-Chancellor said that, when an injunction had been either granted or continued on the merits, the amendment of the bill could not prejudice the injunction, (a) and, therefore, the words in the notice of motion, *without prejudice to the injunction*, were mere words of superfluity, and the motion was, in fact, a motion to amend *simpliciter*, and ought to have been made before the Master. (b)

[Motion refused.]^[1]

(a) See *Pratt v. Archer*, 1 Sim. and Stu. 433. (b) See 3 & 4 Will. 4, c. 94, s. 13 and 14.

[1] It has been held in subsequent cases, (pursuing the principle of the above case) that an amendment of the bill does not *ipso facto* dissolve an injunction. Lord Cottenham in *Ferrand v. Hamer*, (December 17, 22, 1838,) 4 Myl. & Cr. 145, says; many cases prove that, after excep-

1838.—*Bluck v. Colnaghi.*

Mr. Jacob and Mr. Stuart, appeared in support of the motion, and cited *Rees v. Edwards*.(a)

Mr. Knight Bruce and Mr. Chandless, contra.

**BLUCK v. COLNAGHI.*

[*411]

1838: 26th November.—Practice; Dismissal.

After a decree or decretal order, not directing inquiries merely, has been made, the bill cannot be dismissed.

THIS was a suit for winding up the affairs of a partnership between the plaintiff and the defendant.

By consent, an order had been made, on motion, for taking the accounts of the partnership; but the order had not been drawn up.

Mr. Whitmarsh, for the defendant, now moved to dismiss the bill for want of prosecution.

As to an answer allowed or submitted to, the plaintiff may amend as of course, without losing his injunction, and *that*, although the order be not, in terms, without prejudice to the injunction.—It is also the undisputed practice, that after a special injunction, the plaintiff may amend his bill by motion of course, and not prejudice his injunction." Again, (page 147,) the Lord Chancellor says: "In modern cases it is said that the injunction is gone by amending the bill; but that seems to be inconsistent with the general rule, that an injunction once issued cannot be discharged without an order for that purpose, which is founded upon Lord Bacon's order, and other subsequent orders. Many collateral matters may afford unanswerable grounds for dissolving an injunction, but do not of themselves effect the dissolution. A plea allowed, a dismissal of the bill, an abatement of the suit do not dissolve an injunction; but an order for that purpose must be obtained, as observed by Mr. Dickens in his report to Lord Bathurst in *Mason v. Murray*, (2 Dick. 536.) It is inconsistent with the terms of the common injunction, "until an answer and further order," that the injunction should be lost by an amendment of the bill. If the plaintiff's amendment gave to the defendant a right to have the injunction dissolved, it would seem that he ought to obtain an order for that purpose; but no such form of order has been produced. *Patton v. Panton*, (3 Anstr. 651,) was the case of an amendment after answer; and an order to dissolve the injunction on the ground of the amendment, was thought necessary. Some amendments, such as striking out the prayer for the injunction, may make it impossible that the injunction should be continued: yet it must be generally immaterial what the amendments are, with reference to an injunction for default, the merits of which can never be discussed so long as the default continues." [The following remark of Stodwell, V. C., in *Gooseman v. Denn*, 10 Sim. 518, explains some of the observations of the Lord Chancellor quoted *supra*; "an injunction is extraneous to the cause, and not a proceeding in it."] So, Lord Langdale M. R. says; whether expressed to be without prejudice or not, an order to amend does not affect the injunction. When a demurrer is filed, the plaintiff is nevertheless at liberty, before it has been argued, to obtain an order of course to amend his bill, and the amendment will not prejudice the injunction." *Warburton v. The London and Blackwall Railway Company*, (December, 1839,) 2 Beav. 255. So, Knight Bruce, V. C. says: "I conceive that according to Lord Cottenham's opinion, and according to the practice of the court, as it has been understood at least since the case of *Farrand v. Hamer*, (*ubi supra*,) the mere fact of amending a bill, though it may furnish a ground for dissolving the common injunction on an application for that purpose, does not of itself *ipso facto* dissolve it, though there has been no insufficient answer, and though the injunction may never have been continued on the merits." *Brooks v. Purton*, (January, 1842,) 1 Ya. & Coll. C. C. 277. And see *Horne v. Watson*, 2 Sim. 85, and n. 1; 86, n. 1.

(a) 1 Keen, 465.

1838.—*Wardle v. Claxton.*

The Vice-Chancellor said that the order which had been pronounced, was a decretal order; and, though it had not been drawn up, yet either party was at liberty to draw it up: that an order in the nature of a decree, having been made in the cause, the bill could not be dismissed.^(a)

[Motion refused.]

[*412]

*WARDLE v. CLAXTON.[1]

1838: 1st and 3d December.—Practice; Demurrer; Motion.

The pendency of a demurrer does not prevent the plaintiff from serving the defendant with a notice of motion.

AN order had been made for the appointment of a receiver in this cause; which, as usual, directed the defendant to deliver, to the receiver, deeds and papers in his custody or power. The defendant filed a demurrer to the bill. Afterwards, the plaintiff served the defendant with a notice of motion that he might be ordered to deliver the deeds and papers to the receiver.

The motion was made by Mr. Barber.

Mr. *Knight Bruce*, for the defendant, said that the pendency of the demurrer made the notice of motion irregular.

THE VICE-CHANCELLOR, after consulting the Registrar, said:—I think that the objection which has been made, can not be supported, and that the motion is not irregular.

A case might arise of the most imminent danger; as, for instance, if a person were going to take a ward of the court out of the jurisdiction, and then a demurrer should be filed, would the mere pendency of the demurrer prevent a motion from being made to restrain the party from taking the ward out of the jurisdiction?

This is a motion to give effect to a previous order: but I do not decide on the circumstances of this case. I do not think that the mere fact of putting a demurrer on the file, can prevent the plaintiff from giving a notice of motion.

(a) See *Anonymous*, 11 Ves. 169, in which case a bill was dismissed after a decree directing merely inquiries, the parties consenting to have such an order as could be made on further directions. See also *Lashley v. Hogg*, *ibid.* 602, and *Handford v. Storie*, 2 Sim. & Stu. 196, which show that, where creditors may take the benefit of the suit, the bill cannot be dismissed after decree, even with consent of all parties. [*Murphy v. Archdall*, Saunde & Sc. 633.]

[1] S. C. post, 524.

1838.—Mundy v. Jolliffe.

*MUNDY v. JOLLIFFE.

[*413]

836: 4th and 5th December.—Agreement; Specific Performance.

The bill stated a parol agreement, in part performed, for a lease of a farm to be granted by the defendant to the plaintiff, one term of which was that a certain arable field should be laid down in pasture. The plaintiff entered and laid down the field, and it was, afterwards, severed from the farm, and an abatement in the rent, was made in respect of it. The witness examined to prove the agreement, did not state that it contained any provision as to laying down the field; so that the agreement proved, varied from that alleged in the bill; and, on that account, the court refused to decree a specific performance.

THIS was a suit for the specific performance of a parol agreement, made in January, 1824, for a lease of a farm in Hampshire to be granted by the defendant to the plaintiff. By the terms of the agreement as stated in the bill, the plaintiff was to drain the land at his own expense, and was to lay down a certain arable field, in pasture. The plaintiff entered upon the farm shortly after the agreement was made, and expended a considerable sum in drainage and repairs, and also laid down the field in pasture. That field was subsequently severed from the farm and an abatement in the rent was made in respect of it.

The plaintiff, in order to prove the agreement, examined a gentleman named Hector, who was the defendant's steward at the time when the agreement was alleged to have been entered into. The witness, however, did not state that it was one of the terms of the agreement, that the plaintiff should lay down the arable field in pasture.

The *Solicitor General*, Mr. Wakefield, and Mr. Duckworth, for the plaintiff, relied on the agreement having been partly performed by the plaintiff.

Mr. Knight Bruce, and Mr. Jacob, and Mr. Stuart, for the defendant, objected that the agreement which had been proved, varied [*414] from that stated in the bill, as it did not contain any provision for converting the arable field into pasture.

The *Solicitor General* in reply:—I admit that, if a plaintiff proves an agreement different from that which he seeks to have performed, he cannot have relief: but, where an agreement has been entered into and certain terms of it have been performed, if the plaintiff proves what is the agreement that he wishes to have performed, there is no authority for saying that this court cannot perform it. In this case the agreement which we have proved, is that which we allege to remain unperformed, and which we seek to have performed. As we have converted the arable field into pasture; and, especially, as it no longer forms a part of the farm, any stipulation respecting it has become wholly immaterial, and it would be quite useless to insert, any covenant for the conversion of it, in the lease sought to be granted.

THE VICE-CHANCELLOR:—The defendant, in his answer, says that there was no valid or binding agreement between him and the plaintiff, but he does not insist on the statute of frauds.[1] The question then is whether the

[1] When the party must insist in pleading, on the statute of frauds; see *Flag v. Mann*, 2 Sumn. 490, 329. *Jervis v. Smith*, 1 Hoff. Ch. Rep. 470.

1832.—*Mundy v. Jolliffe*.

plaintiff has proved the agreement which he has alleged in his bill. M Hector, whom he has examined for that purpose, states, in substance, what contained, in the bill, as to the duration of the lease and the rent to be reserved; but says nothing as to the laying down of the arable field in pasture; consequently, the agreement which he has proved, is a different agreement from that which the plaintiff has alleged; for, if one term is subtracted from an agreement, it is no longer the same agreement.[1]

[*415] "This case must be dealt with precisely in the same way as it would have been, if the bill had been filed and the cause brought to a hearing shortly after the agreement was entered into; and, if in that case, the court would not have given the plaintiff relief, neither can it give him relief where he files his bill and brings his cause to a hearing at a later period. If the plaintiff represents that, by the agreement, he was to have a lease which was to contain a certain term, and there is good reason to think that that representation is incorrect, his right to have the lease, cannot be affected by anything that may have occurred since the agreement was entered into. He cannot get rid of the consequences of the misrepresentation, by saying that something has been done since which renders it immaterial to inquire whether a term which he has represented to be an integral part of the agreement, was so or not.

I think that the mode in which the plaintiff, in this case, has stated the agreement, makes it impossible for the court to perform it.(a) [2]

(a) The Vice-Chancellor, in the course of his judgment, commented on other parts of the case which it was thought unnecessary to notice; and the inference which he drew from them, was that there was some talking about a lease, but the precise terms of it were never agreed to by either party.

The plaintiff appealed, from his Honor's decision, to the Lord Chancellor, and his Lordship was of opinion that the facts of the case afforded sufficient evidence of an agreement; and referred it to the Master to settle a lease, pursuant to the terms of the agreement. [The case on appeal does not appear to be reported.]

[1] To entitle a party to take the case out of the statute of frauds on the ground of part performance, he must make out by clear and satisfactory proof, the existence of the contract as laid in his bill; and the act of part performance must be of the identical contract set up by him. Nor is it enough that the act is evidence of *some* agreement; but it must be unequivocal and satisfactory evidence of the *particular* agreement charged in the bill. *Phillips v. Thompson*, 1 John. C. Rep. 131. *Perkhurst v. Van Cortlandt*, id. 273. *Byrne v. Romaine*, 2 Edw. Ch. Rep. 445.

[2] Where the answer denies the agreement charged in the bill, and alleges a different agreement, if the plaintiff, not being able to sustain the case presented by his bill, would avail himself of the agreement admitted by the answer, he should amend his bill: otherwise the bill will be dismissed with costs, but without prejudice. *Byrne v. Romaine*, 2 Edw. Ch. Rep. 445.

1838.—*Greenhalgh v. Manchester and Birmingham Railway Company.*

**GREENHALGH v. THE MANCHESTER AND BIRMINGHAM RAIL- [416]
WAY COMPANY.**

539: 3d and 6th December.—Agreement; Railway Company; Corporation.

Two railways called A. and B. were projected, by different parties, to run from M. towards N. The line of A. passed through the centre of the plaintiff's estate, and the line of B. through a corner of it. The projectors of A. agreed with the plaintiff for the purchase of that portion of his land which they required; and they were to have power to vacate the agreement in case the act for making their railway should not pass. Two bills were brought into parliament for forming the railways, and were referred to a committee, at whose suggestion the two projects were amalgamated; and an act was passed incorporating the projectors of both railways into one company, and for making a railway partly in the line of A., and partly in the line of B., the latter being the line selected with respect to the plaintiff's estate. Pending the act, the promoters of the two railways agreed, with each other, that, where either company should have entered into contracts with land-owners whose property might be affected by either line, though in a somewhat different mode, the contracts entered into by the company proposing the rejected line, should be adopted by the united company. A copy of this agreement was subsequently sent to the plaintiff, by the united company. The projectors of the line A. afterwards vacated their agreement with the plaintiff. Held that the plaintiff could not enforce that agreement against the united company.

In 1836 two separate and independent railways were intended to be formed from Manchester towards Birmingham; one was to be called The Manchester South Union Railway, and was to terminate at Tamworth, in Warwickshire: the other was to be called the Manchester, Cheshire and Staffordshire Railway, and was to terminate at Rickerscote, in Staffordshire. The former railway was to be 88 miles, and the latter 67 miles in length. The line of the former passed through the centre, and the line of the latter, through the western corner of the plaintiff's estate.

In February, 1837, an agreement was made between the plaintiff of the one part, and three members of the provisional committee of the South Union Company, on *behalf of themselves and the other subscribers [417] to the undertaking, ("and which said subscribers are intended to be incorporated as a company by an act of Parliament to be applied for and obtained in the present or some subsequent session of Parliament,") of the other part, whereby the plaintiff agreed to give his assent to the passing of the act; and, if the act should be obtained, to sell to the company, for the price therein mentioned, two plots of ground containing together 7040 square yards: and it was provided that, in case the act should not be passed during the then session of Parliament, it should be lawful, for the subscribers, to vacate the agreement, on giving the plaintiff three calendar months' notice in writing under the hand of the chairman or secretary of the provisional committee: and, in the event of any other company obtaining an act, for the purposes of which it might become necessary or desirable to sell the ground to such company, before the South Union Company should obtain their act, or, in the event of the purchase not being completed within two years from the date of the agreement, then that the plaintiff should, in like manner, be at liberty to

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vacate the agreement on giving three calendar months notice to the chairman or secretary.

In pursuance of this agreement, the plaintiff gave his assent to the formation of the South Union Railway: and, in the session of 1837, two bills were brought into Parliament, one for making the South Union Railway, and the other for making the Manchester, Cheshire, and Staffordshire Railway. Both bills were referred to the same Committee of the House of Commons; and, after some investigation of the merits of the two lines, the Committee recommended that the two projects should be amalgamated. This recommendation was [*418] adopted; and, in May, 1837, an agreement was entered into, between certain persons acting for the promoters of each of the railways, which contained the following amongst other clauses: "That, in every case, where either Company shall have entered into any contracts or engagements with the land-owners whose property may be affected by whichever of the two proposed lines may be adopted, though in a somewhat different mode, and the Company projecting the accepted line, shall not (although the other Company may) have made contracts with individual land-owners, the contracts so entered into by the Company proposing the rejected line, shall be adopted by the united Company, having regard to the different mode in which this property may be affected by the adopted line." On the 13th of May, 1837, a copy of this clause was sent, to the plaintiff, by the solicitors of the united Company.

On the 22d of May the Committee reported to the House of Commons that they had consolidated the two bills, and had adopted partly the line of the Manchester, Cheshire, and Staffordshire Railway, and partly the line of the South Union Railway. The adopted line, so far as it passed over the plaintiff's estate, was the same as that of the Manchester, Cheshire, and Staffordshire Railway.

The plaintiff represented, in his bill, that, in the number of assents to the adopted line, his name was included by reason of his assent given under the agreement of February, 1837. This fact, however, was disputed by the defendants, who deposed, in their affidavits, that the plaintiff's name was included amongst the neutrals.

[*419] "The consolidated act received the royal assent on the 30th of June, 1837: and, thereby, 37 persons were incorporated by the name of "The Manchester and Birmingham Railway Company." Of those 37, 22 (including the three gentlemen who signed the agreement of February, 1837) were the subscribers named in the South Union Railway bill, and fifteen were the subscribers named in the Manchester, Cheshire, and Staffordshire Railway bill; and the persons who, at the passing of the consolidated act were the shareholders in the united Company, were the same as those who had been subscribers to the two proposed railways.

On the 7th of October, 1837, the plaintiff received a notice from the chairman of the South Union Railway Company, vacating the agreement of Feb-

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mary, 1837. On the 5th of December, 1837, the plaintiff received a letter from the chairman of the Manchester and Birmingham Railway Company, informing him that the Company's engineers were about to enter on his land for the purpose of staking out the line, and taking levels and surveys for determining the quantity of ground required by the Company; and adding that, as soon as the engineer in chief should have reported, to the directors, the portion of the plaintiff's property which would be wanted for the railway they were desirous of treating for the purchase of it. The plaintiff, however, insisted that the agreement of February, 1837, was binding on the defendants, and refused to treat with them on any other basis, and threatened to take proceedings to enforce that contract: upon which the solicitor to the Company informed him that such proceedings would be resisted. On the 6th of August, 1838, the plaintiff received a notice, from the defendants, stating that they "intended to take and use, for the purpose of their act, two [*420] pieces of his land containing, together, 1352 square yards, and requiring him to treat with them for the sale thereof, and adding that if, for the space of ten days after service of the notice, he should refuse to treat, or should not agree, with the defendants, for the sale, the defendants would, forthwith, cause a jury to be summoned to assess the sum to be paid by them for the purchase.

On the 13th of August, the bill in this cause was filed, insisting that the plaintiff was entitled to have the contract of February, 1837, performed by the defendants, the same being binding on them, and that they were bound to purchase the whole of his land mentioned in that contract, and to pay the price thereby fixed for the same: that the Manchester and Birmingham Railway Company consisted of the same persons as were promoters of the South Union Railway, and were, by the contract of May, 1837, bound to perform all the contracts entered into by the promoters of that railway. The bill prayed that the agreement of February, 1837, might be declared to be binding on the defendants, and that they might be decreed specifically to perform it; and that they might be restrained from causing a jury to be summoned to assess the sum to be paid for the purchase of the plaintiff's land, and from entering thereon, except for the purposes of surveying and taking levels, until they should have paid to the plaintiff the sum fixed by the agreement of February, 1837.

Shortly after the bill was filed, the plaintiffs obtained the injunction *ex parte*. The defendants now moved to dissolve it.

"Mr. Jacob, Mr. Koe, and Mr. Lowndes appeared in support of the [*421] motion.

Mr. Knight Bruce and Mr. Sharpe, for the defendants, relied on *Stanley v. The Chester and Birkenhead Railway Company*, (a) and *Edwards v. The Grand Junction Railway Company*. (b)

(a) Ante, page 264; and 3 Myl. & Craig, 773. (b) Ante, vol. 7, page 337; and 1 Myl. & Craig, 650.

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THE VICE-CHANCELLOR :—In this case, I shall lay out of consideration all the minor points; because I think that the matter must be decided by looking at the agreement of February, 1837, and at what happened with respect to the bill that was introduced, into the House of Commons, for making the South Union Railway.

I understand that the intended South Union Railway Company meant to have their railway commence in Store street, Manchester, and run through Ardwick, (where the plaintiff's land is situate,) and so on to Stockport, and then proceed, through a very considerable tract of country; so that, together with certain branches which were part of the original scheme, it would altogether have extended 88 miles: and, at the same time, the intended Manchester, Cheshire, and Staffordshire Railway Company, formed a design of making a railway, which also was to commence in Store street, Manchester, and go through Ardwick to Stockport, and then to take a very different line of country, from that of the South Union Railway, with respect both to its main line and to its branches. The whole extent of that main line and [*422] its branches, was 67 miles. The *plaintiff, and three gentlemen who were members of the provisional committee of the intended South Union Railway Company, made the agreement in question, which bears date the 14th of February, 1837.

His Honor here read the agreement.

The plaintiff did give his assent to the intended South Union Railway bill; and, when the contending parties for the two different lines, came into the House of Commons, the Committee to which the two rival bills were referred, determined that neither railway should be carried into effect; but that an amalgamation should be made of the two original schemes, adopting 47 miles out of the 67 that the Manchester, Cheshire, and Staffordshire Railway was to extend, and 27 out of the 88 that the South Union Railway was to extend, that is, they took more than two-thirds of the former line, and very little more than one-third of the latter. Then the act of Parliament was passed which formed the promoters of the two bills into a body corporate not for the purpose of making either of the two projected railways, but a new and different railway, for all substantial purposes, from that which either party had contemplated: and, I confess that I cannot understand how it can be fairly and truly said that, for the purpose of considering the agreement in question, the act that was in contemplation by the projectors of the South Union Railway, actually passed.

Now we are to consider that the persons who were projecting the South Union Railway, looked to the probability of their having, in a great degree the right conceded to them, by Parliament, to make their railway, [*423] through their favorite towns and places, to the *extent of 88 miles in length, and which might therefore give them that remuneration, on their capital, which they expected. But it by no means follows, because some persons, with a view to having the South Union Railway carried into

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fact, might think it a reasonable thing to make the bargain which was made with the plaintiff, that they would have made the same bargain with him, if the railway which they had in contemplation, had been one of much less extent and going in a different line. I must then take it for granted that the agreement, as far as the provisional committee of the South Union Railway Company were concerned, was made with reference to that railway. But when the committee of the House of Commons interfered; and, ultimately, an act of Parliament was passed, not for making the South Union Railway, but a very different one, which neither of the parties contemplated: and I must say that it appears to me to be absurd to say that that act of Parliament was the same as that which had been contemplated by the intended South Union Railway Company.

Then there is another thing to be considered. The South Union Railway Company thought that they might be under the necessity of carrying their railway through the central part of the plaintiff's property; and it might be very fair for the plaintiff to say to them: "If you go through the central part of my property, I will not make a bargain to sell any part of it unless you will buy at the least 7040 square yards of it." But if the present company, whose line runs to the westward of the South Union Company's line, had been treating with the plaintiff, they might have said to him: "We want only the western corner of your land: and if you will not treat with us and make what we think a *reasonable bargain, we will defy you [*424] and take the measures which our act of Parliament provides for obtaining that portion of your land which we require." Therefore, it would not be just and fair, if the same terms which the plaintiff exacted from one company, who were under the necessity of going through the centre of his estate, were made applicable to another company which did not contemplate or feel that necessity.

Next, how does the case stand with respect to the assent which the plaintiff had agreed to give by the agreement of February, 1837? It appears that, instead of giving his unqualified assent, he stood neuter, and it is impossible to say what might have been the consequence if there had been a preponderance of neutrals over the assenters.

If then it be true that the act of Parliament which was spoken of in the agreement of February, 1837, did not pass, I cannot see that there is anything which bound, in equity, the persons who represented the intended South Union Railway Company, not to give that notice which they did give, for the purpose of determining the agreement of February, 1837.

I do not understand the plaintiff to make, by his bill, any claim to be paid for the 1352 square yards of land, which the defendants require for their railway, according to the same rate as he was entitled to be paid for the 7040 yards, under the agreement of February, 1837: but, throughout his bill, he insists on having the whole benefit of that agreement: and, therefore, the case is disembarassed of that difficulty which might have arisen, if it had

 1838.—In re Williams, Ex parte Bird.

been put in the alternative and the plaintiff had said: "If I am not
 [*425] entitled to the *whole benefit of the agreement of February, 1837, then, under the agreement of May, 1837, which took place between the two companies and which was notified by them to me, I am entitled to have the 1352 square yards paid for in the same manner as the agreement of February, 1837, provided for the payment of the 7040 square yards." Still, however, it seems to me that, if the case had been so put, there would have been this difficulty, namely, that the agreement of May, which was between the two intended companies, left the agreement of February, just as it was before. Now, as it was one of the conditions of the agreement of February, that, if the then intended act should not pass, the parties to that agreement of the second part, might put an end to it, and, as by the notice which they gave, they did put an end to it, the agreement of February, 1837, became just the same as if it had never had any existence at all. The truth, however, is that the plaintiff has not put his case in that manner, but claims, by his bill, the full benefit of the agreement of February, 1837.

My opinion is that the claim which the plaintiff has made under that agreement, cannot be supported: and the consequence is that the injunction must be dissolved: but, as there is something like a case, and considering the way in which the parties have been dealing with each other, I shall make no order as to costs.(a)

[*426] *IN THE MATTER OF WILLIAMS, deceased, EX PARTE BIRD.

1840: 26th and 27th June.—Mortgagee; Construction of 11 Geo. 4 and 1 W. 4, c. 60, s. 8. The case of a mortgagee leaving an heir, but who is not known, is not within 11 Geo. 4 and 1 W. 4, c. 60, s. 8.

THIS was a petition by the personal representatives of a mortgagee in fee of certain freehold lands, who died, intestate as to his real estates, in August, 1824. It stated that, though the mortgagee *left an heir*, it was not known who was his heir: (b) that the mortgage money was about to be paid, to the petitioners, by the mortgagor, but no reconveyance of the mortgaged premises could be made, unless the court would appoint some person to reconvey them in the name of the mortgagee's heir: that, by 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, it is enacted, that where it shall be uncertain whether the trustee last known to have been seised of any land upon any trust, be living or dead, or, if known to be dead, it shall not be known who is his heir, it shall be lawful for the court to direct any person whom the court may think proper to appoint for that purpose, in the place of the trustee or heir, to convey such land to such person and in such manner as the court shall think proper:

(a) The Lord Chancellor affirmed The Vice-Chancellor's order, but on a different ground from that taken by his Honor. See 3 Myl. & Craig, 784.

(b) The petition did not account for the heir not being known.

1838.—Bickford v. Skewes.

that, by 4 and 5 Will. 4, c. 23, s. 2, it is enacted that, where any person seised of land upon any trust or by way of mortgage, dies without an heir, it shall be lawful for the court to appoint a person to convey such land in like manner as is provided by the first mentioned act, in case such trustee or mortgagee had left an heir and it was not known who was such heir: that, by 1 and 2 Vict. c. 69, s. 3, it is enacted that the two first mentioned acts or either of them, shall not extend to any case of any person dying seised of any land by way of mortgage, other than such as are thereinbefore [*427] expressly provided for. The petition then stated that the case of a person dying seised of any land by way of mortgage and its not being known who is his heir, is not one of the cases by the last stated act expressly provided for; nevertheless, the petitioners were advised that the case was within the first stated act. The petition prayed that it might be declared that the deceased was, at his death, a mortgagee of the premises, and that he was a trustee thereof for the mortgagor, within the meaning of some or one of the acts thereinbefore referred to; and that some person might be appointed to convey the premises, to the mortgagor, on payment of the mortgage money.

Mr. Bird, in support of the petition, referred to, *In the matter of Wilson's estate*, (a) and *Ex parte Whitton*. (b)

The Vice-Chancellor said that, the petition stated that the mortgagee had left an heir, though it was not known who the heir was: that the cases cited were totally different from the present: that it clearly was not within either of the two last mentioned acts, and the only question was whether it was within the eighth section of 11 Geo. 4, and 1 Will. 4, c. 60: that it appeared, from the change in the language of the eighth section from that used in the fifth and sixth sections, that the legislature meant that section to apply to the case of a trustee, and not to the case of a mortgagee; and, therefore, the present case, was one expressly intended, by the legislature, not to be provided for by the statute. [1]

*BICKFORD v. SKEWES.

[*428]

1838: 10th December.—Practice; Affidavit of Service of Subpœna; Subpœna.

An affidavit of the service of a subpœna to appear, stating that the deponent served the defendant with it by leaving a true copy of it and of the endorsement thereon, with A. the wife of L., the sister of defendant, at whose house the defendant lodged, is insufficient, as it does not show where the writ was served.

MOTION to set aside an attachment for want of appearance, for irregularity.

The affidavit of the service of the subpœna stated that the deponent ser-

(a) Ante, vol. viii. p. 392.

(b) 1 Keen, 278.

(1) Vide *Green v. Holden*, 1 Beav. 207. *Memorandum*, post, 494. S. C. post, 642.

 1836.—*Bray v. West.*

ved the defendant with the subpœna, by delivering to and leaving with Ann, the wife of Stephen Lean, the sister of the defendant, at whose house the defendant lodged, a true copy of the subpœna and of the endorsement thereon, and, at the same time, showing her the original writ; and that, at the same time, the deponent explained to her the nature thereof; by which said subpœna the defendant was commanded, &c.

The Vice-Chancellor said that the affidavit did not, to any intent, show where the subpœna was served; and granted the motion.(a)

Mr. *Jacob* and Mr. *Bethel* supported the motion.

Mr. *Knight Bruce* and Mr. *Roupell* opposed it.

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*BARY v. WEST.

1836; 14th December.—Trustee; Costs.

A trustee disclaimed by his answer, but was continued as a party until the hearing. Held, nevertheless, that he was entitled to costs, as between party and party only.

ONE of the defendants, who had been appointed a trustee of the property in dispute, disclaimed by his answer. The bill, however, was not dismissed as against him, but he remained a party to the suit at the hearing.

Mr. *Stinton*, for the defendant, said that the plaintiff, by allowing the defendant to remain a party until the hearing, had treated him as a trustee, and caused him to incur further costs, and, therefore, he was entitled to costs as between solicitor and client.

Mr. *Knight Bruce*, Mr. *Bayley*, Mr. *Wilcock* and Mr. *W. Morley* were counsel for the other parties.

THE VICE-CHANCELLOR :—The defendant was first properly made a party, as a trustee. When he put in his answer and disclaimer, he divested himself of that character, and afterwards he remained on the record, simply, as a party who was not a trustee; and, consequently, he is entitled to his costs as between party and party only.[1]

 [*430]

*PEARSE v. PEARSE.

1836; 14th December.—Probate Duty.

The testator, who was domiciled in England, had, in the hands of his agents in India, certain securities of the Indian government, the principal and interest of which was payable in India, either in cash or by bills on the India Company, at the option of the creditor. Shortly before his death, he accepted an offer made by the Company, to have his notes converted into stock to be registered in England, and to be salable and transferrable there. The conversion was not completed at the testator's death nor until after his will had been proved in England; but ultimately, the stock was transferred to his executors. Held that no probate duty was payable in respect either of the notes or the stock.

(a) See Beames' Orders, p. 169.

[1] Vide *Thompson v. Kendall*, ante, 397.

1838.—Pearse v. Pearse.

At the death of the testator in the cause (who was domiciled in England,) his personal estate consisted, partly, of certain promissory notes of the Indian government, the principal and interest of which, when due, was payable, in India, either in cash or by bills on the India Company, at the option of the holder; and, at his death, those securities were deposited with the accountant general and sub-treasurer at Madras.

A few months before the testator died, the Court of Directors issued a notice giving the holders of such notes the option either of being paid off or of converting their securities into stock, with permission to proprietors in Europe to have their stock registered in England, so as to make it salable and transferrable in London, like other public stock. In consequence of this notice the testator intimated, to the proper officer at the India House, his election to have his notes converted into stock to be registered in England: but although the India Company were bound by that intimation, the conversion and registry of the testator's notes, were not completed until a considerable time after his will had been proved in England. The receipts for the stock were afterwards sent to the executors by the accountant general at Madras, and the stock was transferred into their names.

On the hearing of a petition in this cause presented by the testator's executors, the question was whether probate duty was payable on the notes or on the stock into which they had been converted. [*431]

Mr. *Swanston* for the petitioners:—The cases of *The Attorney General v. Dimond*(a) and *The Attorney General v. Hope*(b) show that probate duty is not payable in respect of the property in question. It is impossible to distinguish those cases from the present: they are parallel to it in all essential circumstances. In those cases as well as in this, the property existed at the time of probate; but it existed beyond the jurisdiction of the Ecclesiastical Courts of this country, and it was afterwards brought within the jurisdiction. The only distinguishing circumstance is the agreement, by which the testator became entitled to have the notes converted into stock.

Mr. *Knight Bruce* and Mr. *James Russell* appeared for other parties, but did not address the court.

THE VICE-CHANCELLOR:—All that the court has to do in deciding the present question, is to consider what was the actual position of the property at the time when probate was granted: whether there was any agreement respecting it, is immaterial.

The notes which the testator had, were simply engagements, by the Governor General of India in Council, "to pay certain sums, when they should become payable, to the testator or his order, at the general treasury at Fort William in Bengal, either in cash, or by bills of exchange, at the option of the proprietor of the notes, to be drawn on the Court of Directors of the India Company. Therefore, all that the testator had, was [*432]

(a) 1 Tyrwhitt's Rep. p. 243.

(b) 4 Tyrwhitt's Rep. p. 878. In p. 904 of the report of this case, the seventh and eighth lines from the top, ought to be transposed. S. C. 8 Bligh, 44.

1838.—*Copland v. Martin.*

a right to be paid the amount of the notes or to receive bills for it at the treasury in Bengal. He died in February, 1835. In his lifetime a notice was issued by which an option was given, to him and the other holders of notes of the same description, either to be paid off, or to convert their notes into stock: and there can be no doubt that it was the testator's intention to convert his notes into stock. But, at the time when probate was granted, there was no debt due from the India Company to the estate of the testator, which could be sued for in this country.

The point appears to me to be settled by the decision in *The Attorney General v. Hope*.

[*433]

*COPLAND v. MARTIN.

1838: 14th December.—Covenant; Specialty Debt.

A. covenanted, with B., to pay him a certain sum, by bills of exchange to be drawn by B. upon and accepted by A. A. only gave B. a bill for part of the sum: and that bill was dishonored. Held that B. was a specialty creditor of A. for the whole sum.

THIS was a creditor's suit.

By an order in the cause, the Master was directed to state, specially, the circumstances connected with the debt due, to George Cottam and Samuel Hallen, from the estate of Thomas Martin, the deceased debtor.

The Master found that, by articles of agreement made between Cottam & Hallen of the first part, Richard Satchell of the second part, and the testator, Thomas Martin, of the third part, after reciting that the testator was employed to build the carcass of King's College, pursuant to a contract entered into between him and the incorporated governors and proprietors of the college, and that the testator would have occasion for a large quantity of wrought and cast iron and of ironfounders' and smiths' work, in completing such contract, Cottam & Hallen, in consideration of 4090*l.*, to be paid to them as thereafter mentioned, agreed, with the testator, to supply him with all the iron required, and to do all the ironfounders' and smiths' work necessary to be done in and about the building, under such terms and stipulations as the testator was bound to perform the same under his contract, and particularly, as to the making any deductions, additions, and alterations in the work, or any extras or omissions as therein provided for, and that they should make such allowances and be entitled to such additions as the testator was

liable or entitled to by virtue of such contract; and that, if Cottam & Hallen should not perform the works to the satisfaction *of Robert Smirke, the then architect of the college, or other the architect for the time being and he should certify, by writing, that they ought not to be continued to do the works, then that the testator might employ some other person or persons to do such works; and that Cottam & Hallen should only be entitled to the difference between the amount which the testator should

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ay for the completion of the works and the 4090*l.*, such difference to be ascertained by the architect and certified by him: and, after making provision for the testator's deducting or being paid all such sums as he might become able to pay by reason of any breach of the contract by Cottam & Hallen, the articles of agreement contained a stipulation in the words following: And the said Thomas Martin, in consideration thereof and of the guarantee on the part of the party hereto of the second part hereinafter contained, agrees to accept of the said contract, and to pay unto the said George Cottam & Samuel Hallen, the said sum of 4090*l.*, or the sum so to be certified as aforesaid (as the case may be) by bills of exchange to be drawn by the said George Cottam & Samuel Hallen, upon and accepted by the said Thomas Martin such bills to be drawn and dated quarterly during the progress of the works, beginning on and from the 1st day of March, 1830, and payable respectively at three months after date, and to be respectively drawn for the estimated amount (subject to such deductions as aforesaid) of iron and work supplied in the quarter next immediately preceding the drawing thereof, such amount to be estimated at the following rates of charge (less 25 per cent.) viz.: Cast iron work at 10*l.* per ton, and wrought iron at 2½*d.* per pound, the last of such bills to be given at the expiration of three calendar months next after Mr. Smirke, or other the architect aforesaid, shall have certified, in writing *under his hand, that the aforesaid contract with King's College [*435] (so far as it respects the smiths' and founders' work) is completed, and to be payable for the balance which shall then remain unpaid of the said sum of 4090*l.*, or other the sum to be certified as aforesaid, at three months after date." And, by such articles of agreement, after making provision for the performance of further new or extra works at King's College, Satchell, at the request of Cottam & Hallen and in consideration of the agreements on the part of Martin, guaranteed, to Martin, the performance, by Cottam & Hallen, of their said agreements. The Master further found that the articles of agreement were duly executed by and under the hands and seals of all the parties thereto: and that Cottam, by his affidavit made in the cause and sworn the 5th of May, 1837, said that, in pursuance of the agreement of 30th of January, 1830, he and his co-partner Hallen, performed and completed the works mentioned in the contract and therein agreed to be performed by them in consideration of the 4090*l.*, so far as the same were required by the architect and according to this directions, and that the sum of 3635*l.* 6*s.* 5*d.* became justly due and payable, to the deponent and his partner, from Martin in respect thereof: that, by various payments made by and allowances made to Martin, in his lifetime, to the amount of 2854*l.* 7*s.* 3*d.*, there remained due, in respect of the said sum of 3635*l.* 6*s.* 5*d.*, the sum of 780*l.* 19*s.* 2*d.*: that Martin was, in his lifetime and at the time of his death, and his estate still was justly and truly indebted unto the deponent and Hallen, his co-partner in trade, in the sum of 780*l.* 19*s.* 2*d.*, for the work so done and performed under and in pursuance of the contract: that neither he, the deponent, nor his part-

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ner Hallen, nor any person or persons by their or either of their order, [*436] *or, to the deponent's knowledge or belief, for their or either of their use, had received the 780*l.* 19*s.* 2*d.*, or any part thereof, or any security or satisfaction for the same or any part thereof, except the said contract and a certain bill of exchange, drawn by the deponent and Hallen upon and accepted by Martin, for 374*l.* 17*s.*, which was dishonored when it became due and still remained unpaid; and that the whole of the 780*l.* 19*s.* 2*d.*, together with interest on the amount of the bill of exchange from the time when the same became due, still remained due and owing to the deponent and his partner from Martin's estate. The Master found that the 394*l.* 17*s.* formed part of the sum which became payable to Cottam & Hallen under the contract, and that 406*l.* 2*s.* 5*d.* formed the residue of the sum which became payable to them under the same contract.

The question was whether Cottam & Hallen were specialty creditors of Thomas Martin.

Mr. *Knight Bruce*, for Cottam & Hallen, said that the covenant was to give bills of exchange which should be paid, and, therefore, Cottam & Hallen were specialty creditors as to the 374*l.* 17*s.* as well as the 406*l.* 2*s.* 2*d.*

Mr. *Jacob* and Mr. *Evans*, for the other creditors. The covenant is to pay by bills of exchange to be drawn by Cottam & Hallen upon and accepted by Martin. The action on the covenant would not be an action of debt, but for not giving the bills. In order to make it a specialty debt, there must be a covenant that creates the debt. If A. covenants with B. to pay him a sum of money, B. may either bring an action [*437] on the *covenant or declare in debt: but, in a case like the present, he could not declare in debt, but only for unliquidated damages for not giving the bills of exchange. Here there is a covenant to pay by specific bills: those bills may not be eventually paid; but still, if the covenantors have given the bills, they have performed their covenant. The intention and effect of the articles of agreement, was not to give a security for the payment, but merely to regulate the mode of payment.

THE VICE-CHANCELLOR:—The covenant was to pay by bills of exchange. Then, if a bill is given which is dishonored, no payment is made by the bill.

If you were to bring an action on the covenant, it would not be for unliquidated damages; for the whole damage would be the debt that remained unpaid; and, therefore, it is a covenant to pay a sum certain.

Declare that Messrs. Cottam & Hallen are specialty creditors for the 780*l.* 19*s.* 2*d.*

1838.—Hadow v. Hadow.

*HADOW v. HADOW.

[*438]

1-33: 21st December.—Will; Construction.

Testator gave one-third of his residuary estate to his wife, and the other two-thirds to trustees in trust for his children at twenty-one: and directed that, until the shares of his children should be payable to them, the income thereof should be paid to his wife, to be by her applied, or, in case of her death to be applied, by the trustees, for the maintenance of the children. Held that the wife was entitled to the income of the children's share during their minorities, she maintaining them in a proper manner.

HENRY PATRICK HADOW, Esq., by his will, dated 23d of December, 1835, after giving plate, jewels, and other articles to his wife, Jane Charlotte Hadow, gave and bequeathed, all other his personal estate, to trustees upon trust to invest, in their names in manner therein mentioned, so much of the trust moneys as would, from the dividends thereof, yield the yearly sum of 300*l.*, and to pay, out of such dividends, to his three sisters therein named, during their respective lives, annuities of 100*l.* a piece: and, as to a proportional part of the money so directed to be invested and of the securities on which the same should be invested, after the death of any of his sisters, in trust for his wife and his two children, and to be paid and transferred in the same manner as was thereafter mentioned in respect to his remaining property. The will then proceeded thus: "and, after providing for the several annuities of 100*l.* a piece to my said three dear sisters, upon trust that my said trustees, or the survivors or survivor of them, do and shall stand possessed of the residue and remainder of my said estate or effects upon trust, as to one equal third part or share thereof, for my dear wife, Jane Hadow, to and for her own absolute use, benefit and disposal, and to be paid to her so soon as conveniently may be after my decease; and, as to the remaining two-third parts thereof, upon trust that my said trustee do and shall place out the same at interest in some of the parliamentary stocks or public funds of Great Britain, or on real securities at interest, and do and shall, from time to time, vary, alter, or transfer the same, as may seem expedient: and, as to one moiety of such stocks, funds or securities, do and shall pay, assign or transfer the same unto my son, Reginald Hadow, as and when he [*439] shall attain the age of twenty-one years; and, as to the remaining moiety of the said stocks, funds and securities, do and shall pay, assign and transfer the same unto my son Henry John Hadow, as and when he shall attain his age at twenty-one years; and, in case either of them, my said two sons, shall die without having attained the said age of twenty-one years, then the share of him so dying of and in the said stocks and securities, shall go and be paid or transferred to the survivor, as and when his original share shall have become payable as aforesaid; and in case both of them, my said two sons, shall die without attaining the said age, then my will is that the said shares of both of my said sons of and in the said last mentioned stocks, funds and securities, shall, from and immediately after the death of the sur-

1838.—*Hadow v. Hadow.*

vivor of my said two sons, be paid and transferred to my said dear wife, Jane Hadow, to and for her own absolute use, benefit and disposal. Provided always, and my will is that, until such stocks, funds and securities shall become payable as aforesaid to my said sons, the dividends thereof shall be paid over, by them or him,^(a) into the proper hands of my said dear wife, Jane Hadow, *to be by her applied, or, in case of her death, to be applied, by my said trustees* or the survivors or survivor of them, for and towards the maintenance, education and advancement in life of my said sons or the survivor of them in such manner as she or they shall think proper."

Henry John Hadow survived his father and died an infant in 1837.

The bill was filed, by Reginald Hadow, against his mother and [*440] the trustees of the will. It stated that the "plaintiff was advised that, under the trusts of the will, he was contingently entitled to two-third parts of the testator's residuary estate, including the sum invested to answer the annuities, subject nevertheless to the payment of those annuities; and that, when he should attain twenty-one, he would become absolutely entitled to the two-third parts of the residuary estate subject as aforesaid: and that he was further advised that, out of the dividends of the two-third parts, a sufficient sum ought to be allowed to his mother, for his maintenance and education; and that the surplus of such dividends ought to be accumulated for his benefit.

The bill prayed that the amount of the testator's estate and effects not specifically bequeathed, might be ascertained; and that the two-third parts thereof to which the plaintiff was so entitled as aforesaid, subject as aforesaid, might be secured for his benefit; and that, out of the dividends of the two-third parts, a sufficient sum might be paid to his mother, for his maintenance and education, and that the surplus of such dividends might be accumulated for his benefit.

Mrs. Hadow, in her answer said that she was advised that, under the will, she was absolutely entitled to one-third part of the testator's residuary estate for her own absolute use and benefit, subject, as to such part thereof as was set apart to answer the annuities, to the same annuities; and that, until the remaining two-third parts of the residuary estate should have become payable under the trusts of the will, she was absolutely entitled to the dividends of the same two-third parts, for her own use and benefit, she being willing to maintain, educate and advance the plaintiff in a proper manner.

[*441] *The *Solicitor General* and Mr. *G. L. Russell*, for the plaintiff.

The proviso in the will directs the income of the children's fortunes to be paid to their mother, *to be by her applied* for the maintenance and education of the children as she may think proper. The mother, therefore,

(a) So in brief. [The meaning is obvious, notwithstanding the remoteness of the relative from the antecedent. The words "by them him" can only refer to the words "my said trustees or the survivors or survivor of them." By any other construction there would be no person competent to carry into effect the intention of the testator.]

1838.—*Rawson v. Samuel.*

was not intended to take any part of the income for her own benefit. Besides, as the same words are used with respect to the trustees, the court, if it decides in favor of the mother's claim, must hold that, if she were to die during the plaintiff's minority, the trustees, if they maintained him, would be entitled to the income of two-thirds of the residue: that, surely, could not have been the testator's intention. Moreover, the testator has shown the measure of his bounty to his widow; for, he has given her one-third of the residue absolutely. In *Berkeley v. Swinburne*,^(a) there was no gift to the testator's sisters. *Hammond v. Neame*,^(b) *Wetherell v. Wilson*.^(c)

Mr. Knight Bruce, Mr. Jacob, Mr. Norton and Mr. F. Bayley, appeared for the defendants.

THE VICE-CHANCELLOR :—I do not think that the gift, of a share of the residue to the wife, at all alters the case.

The testator meant that his widow and children should live together, and that, during her life, she should have the income of the children's property to maintain them, without being liable to account.

Declare that the defendant, Jane Charlotte Hadow, is entitled to the income of two thirds of the testator's residuary estate, she maintaining and educating the plaintiff in a proper manner.[1]

**RAWSON v. SAMUEL.*

[*442]

1838: 29th November.—Discovery; Plaintiff.

A bill was filed for an account of dealings and transactions between the parties, and to restrain an action brought by the defendant against the plaintiff for a breach of contract, in not accepting bills drawn on him by the defendant. Held, that the plaintiff was entitled to inspect those parts only of the books mentioned in the schedule to the answer, which related to the matters in question in the suit; and that, if he wished to inspect other parts of them, with a view to his defence to the action, he must file a bill of discovery.

THE bill was filed for an account of dealings and transactions which had taken place between the parties, and for an injunction to restrain an action brought by the defendant against the plaintiff for a breach of contract in refusing to accept bills drawn by the former, upon the latter. The plaintiff's defence to the action was that, when he refused to accept the bills, a balance was due to him from the defendant; and that, by the terms of the contract, he was not bound, when that was the case, to accept the defendant's bills.

The plaintiff had obtained an order for a production of books and papers

(a) Ante, vol. 6, p. 613.

(b) 1 Swanst. 35.

(c) 1 Keen, 80.

[1] Several cases on the subject (some more recent than the above) are stated or referred to by the editor, 1 Keen 86, n. 1, where in line 5 from the end of the note, "here" is misprinted for "how." See also *Page v. Way*, 3 Beav. 20. *Jubber v. Jubber*, post, 508. *Wardle v. Claxton*, post, 524. *Gilbert v. Bennett*, 10 Sim. 371.

 1840.—*Curteis v. Kenrick*.

which the defendant admitted in his answer, to be in his custody and power, and the object of the present application, on the part of the plaintiff, was to obtain an inspection, not only of those parts of the books and papers which related to the matters in question in the suit, but also of those parts which might contain evidence in support of the plaintiff's defence to the action.

Mr. Knight Bruce, Mr. Jacob and Mr. Blunt, appeared for the plaintiff.

Mr. Wigram and Mr. Hull, for the defendant, contended that the defendant ought to be permitted to seal up those portions of the documents which did not relate to the matters in question in the suit,[1] as there was [*443] no connection between those matters and the cause of action, the bill not seeking to have the state of the accounts, at the time when the plaintiff refused to accept the bills, ascertained.

The Vice-Chancellor said that the plaintiff was not entitled to inspect any portions of the books or papers, except those which related to the matters in question in the suit; and that, if he required to inspect any parts of them with a view to his defence to the action, he ought to have filed a bill of discovery for that purpose.

•Motion refused.[2]

CURTEIS v. KENRICK.

1840: 6th July.—Power.

By a marriage settlement, freehold lands were conveyed to trustees during the joint lives of the husband and wife, in trust to pay one moiety of the rents to the wife, for her separate use, and the other moiety to the husband; and, after the decease of one of them, to the use of the survivor, with remainder to the use of the children of the marriage, with remainder, in default of such issue, if the wife should survive the husband, to the use of her in fee, but if not, then to such uses, &c. as she, notwithstanding her coverture, by her will, by her signed and published in the presence of and attested by three or more credible witnesses, should appoint, and, in default of appointment, to the use of her in fee. The wife died in her husband's lifetime, having made a will which purported to be signed, sealed and delivered by her, and by which, without referring to any power, she gave all the property of which she was possessed, whether real or personal, and also her reversionary interest or interests in any property or properties whatsoever, to her husband. Held that the will was a due execution of the power given to the wife by the settlement.

IN obedience to the decree in this cause, the following case was stated for the opinion of the Barons of the Court of Exchequer.

By indentures of lease and release, dated respectively on or about [*444] the 22d and 23d days of April, 1832, the release being made

[1] As to the right of a defendant to seal up such parts of books, &c., as he swears do not relate to the claims of the plaintiff, see 1 Hoff. Ch. Pract. 308. 1 Barb. Ch. Pract. 235. *Maud v. Allies*, 4 Myl. & Cr. 5 03

[2] Vide 3 Myl. & Cr. 546, n. 1; 549, n. 1. 2 Sim. & Stu. 243, n. 2; 244, n. 3. *Commercial Bank of Buffalo v. Bank of the State of New York*, 4 Hill, 518. *Brown v. Newell*, 2 Myl. & Cr. 573, 574. *Kelly v. Esford*, 5 Paige, 548. *Shepherd v. Morris*, 1 Beav. 175. *Taylor v. Heming*, 4 Beav. 235. *Burrell v. Nicholson*, 1 Myl. & K. 680.

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and duly executed between and by Anne Catherine Wykeham Martin, since deceased, late the wife of Richard Fiennes Wykeham Martin, by her then name and description of Anne Catherine Mascall, spinster, one of the three surviving daughters and co-heiresses of Robert Mascall, Esq. deceased, by Martha Mascall his wife, of the first part, the said Richard Fiennes Wykeham Martin of the second part, William Waterman, Esq., and Richard Curteis Pomfret, gentleman, of the third part, and Francis James Newman Rogers, Esq., and Charles Wykeham Martin, Esq., of the fourth part; being the settlement made previously to the marriage of the said Richard Fiennes Wykeham Martin, with the said Anne Catherine Wykeham Martin, which was afterwards solemnized: in consideration of the then intended marriage, she the said Anne C. W. Martin, with the privity of the said Richard F. W. Martin, did grant, bargain, sell and release the undivided third part or share of the said Anne C. W. Martin (the whole into three equal parts or shares being divided) of and in the several manors, messuages, farms, lands and tenements therein particularly described, unto the said Francis James Newman Rogers and Charles W. Martin, in their actual possession then being: to hold to them their heirs and assigns to the uses thereafter expressed (that is to say) after the solemnization of the said then intended marriage, to the use of the said Francis James Newman Rogers and C. W. Martin, their heirs and assigns, during the joint lives of said Richard F. Wykeham Martin and Anne C. W. Martin (without impeachment of waste,) upon trust to pay one moiety of the rents and profits thereof, to or for the separate use of her the said Anne C. W. Martin, and to pay, the remaining moiety of the said rents and profits, unto the said Richard F. W. Martin, or as he "should, in manner therein mentioned, appoint, and, [*445] after the decease of such one of them the said Richard F. W. Martin and Anne Catherine his wife as should first depart this life, to the use of the survivor of them the said Richard F. W. Martin and A. C. W. Martin his wife, and his or her assigns during his or her life, without impeachment of waste, with remainder to the use of Francis J. N. Rogers and Charles W. Martin, their heirs and assigns, during the life of such survivor, in trust to preserve contingent remainders, with remainder to the use of the children of the said R. F. W. Martin by the said A. C. W. Martin his wife, for such estates, and in such shares and interests as therein mentioned, with remainder in default of such issue, if the said Anne C. W. Martin should survive the said Richard F. W. Martin, to the use of her the said Anne C. W. Martin, her heirs and assigns for ever: but, if the said Anne C. W. Martin should die in the lifetime of the said Richard F. W. Martin, then to such uses, upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes and declarations as the said Anne C. W. Martin, notwithstanding her coverture, by her last will and testament in writing, or by any codicil or codicils thereto by her signed and *published* in the presence of and attested by three or more credible witnesses, should direct or appoint;

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and, in default of such direction or appointment, and so far as any such direction or appointment should not extend, to the use of the said Anne C. W. Martin, her heirs or assigns for ever.

The intended marriage between Richard F. W. Martin and Anne C. Mascall was duly solemnized: and Anne C. W. Martin, formerly A. C. Mascall, died some time in or about February, 1833, without issue by the said [*446] *R. F. W. Martin, having first duly made and published her last will and testament in writing, or a paper writing purporting to be her last will and testament, of the date and in the words and figures following (that is to say) "I, Anne Catherine Wykeham Martin do hereby make my last will and testament, and *do give and bequeath*, to my dearly beloved husband, R. F. W. Martin, *all the property of which I am possessed whether real or personal*, and also all my reversionary interest or interests in any property or properties whatsoever: and I hereby nominate and appoint Francis James Newman Rogers, Esq. to be my executor."

ANNE CATHERINE WYKEHAM MARTIN.

(L. S.)

Signed sealed and *delivered* this 3d day of December, 1832, in the presence of James Whatman, surgeon, Maidstone, Kent; Frances Anne Kenrick, Bourne place, Kent; Elizabeth Bentham.

The question for the opinion of the court, is whether the testamentary instrument of the 3d day of December, 1832, was a due execution of the power given to Anne Catherine Wykeham Martin by her marriage settlement.

The Barons of the Court of Exchequer, by their certificate dated the 3d of May, 1838, certified as follows:

"We have heard this cause argued by counsel, and have considered the same; and we are of opinion that the testamentary instrument of the [*447] 3d December, 1832, is a due execution of the power given to *Anne Catherine Wykeham Martin by her marriage settlement."

ABINGER.

J. PARKE.

A. H. ALDERSON.

J. GURNEY.(a)

(a) See 3 *Mees. & Wels.* 461. The certificate in the above case seems to be at variance with the decisions in *Lovell v. Knight*, ante, vol. 3, p. 275, and *Lempriere v. Valpy*, ante, vol. 5, p. 108. Since these cases were decided, a report has been published of the important case of *Churchill v. Dibben*. See 3d Lord Kenyon's Cases, p. 85. There is also a note of it in Sergeant Hill's MSS in Lincoln's Inn Library, vol. 31, p. 85, which is as follows:

CHURCHILL v. DIBBEN.

(*Post Hill* 27 *Geo. 2. In Chanc.*)

Will; Construction; Power; Feme Coverts.

A married woman, having freehold estates, which were settled, on her marriage, to her separate use with a testamentary power of appointment over them, made a will by which, without referring to the power, she disposed of certain of the estates, *nominatim*, and then gave all the rest of her goods, chattels, estate and estates to R. C. Held that the residuary clause was a good execution of the power, as to all the estates not previously mentioned.

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"The cause having come on for further directions, an order was [448] taken, without discussion, declaring the will to be a due execution [449] of the power contained in the settlement.[1]

[1] *Vide Bradish v. Gibbs*, 3 Johns. Ch. Rep. 523. 3 Russ. 359, n. 1. *Walker v. Mackie*, 4 Russ. 6, and cases cited, *ibid.* 77, n. 2. 1 Russ. & M. 525, n. 1.

If a married woman having a testamentary power of appointment, makes a will, it must be intended to be an exercise of the power, although it contains no reference to it.

A married woman having real property settled to her separate use, with a testamentary power over it, may dispose of leaseholds and other chattels purchased with the produce of it, but not of real estate so purchased.

A bequest of "all my goods, chattels, estate and estates whatsoever," will pass real as well as personal property.

By articles made previous to the marriage of T. Dibben with Elizabeth Brown, particular lands therein mentioned are conveyed to trustees, to receive and pay the rents and profits over to the said Elizabeth, for her separate use and benefit, and then on this further trust, that they, their heirs, and assigns, shall stand seised of all such premises, in trust and for the benefit and behoof of such persons, for such interest, estate and estates, and subject to such powers, provisions, conditions, limitations or agreements, and in such manner and form, as the said Elizabeth Brown shall or may, at any time or times hereafter, after the said intended marriage shall be had and solemnized, notwithstanding her said intended coverture or whether she shall be sole, by any deed or writing by her to be signed or sealed in the presence of two or more credible witnesses, or by her last will and testament in writing, signed, sealed and delivered as aforesaid, direct, limit or appoint, and in default, &c., in trust for the only use, benefit and behoof of the said Elizabeth Brown, her heirs and assigns forever. There was likewise a power given her, by the settlement, to appoint 1000*l.* of her personal estate, by her will, to such persons as she should think proper; and for want of such appointment, it was to go to the executor that she should name in her will.

Elizabeth Dibben, with the savings out of the estate which she had to her separate use, purchased, during the coverture, several freehold lands; and she likewise contracted, with one Sanders, for some other freehold lands at Nettlecombe; but the conveyances of them was not executed at her death.

May 14th, 1749, her husband being then alive, she makes her will, whereby, without taking any notice of the power given her by the settlement, she devises as follows: "I give to my sister Mary, the wife of Richard Churchill, Esq., all my estate in Porten: Item, I give unto Thomas Churchill, all the moiety of Mappercombe farm, now in my possession: I likewise give unto my aforesaid kinsman, Thomas Churchill, all the lands that I have purchased, except that which I purchased of W. Sanders, at Nettlecombe: Item, I give, unto Thomas Dibben, Esq., my husband, Buckham farm and the estate purchased of W. Sanders at Nettlecombe: Item, I give unto my kinswoman, Ann Churchill, 200*l.*, and to John Riglan, 5*l.*: All the rest of my goods, chattels, estate and estates whatsoever, I do give and bequeath unto Richard Churchill the younger, to him, his heirs, executors and assigns for ever."

Upon the residuary bequest there arose two questions, which the Lord Chancellor stated, with his opinion, as follows:—

The first question is upon the extent of the residuary clause, whether it comprises real as well as personal estate: if both, then secondly, whether it is not restrained, by the incapacity of the testatrix, who, as a feme covert, can devise only in execution of a power.

As to the first, I think the words of the residuary clause comprise both real and personal estate [1] and I consider the present in the same light as if it had been the will of an unmarried person who had a capacity of ownership, in which case there would be no room for the second question. It is said that the word "estate" stands coupled with others that carry a chattel interest, and, therefore, is restrained to relate to things *ejusdem generis*. [2] The clear answer to this, is that the word "estate" does stand so accompanied; yet it is with words that describe the whole

[1] *Vide Saumarez v. Saumarez*, 4 Myl. & Cr. 331. *Blagge v. Miles*, 1 Story's Rep. 455.

[2] *Vide Parker v. Marchant*, 1 Yo. & Coll. C. C. 301.

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[*450] *Mr. *Wigram* and Mr. *Merley* appeared for the plaintiffs, and, Mr. *Simons*, Mr. *Stinton*, and Mr. *Willcock*, for the defendants.

personal estate: which distinguishes this from other cases where a gift of particular species of personality, as bonds, notes, stocks, furniture, &c. precedes the general word "estate." But when she has before given all the residue of her goods and chattels what other personal thing could she give? Unless, therefore, the words "estate and estates" take in the realty, they can have no operation at all. That they may have this sense, was determined in *The Countess of Bridgewater v. The Duke of Bolton*, (1 Salk. 236. This case is not within the distinction of the determination in 1 Eq. Ab. 178, *Wilkinson v. Merryland*.) Another answer to the objection arises from the manner of penning this clause. The words are, "estate and estates," in the plural number: the latter of which is never made use of to describe personal estate, but means the same, in common speech, as lands and farms.

The second question relates to the capacity of the testatrix: and I think that this clause is sufficient to pass lands by virtue of the power. If it had been the devise of an unmarried woman, there could be no doubt but that this residuary clause would carry everything undisposed of. Is there any difference, as it is the devise of a feme covert, taking effect in the nature of an appointment in pursuance of a power in the marriage settlement? There are several kinds of powers: first, over another's estate; second, over one's own estate. If this had been of the former kind, the lands would not have passed. It was formerly doubted whether a feme covert could execute, a power coupled with an interest; but, in *Rich v. Beswment*, 6 Bro. P. C. 152, it was determined that she may. In the present case, there is no room for that question, because the power is given her to execute, whether sole or covert. Here the inheritance is in herself. This is her estate: she has a power over it as her own. What difference is there between this and a person's capacity to make a will by the statute of Hen. 8, which in that case shall operate as it can, either by ownership or power? Here she could not give by virtue of the former. The expression, "all my lands," comprehends the lands over which she has a power, and her ownership explains and completes that description, though she does not give by virtue of the ownership. I am of opinion that the lands will pass, and the rather because the court must think it a will meant to execute a power, though there is no reference to it, which makes no difference; it can have no other sense. By the very act of making a will, she could have nothing in view but to execute the power. That is plain, because, as a feme covert, she had no other capacity than what was reserved to her by the settlement; which differs this from what it would be if the words could mean a disposition of other lands than what are comprised in the power. If a man had a power, by appointment, of disposing of particular lands, and other lands of his own in fee, there the latter would satisfy the residuary devise. But here the testatrix must be intended, by this disposition, to have executed the only power she had. How are the goods and chattels to pass but by the power? In that manner they may, because the settlement has made them her separate estate.

As to the lands purchased after marriage, I think they will not pass by the will. Where a feme covert has a separate fortune, she may dispose of the produce of it by will, if she has such a power over her personal estate; but, if it is laid out in land, she cannot devise that to the disinheriting of her heir; that is, she shall not, by virtue of any power, though before marriage, devise a legal estate. But it is clearly otherwise where an estate is settled in trust, subject to such powers; there she may devise an execution of a power; for he who takes by the devise, comes in under those who created the power. All these purchased estates are legal estates in her, subject to the rules of law, and, therefore, not devisable by virtue of her ownership on account of her incapacity, nor by virtue of any power, for there neither was nor could be any such power. If the husband should agree, generally, with his wife, that she should have a power to make a will and dispose of her real estate, it would be void. The lands contracted for with *W. Sanders*, and devised to her husband, must be considered as if the conveyance had been executed. The vendor, who has still the legal estate in him, indeed, may, to some purposes, be considered as a trustee; but this will not give her any power of devising: for a feme covert can no more dispose of a trust than of a legal estate, without a particular power of appointment. I am of opinion, therefore, that, as the testatrix had no such power over those lands, they will not pass at all, either by the particular devise to *Thomas Churchill* and her husband, nor by the residuary devise to *Richard Churchill*.

1839—Turner v. Trelawny.

*TURNER v. TRELAWNY.

[*453]

339: 17th January.—Practice.

If liberty is given to a party to exhibit further interrogatories for the examination of witnesses, he may re-examine a witness whom he has examined before, but not to the same matter.

On the 9th of November last, the defendant obtained an order to enlarge publication, and for liberty to sue out a new commission for the examination of witnesses, and, from time to time, as long as the publication should stand enlarged, to exhibit interrogatories for the examination of witnesses in chief, and for their cross examination under the then existing and the new commission as he might be advised.

The new commission having issued, the defendant gave notice that one Sylvester was to be examined as a witness on his behalf, on certain further interrogatories exhibited under the before-mentioned order. The commissioners, however, declined to examine Sylvester, on the ground that he had been examined for the defendant, under the former commission, and, therefore, they had no power to re-examine him without an order of the court for that purpose. Whereupon, the defendant moved for liberty to examine witnesses, notwithstanding they should have been examined under the former commission, provided such examination should not be upon the same interrogatories as the witnesses had been before examined upon.

This application was supported by an affidavit stating that the defendant's object in applying for the new commission was, that he might be allowed to add further interrogatories, in order to prove some new and additional facts, discovered since the opening of the *old commission, and most [*454] important to his case; and that it was of the utmost importance to his defence, that Sylvester should be again examined, on further interrogatories, as to some of the facts thereinbefore referred to, and on which the defendant would have examined him under the old commission, had he been then acquainted with those facts.

Mr. *Knight Bruce* and Mr. *Steere*, for the motion, said that the commissioners had acted against the established practice of the court in refusing to examine a witness on fresh interrogatories merely because he had been examined before on the old interrogatories.

As to the 1000*l.*, which, by the settlement, she was enabled to dispose of; as she has not given it to any one: that must go to her executor.^(e) Having a power to make a will, she may, consequently, appoint an executor; as it is now the settled practice of the Ecclesiastical Courts to grant probate to such an executor. The husband being generally, the wife's representative, is the only person that would contest this probate; and he has precluded himself by the express stipulation in the settlement.

Upon the whole, therefore, I am of opinion that this will passes all her estate real and personal, except the lands purchased during the coverture.

(e) It appears, from Lord Kenyon's report, that the testatrix appointed Richard Churchill, the younger, her executor; but Serjeant Hill's note omits that fact.

 1839.—*Blundell v. Gladstone*.

Mr. *Jacob* and Mr. *G. Richards*, for the plaintiff, said that a witness who had been once examined, could not be re-examined except under such special order. They cited *Asbee v. Shipley*,^(a) 1 Smith's Pract. page 395, and *Stanney v. Walmsley*.^(b)

THE VICE-CHANCELLOR :—I think that the commissioners were not warranted in refusing to examine the defendant's witness : for I never understood that, where liberty is given to a party to exhibit fresh interrogatories, the examination is to be confined to new witnesses.

Motion granted.

 [*455]

*BLUNDELL v. GLADSTONE.

1839 ; 17th and 24th January.—Jurisdiction ; Injunction ; Commissioners for examining witnesses. The court will restrain commissioners for examining witnesses from bringing an action for their fees against a solicitor in the cause, and will refer it to the Master to ascertain what is due to them.

MOTION by the plaintiff's solicitor, to restrain T. Fisher and James O. Watson, the plaintiff's commissioners for the examination of witnesses in the cause, from proceeding with actions brought by them against the solicitor, for fees claimed by them as such commissioners.

The solicitor had offered to pay Fisher and Watson a certain sum, being at the rate of two guineas a day each for 38 days, which was the time that they had been engaged in examining witnesses. Fisher and Watson, however, claimed to be paid a larger sum, on account of their having been engaged more than thirty-eight days in examining witnesses, indorsing exhibits and making up the return ; and, because, on some of those days they had sat more than four hours, which was the time fixed by them for their daily sitting, and acquiesced in by the solicitors on each side, at the opening of the commission.

Mr. *Skirrow* and Mr. *Macdonnell*, in support of the motion, said that the court would interfere to stay the proceedings in an action arising out of a suit in this court, and brought by one officer of the court against another.

Froud v. Lawrence.^(c) *In re Weaver*.^(d) *Barker v. Dacie*.^(e)

[*456] *Mr. *Jacob*, for Fisher and Watson, referred to *Stockhold v. Collington*.^(f) *Goslin v. Ellison*.^(g)

THE VICE-CHANCELLOR :—This application, in the form in which it is made, is certainly new : but I do not think that it is distinguishable in principle, from *In re Weaver*. I shall, therefore, grant the injunction : but, at the same time, provision ought to be made for securing to the commissioners the payment of what is justly and fairly due to them. A commissioner

(a) 5 Madd. 467.

(b) 1 Myl. & Craig, 361.

(c) 1 Jac. & Walk. 655.

(d) 2 Myl. & Craig, 441.

(e) 6 Ves. 681.

(f) 1 Salk. 330.

(g) *Ibid*.

1840.—*Caldecott v. Harrison.*

might not be able to sit longer than four hours a day, without great inconvenience to himself; and, therefore, the stipulation made by Messrs. Fisher and Watson, that they should not sit more than that number of hours daily, may have been perfectly fair and reasonable. The order, therefore, that I shall make, is, that Messrs. Fisher and Watson be restrained by the order of this court, from proceeding any further in their two several actions: and it must be referred to the Master, to inquire and state what is due to them for their loss, on taking the examination and cross examination of witnesses in this cause, having regard to any special circumstances.

**CALDECOTT v. HARRISON.*

[*457]

1840: 11th July.—Will; Cousins; Construction.

Testator, by his will, gave legacies to several persons, describing each of them as his cousin. By a codicil he gave his residuary estate to all such of his cousins both on his father's and mother's side, as should be living at his decease, and to all the children of such of his said cousins as might have theretofore died or might die in his lifetime. The testator left several first cousins and children of first and second cousins, and one first cousin once removed. Held that none of them were included in the residuary bequest, except the first cousins living at the testator's death, and the children of first cousins who died in his lifetime.

GEORGE CLUBLEY, by his will dated the 6th of March, 1835, devised as follows:—"I give and devise all and every my messuages, lands and hereditaments, situate within the township, precincts and territories of Waxholme, in Holderness, in the county of York, unto Francis Clubley of Waxholme aforesaid, the son of my cousin John Clubley of Welwick, his heirs and assigns for ever, subject nevertheless to and charged and chargeable, in exoneration of my personal estate, with the payment of the several annuities or annual sums of money following, (that is to say,) to Mrs. Smith, the wife of my late cousin, George Smith, an annuity of 30*l.*, for and during her natural life; to my cousin, Francis Smith and his present wife, an annuity of 30*l.*, for and during their joint natural lives and the life of the survivor of them; to my cousin, Thomas Smith, and his present wife, an annuity of 30*l.*, for and during their joint natural lives, and the life of the survivor of them; to my cousin, Ann Wilkin, and her present husband, an annuity of 30*l.*, for and during their joint natural lives and the life of the survivor of them; to my cousin, Eleanor Caldecott, and her present husband, an annuity of 30*l.*, for and during their joint natural lives, and the life of the survivor of them; and to my cousin, Mary Musgrave, and her present husband, an annuity of 30*l.*, for and during their joint natural lives and the life of the survivor of them." The testator then directed his other real estates to be sold, and, after giving several legacies out of the proceeds, proceeded thus:

"I give and bequeath all the rest, residue, and remainder of the money arising from the sale of my said real estates, and all and singular my personal

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estate and effects, of what nature or kind soever, unto the said John Clubley of Welbeck, and the said Francis Clubley of Easington, for their own severa and respective use and benefit absolutely."

The testator made a codical, dated the 13th of April, 1835, in the following words:—"Whereas, in and by my said will, I have given and bequeathed all the residue and remainder of the moneys to arise from the sale of my real estate therein directed to be sold, and my personal estate and effects, after paying or satisfying the several legacies therein mentioned, unto my cousin, John Clubley of Welbeck, and Francis Clubley of Easington, for their own use now I do hereby revoke and make void said bequest, and, instead thereof, I do hereby give and bequeath all said rest and residue of the said moneys, personal estate, and effects, unto and equally amongst all such of my cousins, both on my father's and mother's side, as may be living at the time of my decease, and unto and amongst all and every the child or children, living at my decease, of such of my said cousins as may have heretofore died, or may die in my lifetime, leaving a child or children him, her, or them surviving, the child or children of any such deceased cousin taking, between or amongst them in equal shares, such part or portion only of said [*459] moneys and effects as would have passed to his, her, or their parent or parents, if living: and in all other respects I do hereby confirm my said will."

The decree referred it to the Master to inquire and state what cousins of the testator, both on the father's and mother's side, were living at his death, and, if any of them were then dead, who was or were their legal personal representatives, and also what child or children of such the testator's said cousins who had died in the testator's lifetime, were living at his decease, and, if any of them were then dead, who were their legal personal representatives.

The persons who came in and claimed before the Master, were first cousins of the testator, children of his first and second cousins, and a first cousin of his father.

The cause now came on to be heard for further directions.

Mr. *Knight Bruce* and Mr. *Elmsley*, for the plaintiffs, who were the first cousins of the testator living at his death, and the children of his first cousins who died in his lifetime.

The testator has mentioned, in his codicil, children of cousins as well as cousins. Now every child of a cousin, is a cousin: and, therefore, it is necessary, in construing the codicil, to put a restricted sense upon the word cousins, and to hold that it means first cousins only. Besides, it appears, from the report, that every person whom the testator mentions, in his will, as his cousin, was his first cousin.

[*460] "The Vice-Chancellor: If that be so, the testator has put his own interpretation upon the language which he has used.

Mr. *Kee*, for James Bradley, the first cousin of the testator's father:—"The language of the codicil must be taken in an extended sense; and James

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Bradley, who was a first cousin once removed of the testator, must be held to be included in the residuary bequest.

Mr. G. Richards or the children of the second cousins who died in the testator's lifetime:—The court cannot put that confined construction upon, the language of the codicil which the counsel for the plaintiffs have contended for. On looking at the words which the testator has used, in his codicil, it is plain that he meant to extend his bounty, and not to confine it within the former limits. The language is extremely general. It includes cousins both on his father's and mother's side. A second cousin or the child of a first or second cousin, is as much a cousin as a first cousin is. The term is a flexible one; and there is nothing in this codicil to limit it to first cousins. *Silcox v. Bell*,^(a) *Mayott v. Mayott*,^(b) *Charge v. Goodyer*.^(c)

Mr. Twells, for the executors.

THE VICE-CHANCELLOR:—I admit that the word "cousins" if used *simpliciter*, would include cousins of every description.[1] But the court frequently is obliged to put a restricted sense on general words.

"In my opinion, wills like all other instruments, are best construed when you can find out, from the context of the instrument itself, in what sense the testator has used the term, the meaning of which is disputed. Here it is stated that, whenever he has named, in his will, persons as his cousins, they are all of them persons who stood in the relation of first cousins to him. In the codicil he gives his residuary estate to such of his cousins on his father's and mother's side as might be living at his decease, and to all the children living at his decease of such of his said cousins as might have theretofore died or might die in his lifetime. As therefore, he uses the words "cousins and children of cousins," it is obvious that he must use the term "cousins" in a restricted sense; for the children of cousins are not meant to take directly, but by way of substitution.

I think that the true interpretation of the will and codicil taken together, is that, by the word "cousins," the testator meant first cousins, simply and strictly, without any qualification. Therefore Bradley, who was a first cousin once removed, cannot take: nor can the children of first cousins, unless they happen to come in by way of substitution.

I assume that to be true which has been stated to me, namely, that every person called a cousin in the will, is a first cousin. That is an important fact.^(d)

(a) 1 Sim. & Sta. 301. (b) 2 Bro. C. C. 125. (c) 3 Russ. 140. (d) See *Slade v. Fooks*, ante, 386.

[1] Vide *Sanderson v. Bailey*, 4 Myl. & Cr. 56. 3 Russ. 141, n. 1.

 1839.—*Forbes v. Adams.*

[*462]

FORBES v. ADAMS.

1839: 23d January.—*Feme Coverts*; *Fine*.

By a marriage settlement, a Jamaica estate was limited, to trustees for a term of years, in trust to raise 18,000*l.* to be laid out in land, in Great Britain, of the value of 600*l.* a year: and the land, when purchased, was to be settled on the husband for life, with remainder to the wife for life, with an option to her to have an annuity of 600*l.* a year, out of the land, in lieu of her life estate. Before the 18,000*l.* was raised, the wife joined, with her husband (both of them being resident in this country) in mortgaging the Jamaica estate in fee: and the wife acknowledged the mortgage deed before a magistrate, which, by the laws of Jamaica, was equivalent to levying a fine.—The husband afterwards died. Held that the wife had barred herself of all claim to the provision made for her by the settlement.

CHARLES FORBES, formerly of Jamaica but afterwards of Great Stanmore, Middlesex, by the settlement on his marriage with Mary Clutterbuck, dated the 29th of August, 1800, demised, to trustees, two plantations in Jamaica, for 1000 years, subject to a proviso for cesser of the term in case he should, in his lifetime, or his heirs, executors, &c., should, within two years after his death, pay, to the trustees, 18,000*l.* sterling, with interest, if not paid in his lifetime, after the rate of 5*l.* per cent. per annum, from the day of his death: and the settlement declared that the trustees should stand possessed of the 18,000*l.* upon trust, with the consent of Forbes and his intended wife or the survivor of them, if they or either of them should be then living, and, after the death of the survivor, then of the proper authority of the trustees, to invest the 18,000*l.*, or so much thereof as should be necessary, in the purchase of freehold or copyhold hereditaments in fee simple in possession, to be situate in Great Britain, of the clear yearly value of 600*l.*, to be settled and assured to the use of G. Forbes, for his life, and, after his decease, in case Mary Clutterbuck should survive him, to her use for her life, or, at her option signified by her, whether covert or sole, by some writing under her hand and

[*463] seal, to the use that she and her assigns should, in the event aforesaid receive, a clear annuity or rent charge of 600*l.*, out of the hereditaments so to be purchased, in lieu or instead of her life interest therein, and with a term of 100 years to be limited to trustees, in such settlement to be named, for that purpose, and to commence from the day of the death of Charles Forbes, upon trust, by the usual ways and means, for the further and better securing the payment of the rent charge, and subject to such provisos and agreements as were usual in terms of the like nature and created for the like purpose: which said life estate so to be limited to Mary Clutterbuck, upon the event of her surviving Charles Forbes, in the hereditaments so to be purchased as aforesaid, or the rent charge of 600*l.* so directed to be charged upon and made payable thereout, should be for a jointure for Mary Clutterbuck, and in bar of her dower or thirds at common law or by custom or otherwise, which she might claim out of any manors, messuages, &c. which Charles Forbes was or might be seised of or entitled unto, for any estate of inheritance, during the intended coverture; and, after the decease of

1838.—Forbes v. Adams.

the survivor of Charles Forbes and Mary Clutterbuck, in case the hereditaments to be purchased should, at the option of Mary Clutterbuck, be limited to her for her life, expectant and to take effect as aforesaid, or in case the rent charge of 100*l.* should be limited, in the event aforesaid, to her for her life as aforesaid, then, after the decease of Charles Forbes (but subject to such rent charge and the repairs and remedies and term of years for better securing the same) to the use of all the children of the marriage, equally, if more than one, as tenants in common in tail, with cross remainders between them in tail, and, if there should be but one such child, then to the use of such only child in tail, and "with the ultimate remainder to the use of Charles Forbes [*464] in fee: and it was thereby further declared that, upon payment of the 18,000*l.* and until an opportunity should offer for investing it in the purchase of lands to be settled as aforesaid, it should be lawful, for the trustees, with the consent of Charles Forbes and Mary Clutterbuck or the survivor of them, if they or either of them should be then living, and, after the decease of the survivor of them, of the proper authority of the trustees, to invest the 18,000*l.* in the usual securities, and that the trustees should apply the income of those securities in payment of an annuity of 600*l.* to such person or persons as would be entitled to the rents of the hereditaments to be purchased and settled as aforesaid, in case the same were actually purchased and settled pursuant to the settlement, and should pay the residue of such income to Charles Forbes, his executors, &c. : and it was thereby further declared that it should be lawful for the trustees to receive, from Charles Forbes in his lifetime, or from his heirs, executors or administrators after his death, any sum or sums of money on account of the 18,000*l.*, by such instalments and at such times as he or they should be desirous and find it convenient to pay, so as the sum to be paid at any one instalment, should not be less than 500*l.*, and so as the payment of the whole thereof, should not be postponed beyond two years from the death of Charles Forbes.

By an indenture dated the 20th of Feb. 1818, Charles Forbes and Mary his wife, and each of them, conveyed the two plantations, and all the estate, right, title, interest, benefit, claim and demand whatsoever, either at law or in equity, of them and each of them, of, into or out of the same, to the defendants Adams, Robertson, Greenfield and Atkinson in fee, subject to redemption on repayment by Charles Forbes, his heirs, executors, &c., of two sums of 8000*l.* and 6000*l.* currency : and Mary Forbes appeared before the mayor of Chichester, and acknowledged that she executed the deed for the uses and purposes therein mentioned ; and, being examined apart from her husband, she acknowledged, before the mayor, that she voluntarily executed the deed without any force, threat, compulsion or coercion of, from or by her husband or any other person or persons whomsoever, and that, at the time of the execution thereof, she knew the same to be a conveyance, of the several plantations therein comprised, to the defendants for the purposes therein mentioned : and a memorandum of such acknowledgment

1839.—*Forbes v. Adams.*

was endorsed upon the deed and sealed with the mayor's official seal. The defendants, by their answer, alleged that, by the law of Jamaica, such conveyances and acknowledgments as aforesaid, were sufficient and effectual to pass the rights and interests of married women.

C. Forbes died on the 27th of July, 1835, leaving his wife surviving. There was issue of the marriage seven children, two of whom were still living.

A sum of money having been awarded, under the act for the abolition of slavery, (3 & 4 Will. 4, c. 73,) as a compensation for the slaves on the two plantations, and that sum having been invested in stock in the name of the Accountant General, the question, on the hearing of a petition presented by

Mrs. Forbes and her children and the trustees of the settlement, was [*466] whether Mrs. Forbes was entitled, as against the mortgagees, to *be paid the dividends of the stock, on account of the interest of the 18,000*l.* which had never been raised.

Mr. *Jacob* and Mr. *Koe*, for the petitioner:—The question is whether Mrs. Forbes, by joining in and acknowledging the mortgage deed, passed to the mortgagees her interest in the estate to be purchased with the 18,000*l.* There is nothing on the face of the mortgage deed to show that she intended to transfer her jointure to the mortgagees. *Solly v. Whitfield.*(a) Mr. Forbes might have paid the 18,000*l.* out of his property in Jamaica, or out of any other property. He might have paid it in his lifetime: and, supposing that he had paid it before the mortgage deed was executed, would Mrs. Forbes' interest have passed to the mortgagees?

Mr. *Knight Bruce* and Mr. *Mitchell*, for the mortgagees:—Mrs. Forbes, when she executed and acknowledged the mortgage deed, did an act which, by the laws of Jamaica, is equivalent to levying a fine. The fund which was to produce the 900*l.* a year still remains to be raised, and as Mrs. Forbes has levied a fine of the estate out of which that fund was to be raised, she has effectually barred herself from claiming the 600*l.* a year. *May v. Roper.*(b)

Mr. *Jacob*, in reply:—The case of *May v. Roper* does not at all [*467] affect the present question. Here the question is not whether *Mrs.

Forbes' claim is barred or extinguished, but whether it has been transferred to the mortgagees.

THE VICE-CHANCELLOR:—It appears to me that Mrs. Forbes, when she executed the deed and acknowledged it before a magistrate in this country, gave the same effect to the conveyance to the mortgagees as it would have had if it had been a conveyance of an estate in this country and she had levied a fine.[1] In that case all possible interest that she might have previously had, either at law or in equity, in the estate, would have been barred.

The 18,000*l.*, when raised, would have been to be laid out in the purchase of land in this country, in order to secure to her a jointure of 600*l.* a year.

(a) *Ca. Temp. Finch*, 277.(b) *Ante*, vol. 4, p. 360.[1] *Vied Bent v. Young*, *ante*, 190, and note, *ibid.*

 1849.—*Livingstone v. Cooke.*

The creation of the term was nothing but a method of charging the West India estate with such a sum as would produce the 600*l.* a year.

This court looks at the substance of the case, not at the form of it, and the substance is that Mrs. Forbes had, in equity, a charge of 600*l.* a year upon the West India estate by means of the term : and the effect of her executing and acknowledging the deed was to bar herself of all interest, as well in equity as at law, which she had in the estate.

The consequence is that she is not entitled to the dividends of the stock in which the compensation money has been invested, and the petition must be dismissed with costs.(a)

 LIVINGSTONE v. COOKE.

[*468]

1840: 9th July.—Practice ; Contempt ; Order to Amend.

If a defendant is in contempt for want of answer, the plaintiff does not waive the contempt by obtaining an order to amend.

MR. LOVAT moved that the defendant, who was brought up under an attachment for want of answer, might be committed to the Fleet.

MR. TERRELL, for the defendant, said that the plaintiff had obtained an order to amend, which was a waiver of the contempt. *Symonds v. Duchess of Cumberland.*(b)

MR. LOVAT replied that, where exceptions are taken to an answer, and the plaintiff obtains an order to amend and for the defendant to answer the amendments and exceptions at the same time, the contempt is waived, because the order prevents the defendant from putting in his answer ; but that it was not so where, as in the present case, the order that had been obtained, was a simple order to amend ; and that, in the case cited, the bill had been actually amended.

THE VICE-CHANCELLOR :—A mere order to amend, is not a waiver of the contempt ; as it creates no obstacle to the defendant putting in his answer.

Motion granted.[1]

(a) See *Pearson v. Lane*, 17 Ves. 101.

(b) 2 Cox, 411.

[1] But it seems that an actual amendment of the bill would be a waiver of the contempt. *Gray v. Campbell*, 1 Russ. & Myl. 324. *Ball v. Etches*, id. 324, and see *Woodward v. Twinaine*, ante, 301.

1839.—Webb v. Kelly.

[*469]

*WEBB v. KELLY.

1839; 23d January.—Will; Construction.

Testator directed his trustee to apply the rents of his freehold estates *during the life of his wife, for the maintenance and education* of his two great nieces, and, after his wife's death, to sell the estates and apply the proceeds to the use and benefit of both his great nieces, share and share alike, but, if there should be but one of them living at his wife's death, to the use and benefit of the surviving great niece, only. One of the great nieces died, an infant, in the lifetime of the wife. Held that a moiety of the rents accrued between her death and the death of the widow, did not go to the surviving great niece, or result to the testator's heir, but belonged to her personal representative.

PHILIP MONTAGUE, by his will dated the 15th day of March, 1780, after reciting that he had, by a marriage bond then in the hands of William Barford, made a provision for his wife Kezia, by the dividend of 1700*l.* of his Old South Sea annuities, willed that the dividend of the remaining 2300*l.*, that is, the dividend of the whole 4000*l.* of his said annuities, should be paid, as an additional provision for his wife, during her life, and that the said additional sum of 2300*l.* should be, as soon as conveniently could be after his death, invested in the hands of William Barford and John Clementson for the same uses and trusts that he had before settled by the before-mentioned bond: and he willed that the said John Clementson should receive the rent of his freehold estates at Fiddington in the county of Somerset and at Wingfield in the county of Berks, *during the life of his wife*, and apply it in equal shares, *to the maintainance and education* of his two great nieces, Mary Baker and Anna Maria Baker: and, after his wife's decease, he empowered Clementson and willed him to sell both the estates and apply the moneys arising therefrom, in the most advantageous manner, to the use and benefit of both his said great nieces, share and share alike, or, if there should be but one of them living at the time of his wife's decease, to the use and benefit of the

[*470] surviving sister only; but he declared that he made *that bequest* to his two great nieces, upon a supposition that the public security would continue good, and the dividend of his above named annuities be regularly paid his wife during her life; but that, if public security should fail, and the dividends of the above mentioned Old South Sea annuities should not be regularly paid his wife, he empowered Clementson and willed that he should sell both the above named estates, and with the money thence arising, purchase her the best annuity he could for her life: and he appointed his wife and Clementson executors of his will.

The testator died shortly after the date of his will. Mary Baker died in July, 1784, an infant and unmarried. Kezia Montague, the testator's widow, died in November, 1815. Anna Maria Baker married Edward William Webb, and died in November, 1834.

The dividends on the South Sea Stock having been regularly paid during the widow's life, one question, on the hearing of a petition in the cause, was

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whether Anna Maria Webb became entitled, on the death of her sister, Mary Baker, to the whole of the rents of the estates at Fiddington and Wingfield.

Mr. *Knight Bruce*, for parties claiming under Anna Maria Webb:—The sole object in postponing the sale of the freehold estates, was to secure an income, of a certain amount, to the wife. Supposing that object to be removed here is an absolute gift to the two great nieces; for, both the income and the produce of the two estates are given to them; and there is a gift over, to the survivor, in the event of one of them dying in the widow's lifetime. It is plain that the testator intended the income to go over with the [*471] capital; for it would be unreasonable that the representatives of the deceased great niece should continue to receive one moiety of the income *pur autre vie*, after the capital has gone over.

THE VICE-CHANCELLOR:—The only subject of the gift over, is the moneys arising from the sale of the freehold estates. In the preceding clause, the testator wills that John Clementson should receive the rent of his estates during the life of his wife, and apply it, in equal shares, to the maintenance and education of his two great nieces: they are, therefore, made tenants in common of the rent, during the life of the wife. Then, after the death of the wife, Mr. Clementson is to sell the estates; and the moneys arising therefrom are to go to the two great nieces equally, if both survive the wife; but, if only one survives, the whole is to go to the survivor. Consequently, there is no doubt that, as against parties claiming under Anna Maria Webb, the representatives of Mary Baker, are entitled to one moiety of the rent accrued in the lifetime of the widow.

Another question was, whether the testator's heir was entitled to a moiety of the rents that accrued between the death of Mary Baker and the death of the widow.

Mr. *Jacob* for the heir:—The only trust that is declared of one moiety of the rents, is for the maintenance and education of Mary Baker: therefore, no trust is declared beyond her life; and, consequently, there is a resulting trust, for the heir, as to one moiety of the rents accrued between her death and the death of the widow.

*Mr. *Matthews*, Mr. *Willcock*, Mr. *Webster*, and Mr. *Stone* appeared for the other parties. [*472]

THE VICE-CHANCELLOR:—I think that a gift for the maintenance and education of the legatee, is an absolute gift; so that, in this case, Mary Baker was entitled to a moiety of the rents during the life of the widow.[1]

[1] *Vide Hadow v. Hadow*, ante, 438. *Wardle v. Claxton*, post, 524.

 1840.—*Morris v. The Duke of Norfolk.*

MORRIS v. THE DUKE OF NORFOLK.

1840; 4th and 5th May.—Jurisdiction; Discovery; Tithe Commutation Act.

A Court of Equity, will compel a discovery and production of documents, in aid of proceedings at law, to try a disputed right under the Tithe Commutation Act, notwithstanding special provisions are contained in that act for those purposes.

THE bill stated that, in 1822, the plaintiff was presented, by the late Duke of Norfolk, to the rectory of Shelfanger, in Norfolk: that the defendant, the present Duke, and his ancestors for a great many years past, had been, and the defendant then was seised in fee of certain lands in the parish, which had, for some time, constituted one farm, called the Shelfanger Hall farm: that, in October, 1838, the commissioners appointed under the tithe commutation act, 6 and 7 Will. 4, c. 71, determined to ascertain and award the rent charge to be paid in lieu of the tithes of the parish, no agreement binding upon the parish having been made under the authority of the act: that certain suits then were and still continued to be pending, in the Court of Exchequer, touching the plaintiff's right to the tithes of the farm, which were commenced by the plaintiff, against Richard Ellis, as tenant of the farm under the defendant, and against his executors, by original bill and bill of revivor, and also against Charles Ellis as the subsequent tenant under the defendant, and that R. Ellis, in his answer to the first of the said bills, insisted that the farm was an ancient farm, and was covered by a modus of 14*l.* a year: that such

[*473] suits were, in fact, defended by and at the expense of the defendant, and, consequently, a question had arisen between him and the plaintiff, touching the existence and validity of the alleged modus; and the assistant commissioner appointed under the act for the purpose of ascertaining and awarding the rent charge to be paid in lieu of the tithes of the parish, appointed a time and place for hearing and determining such question, and, having heard the same, he made his award, dated the 25th of June, 1839, and thereby determined that the modus was good and valid: that the plaintiff, being dissatisfied with the award, and the yearly value of the tithes of the farm greatly exceeding 20*l.*, he, under the authority of the act, caused an action to be brought, in the Court of Exchequer, against the Duke, within the time prescribed by the act, and caused a feigned issue to be delivered therein in order that such disputed right might be tried; such issue being whether a modus of 14*l.* a year, was then lawfully payable, by the occupiers of the farm, to the rector of the parish in lieu of the tithes of the farm: that the defendant, his solicitors or agents had, in their possession or power, divers ancient and other deeds, books and documents by which, if produced, it would appear that no such modus had been payable from time immemorial, and from which, several matters would appear utterly inconsistent with the alleged immemoriality and validity of the alleged modus: that, from such deeds, books, &c., it would appear that, in and before the reign of William the Conqueror,

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at an early period subsequent thereto, the rectory was divided into mediety, and that one mediety was appendant to the manor of Hoes in the parish and the other to the manor of Visedeliens in the same parish. The bill then stated the names of the successive lords of the two manors, and of the incumbents of the rectory down to the year 1375, when "the two [474] medieties of the rectory were consolidated and alternate rights of presentation to the consolidated rectory, were given to the lords of the two manors. It next stated who were the lords of the manors from 1375 down to 1532, when they were purchased by the then Duke of Norfolk; and that, from the several deeds, books, &c., by which the several matters thereinbefore mentioned appeared (all which, or some copies thereof, or extracts therefrom, were in the possession or power of the defendant, his solicitors or agents,) it would appear that tithes in kind were payable in respect of all the lands in the parish, and particularly, in respect of the farm: that it would also appear, from such deeds, &c., and from certain other deeds, &c., then or late in the possession or power of the defendant, his solicitors or agents, that, upon the foundation of the parish church, the parish constituted two distinct rectories, which were endowed with lands and tithes by different lords of manors or other persons, who by reason or in respect of such endowments, held and exercised the advowson of each mediety, the person or persons who had endowed the church with one portion of such lands and tithes, holding the advowson of one mediety, and the person or persons who had endowed the church with the residue of such lands and tithes, holding the advowson of the other mediety: that it was impossible or highly improbable that the patrons or rectors of each mediety, could, at any time before the period of legal memory, have agreed to one composition or pecuniary payment in respect of the tithes of the entirety of the farm: that the defendant, his solicitors or agents then had or then lately had in their possession or power, divers deeds and writings conveying or otherwise relating to the advowson of the rectory or the advowson of the two medieties thereof or of one of them, and to the manors "and [475] the lands alleged to be covered by the modus, and, in particular, the deeds by which the advowson of the rectory and the said lands were granted to his ancestors or to some person from whom he derived title thereto, and also divers leases and counterparts of leases of or touching the said lands: that, by and from such deeds, writings, leases and agreements, it would appear that the said lands were subject to tithes in kind, and that no such modus as aforesaid had subsisted from time immemorial, and that the annual rents of the said lands were not more until recently, or were, at least, little more than the yearly sum of 14*l.*: that, during the reign of James the First, leases of the said lands were granted by one of the defendant's ancestors, which contained covenants for the payment of the tithes thereof: that the defendant, his solicitors or agents, then had or then lately had, in their possession or power, divers receipts for tithes or compositions for tithes of the lands, and also divers accounts, books of account and memorandums of or by stewards, bailiffs, recei-

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vers and agents, in which payments for tithes or compositions for tithes were entered or stated, and also the court books and rolls of the two manors, from which the matters before stated would appear: that the lands had not constituted one entire farm until a period comparatively recent, but the same, together with other lands, did, in ancient times and at the beginning of the reign of Richard the First, constitute a park, and yielded no produce but grass which was eaten by the deer which were kept in the park, and, in fact, yielded little or no titheable produce whatever: that grants of free warren over the lands had been made, at different times, to the lords of the two manors, and such grants were, or then lately were in the possession or power of the

[*476] defendant, or his solicitors or agents, and it would appear *therefore that the lands did not constitute an ancient farm or yield any other produce than grass: that, in order to defend the suits in the Exchequer and substantiate the validity of the alleged modus, the defendant had employed persons to make search amongst ancient records and documents, and such persons had made reports to the defendant of the result of their searches, and sent to him copies, extracts, or abstracts of and from such records, and documents all which were in his possession or power, and they tended to show the invalidity of the modus, and the defendant had refused to produce the same to the plaintiff: that, on the 30th of November, 1339, Sir R. M. Rolfe, one of the Barons of the Exchequer, made the following order in the said action at law: "*Morris, Clerk, v. the Duke of Norfolk.* Upon hearing counsel and the attorneys or agents on both sides, I do order that the defendant do produce to, and that the plaintiff or his attorney or agent be at liberty to inspect all deeds, books, papers and writings, terriers, maps, plans and surveys relating to the matters in issue in this cause, now in the custody or power of the defendant, at the office of Messrs Few & Co., on the 4th of December next, with liberty to the plaintiff to apply for further time if necessary:" that the time for producing the documents mentioned in the order, was afterwards enlarged to the 13th of December, 1839, on which occasion the defendant's attorney produced only four papers and five small books purporting to be rector's books, and refused to produce divers other documents which the plaintiff's attorney then required him to produce, and, amongst others, the court books of the manors and the conveyance of the lands, alleged to be covered by the modus, to the defendant's ancestors; in consequence of which the plaintiff's attorney

[*477] required Messrs. Few, the *defendant's attorneys, to produce the court books and conveyances; but Messrs. Few declined to give any answer as to those documents, on the ground that the defendant had complied with Mr. Baron Rolfe's order: that, at an adjourned meeting before the assistant commissioner, the defendant, upon a question being addressed to him, on the plaintiff's part, in reference to the immemoriality of the alleged modus, stated that he ought to have had an opportunity of informing himself, and that he was taken by surprise and had no information, but, if he had had an intimation beforehand, he might have answered; and, in order therefore that

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the defendant might be prepared to furnish the plaintiff with the necessary information touching the matters before stated, the plaintiff, on the 18th of February, 1840, sent to him a notice requiring him, either personally or by some experienced agent, to search for and examine the various deeds, &c. in his possession relating to the alleged modus and the lands alleged to be covered thereby, and, especially, the several documents which, by a certain summons by the assistant commissioner, bearing date the 18th of May, 1839, and by the order of Mr. Baron Rolfe, the defendant was required to produce, and so all such deeds, &c., in the defendant's possession or power, as would enable him to give the discovery required by a bill in the Court of Chancery which the plaintiff was about to file against him: that the defendant or his solicitors or agents, then had or then lately had, in their possession or power, the several documents aforesaid, and also divers other writings tending to show that the alleged modus was invalid, but he refused to produce the same: that the defendant ought, by himself or his agents, to search for the several documents required to be produced, before he should answer the bill, in order that the result of such search "might be fairly stated in his [*478] answer thereto: that the defendant or his agents had burned, destroyed, obliterated, defaced or improperly parted with divers of the documents aforesaid, with the view of preventing the plaintiff from availing himself of the benefit thereof on the trial of the feigned issue; and that the plaintiff was unable to proceed with effect in the prosecution and trial of the issue, without the discovery from the defendant, of the several matters aforesaid, but which he refused to make.

The bill then required the defendant to answer all the matters aforesaid, and, more especially, that after making or causing to be made such search as he was thereafter required to make, he might answer the interrogatories.

The bill prayed that the defendant, before filing his answer to the bill, might either personally or by some experienced person, search his depositories and muniment rooms and all other proper places for all such deeds, books, papers and particulars as he was therein required to discover and produce, and might examine or cause to be examined such several deeds, books, papers and particulars, and might then answer the premises, and might, in his answer, state whether he had made or caused to be made such search and examination as aforesaid, and when and where and in what manner and by whom and for how long the same search and examination had been made, and might set forth what instructions and directions had been given, and by whom, to the person or persons making such search and examination as aforesaid, touching the nature, mode, object and particulars of such search and examination: and that the defendant might then make a full and true disclosure and discovery touching the matters aforesaid; and [*479] that, in the meantime, he might be restrained from taking any proceeding to compel the plaintiff to proceed with the trial of the action or feigned issue.

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The defendant put in a demurrer stating that the plaintiff had not, by his bill, made such a case as entitled him, in a court of equity, to any discovery from or against the defendant touching the matters contained in the bill or any of such matters, and had not by his bill, shown any right or title to the discovery or the injunction thereby sought.

Mr. Jacob, Mr. Wigram, Mr. Bethell and Mr. Loftus Wigram in support of the demurrer. (a) *The tithe commutation act

(a) The following sections of the Tithe Commutation Act were referred to in the course of the argument.

Sect. 10.—“That the said commissioners or any assistant commissioner may, by summons under their or his hand, require the attendance of all such persons as they or he may think fit to examine upon any matter, brought before them or him as hereinafter mentioned, relating to the commutation of tithes, and also make any inquiries and call for any answer or return as to any such matter and also administer oaths, and examine all such persons upon oath, and cause to be produced before them or him, upon oath, all books, deeds, contracts, agreements, accounts and writings, terriers, maps, plans and surveys, or copies thereof respectively, in anywise relating to any such matter: provided always that no such person shall be required, in obedience to any such summons, to travel more than ten miles from the place of his abode, or to produce any deeds, papers, or writings relating to the title of any lands or tithes.”

Sect. 45.—“That if any suit shall be pending touching the right to any tithes, or, if there shall be any question as to the existence of any modus or composition real, or prescriptive or customary payment, or any claim of exemption from or non-liability, under any circumstances, to the payment of any tithes in respect of any lands or any kind of produce, or touching the situation or boundary of any lands, or if any difference shall arise whereby the making of any such award by the commissioners or assistant commissioner shall be hindered, it shall be lawful for the commissioners or assistant commissioner to appoint a time and place, in or near the parish, for hearing and determining the same; and the decision of the commissioners or assistant commissioner shall be final and conclusive on all persons, subject to the provisions hereinafter contained.”

Sect. 46.—“That any person claiming to be interested in any lands or in the tithes thereof, who shall be dissatisfied with any such decision of the commissioners or assistant commissioner, may, if the yearly value of the payment to be made or withholden according to such decision, shall exceed the sum of 20*l.*, cause an action to be brought, in any of his Majesty's courts of law at Westminster, against the person in whose favor such decision shall have been made, within three calendar months next after such decision shall have been notified in writing, in such a manner as the commissioners or assistant commissioner shall direct, to the parties interested therein, or to their known agents, in which action the plaintiff shall deliver a feigned issue whereby such disputed right may be tried, and shall proceed to a trial at law of such issue at the sittings after the term, or at the assizes then next, or next but one after such action shall have been commenced to be holden for the county within which such lands or the greater part thereof are situated, with liberty, nevertheless, for the court in which the same shall have been commenced, or any judge of his Majesty's courts of law at Westminster, to extend the time for going to trial thereon, or to direct the trial to be in another county, if it shall seem fit to such court or judge so to do; and every defendant in such action, shall enter an appearance thereto, and accept such issue: but in case the parties shall differ as to the form of such issue, or in case the defendant shall fail to enter such appearance, or accept such issue, then the same shall be settled under the direction of the court in which the action shall be brought, or by any judge of his Majesty's courts of law at Westminster, and the plaintiff may proceed thereon in like manner as if the defendant had appeared and accepted such issue; and the parties in such action, shall produce, to each other and their respective attorneys or counsel, at such time and place as any judge may order, before trial, and also to the court and jury upon the trial of any such issue, all books, deeds, papers and writings, terriers, maps, plans and surveys, relating to the matters in issue, in their respective custody or power; and it shall be lawful for the judge by whom any such action shall be tried, if he shall think fit, to direct the jury to find a verdict subject

has created an entirely novel and special jurisdiction, armed with extensive powers calculated to answer all the purposes of the [481] act. The 46th section provides that a party who is dissatisfied [482] with the decision of the commissioners or assistant commissioner, may either bring an action against the party in whose favor the decision has been made, or may state a special case for the opinion of a court of law. The act, however, did not mean to give the common right of action with all its incidents. It prescribes the course of proceeding with great particularity, and subjects it, entirely, to the discretion of the judge in common law. It is, in some respects, analogous to an action or an issue directed by this court or in bankruptcy. Where either an action or an issue is so directed, no bill of discovery can be filed without the leave of the court or jurisdiction that directed the action or issue. *Cooke v. Marsh.*(a) *Ex parte Coles.*(b) *Few v. Guppy.*(c) *A fortiori*, therefore, in a case like the present, where the act prescribes, with great minuteness, the course of proceeding in the action which it authorizes to be commenced, and makes the whole of it subject to the discretion of a judge at common [483] law, no bill of discovery can be filed without the permission of that judge or of the court in which the action is brought.

Besides, the act has given, to the commissioners and to the judge, the power of doing everything that this court can do in an ordinary case. Under the 10th sect., the commissioners have the power of examining the parties on oath and of compelling the production of documents; and, under the 46th sect., the judge has the power of compelling the production of docu-

to the opinion of the court upon a special case; and the verdict which shall be given in any such action, or the judgment of the court upon the case subject to which the same may be given, shall be final and binding upon all parties thereto, unless the court wherein such action shall be brought shall set aside such verdict and order a new trial to be had therein, which it shall be lawful for the said court to do, if it shall see fit: provided also, that, in case any such decision shall involve a question of law only, and the parties in difference shall be agreed upon the facts relating thereto and whereon such decision shall have been founded, the said commissioners or assistant commissioner, at the request of the person dissatisfied, (such request to be made in writing within three calendar months after such decision, and at least fourteen days' previous notice in writing of such request to be given in like manner to the other parties in difference or to their known agents,) shall direct a case to be stated for the opinion of such one of his Majesty's courts of law at Westminster as the commissioners or assistant commissioner shall think fit, which case shall be settled by them or him or under their or his direction, in case the parties differ about the same, and may be set down for argument and be brought before the court in like manner as other cases are brought before the court; and the decision of such court upon every case so brought before it, shall be binding upon all parties concerned therein: provided always, that after such verdict given and not set aside by the court, or after such decision of the court, the said commissioners or assistant commissioner shall be bound by such verdict or decision; and the costs of every such action, or of stating such case and obtaining a decision thereon, shall be in the discretion of the court in or by which the same shall be decided, which may order the same to be taxed by the proper officer of the court. and the like execution may be had for the same as if such costs had been recovered upon a judgment of record of the said court."

(a) 18 Ves. 209. (b) Buck. 293. (c) 1 Myl. & Craig, 487. *Hare on Discovery*, 124.

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The defendant put in a demurrer stating that. Therefore, the interference, bill, made such a case as entitled him, in a court out would be improper, as it from or against the defendant touching the law judge has done. In this any of such matters, and had not by his order for a production of documents: discovery or the injunction thereby so plaintiff, instead of filing a bill in this

Mr. Jacob, Mr. Wigram order, from that learned judge, for the
[*480] ram in support of the de

(a) The following sections of the Tithe argument.

Sect. 10.—“That the said commissioners or his hand, require the attendance upon any matter, brought before them of tithes, and also make an and also administer oaths, and fore them or him, upon oath riers, maps, plans and survey ter: provided always that travel more than ten miles relating to the title of

Sect. 45.—“That be any question as payment, or any ment of any tithe boundary of an the commission sioners or ass determining final and c

Sect. 46 be dissat yearly v sum of agains next: or as in w and ne- wi ce V c

f

that when, as in this case, the court in can, itself, give the discovery required, a (a) Neither will a court of equity interfere, making the discovery effectual. By the provi must be tried at the next assizes or the next assizes the court of common law shall direct the contra- has no power to postpone the trial so as to render effectual. *Gwinett v. Bannister*. (b) injunction prayed for by the bill, is a special injunction not known to the ordinary practice of this court. If that be so, the bill is a bill for relief as well as

and Mr. Sidebottom, in support of the bill:—The legis- did not mean to abridge the tithe owner. An ordinary tithe suit, is in the nature of a necessary action; but the proceedings under the act, were intended to the rights of the tithe owner *in perpetuum*: therefore, he ought to procure the means of procuring all the discovery he can.

Sect. 46 be dissat yearly v sum of agains next: or as in w and ne- wi ce V c
f
The means of obtaining discovery, which the act gives the tithe owner, are not effectual. There are two powers given, by the act, to different individuals which, it is said, render it unnecessary to apply to this court for that purpose. The first is given by the 10th section. Suppose, then, that the land owner, in obedience to the order of the commissioners, produces certain deeds and papers; and, on being asked whether he has any more, he answers, not that he knows of; and that he is then asked, whether he has made any search; and he replies, no. What power have the commissioners to compel him to make the search? Next: no person is to be obliged to travel more than ten miles from his place of abode, or to produce his title deeds. Therefore, the remedy given by the 10th section is not effectual.

[*485] Then what is the power which the 40th section gives to the judge? It empowers him to order the parties in the action, to produce, both before and at the trial, all books, deeds, &c., relating to the matters in issue, in their respective custody or power. But this remedy also fails: for the section in question relates to documentary evidence only: no power

(a) Treat. on Plead. 186, 4th edition.

(b) 14 Ves. 530.

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ments not only before, but at the trial of the action. Therefore, the interference of this court is not only unnecessary, but would be improper, as it might create a conflict with what the common law judge has done. In this very case, Mr. Baron Rolfe has made an order for a production of documents: and, if that production is deficient, the plaintiff, instead of filing a bill in this court, ought to have obtained a second order, from that learned judge, for the purpose of supplying the deficiency.

It is laid down, by Lord Redesdale, that when, as in this case, the court in which any civil action is pending can, itself, give the discovery required, a court of equity will not interfere.^(a) Neither will a court of equity interfere, when it has not the means of making the discovery effectual. By the provisions of the act, the action must be tried at the next assizes or the next assizes but one, unless the judge or the court of common law shall direct the contrary. This court, therefore, has no power to postpone the trial so as to render the discovery effectual. *Gwinett v. Bannister.*^(b)

[*484] *Lastly: the injunction prayed for by the bill, is a special injunction: it is one not known to the ordinary practice of this court.

The Vice-Chancellor. If that be so, the bill is a bill for relief as well as discovery.

Mr. *Kight Bruce* and Mr. *Sidebottom*, in support of the bill:—The legislature, when it passed the tithe commutation act, did not mean to abridge the rights of the tithe owner. An ordinary tithe suit, is in the nature of a mere possessory action; but the proceedings under the act, were intended to settle the rights of the tithe owner *in perpetuum*: therefore, he ought to have the means of procuring all the discovery he can.

The means of obtaining discovery, which the act gives the tithe owner, are not effectual. There are two powers given, by the act, to different individuals, which, it is said, render it unnecessary to apply to this court for that purpose. The first is given by the 10th section. Suppose, then, that the land owner, in obedience to the order of the commissioners, produces certain deeds and papers; and, on being asked whether he has any more, he answers, not that he knows of; and that he is then asked, whether he has made any search; and he replies, no. What power have the commissioners to compel him to make the search? Next: no person is to be obliged to travel more than ten miles from his place of abode, or to produce his title deeds. Therefore, the remedy given by the 10th section is not effectual.

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(a) Treat. on Plead. 186, 4th edition.

(b) 14 Ves. 530.

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is given by it to examine the party, on oath, before the judge, nor are the books, &c., to be produced on oath. Where then is the power of ascertaining whether the party has produced all the documents which are in his custody? In this very case the defendant's solicitors, on being asked, by the plaintiff's solicitor, whether the defendant had, in his possession, the court books of the manor and the conveyance of the farm to the defendant's ancestor, and whether the defendant had produced, in the terms of the judge's order, all deeds, &c., in his possession, declined to answer those questions, and added that the defendant had complied with the judge's order. All that we got under that order was a few documents of no value; consequently, the remedy given by the 46th section proved ineffectual, and we were under the necessity of filing the present bill. It is true that the 10th section gives the commissioners the power of examining the parties and of compelling them to produce documents upon oath: but the time for availing ourselves of that provision is passed; and, moreover, we may have now discovered something which we did not before know of, and which makes it necessary to file a bill of discovery.

It was said that, by the provisions of the 46th section, the plaintiff is deprived of his right to file a bill of discovery. But what is there, in that section, which interferes with that right? All the exceptions to the plaintiff's common law right, are specifically *mentioned: and, when [486] the legislature gave, to the party dissatisfied with the decision of the commissioners, the right of bringing an action against the party in whose favor the decision should be made, it intended him to have all the same privileges as a plaintiff at common law has, except those which are expressly taken away. One of those privileges is the right to examine his adversary, on oath, in a court of equity (a) and that general right cannot be taken away without express words.

It has been truly said, that there are some cases in which the court will not allow a bill of discovery to be filed without its permission. The reason is, that the court, in the order or decree by which it directs the action to be brought, provides for the making of all such admissions, and for the production of all such documents as it considers proper to be made and produced at the trial. (b) In *Few v. Guppy*, this court ordered an action to be brought, and a bill of discovery was filed without its leave; but, nevertheless, the court acted on the bill of discovery; which it would not have done, if the filing of the bill had been clearly wrong. Besides, the present case relates to an action not brought by the direction of this or any other court: and who ever heard of an application being made to a court of law for leave to file a bill of discovery? If it is said that the application ought to have been made to the commissioners, the answer is, that their functions were at an end before the action was commenced.

(a) *Hare on Discov.* 119.

(b) 18 Ves. 210.

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If the form in which the injunction is prayed, makes the bill a bill [*487] for relief, then the demurrer is bad : for *it treats the bill as a bill of discovery. But all that the injunction is prayed for, is that the discovery may be available, that is, that it may not come too late. But, suppose that the court cannot grant the injunction, is that a reason for the defendant's not answering the bill ?

The bills also prays that the defendant may search his depositories and muniment rooms : but neither does that make it a bill for relief. It is consistent with what is found in old precedents ; and the only object of it is that the defendant may put himself in a situation to give the required discovery. Besides, the bill prays that the defendant may answer all the premises aforesaid ; so that it seeks for oral as well as documentary discovery.

Mr. *Jacob* in reply :—The injunction prayed by the bill, is not only not the common injunction, but it is one which is wholly unknown to this court. The common injunction stays execution only ; but, in a case like the present, there is no execution ; the verdict is final and conclusive, unless the court shall think fit to direct a new trial. The common injunction, therefore, would be of no use ; but, in order to be effectual, it must be an injunction which will stay the trial of the action. The act, however, directs that the trial shall take place within a limited time ; and, if the injunction should stay the trial beyond that time, the action would be at an end.

It has been said that the power of compelling discovery, given by the tenth section, is ineffectual ; because the person who is to be examined or to [*488] produce the documents, cannot be required to travel more *than ten miles from the place of his abode. But the commissioners may adjourn from place to place, and may go to him, if he will not come to them.

Next, as to the quarter to be applied to for leave to file the bill of discovery. I admit that the application is not to be made to the commissioners ; but why is it not to be made to the Court of Exchequer, whose order has not been obeyed ? The plaintiff ought to state, to that court, on affidavit, that there is good ground for thinking that the defendant has, in his possession, documents which he has not produced ; and the court would attach him for the contempt in disobeying its order. The courts of common law have power to examine a party, on oath, before the Master, for a contempt ; but, if they should think that a bill of discovery was the better mode of obtaining the discovery, they would direct a bill to be filed for that purpose.

In a common law action, the plaintiff is *dominus litis* ; but the proceedings in an action brought under this act, are not under the control of the plaintiff. He must deliver a feigned issue, which is to be settled, either by the court or by a judge, in case the parties differ about the form of it. There is to be no writ of error ; and the costs of the action are to be in the discretion of the court. In short, it resembles an issue directed by this court, much more than an action at common law.

THE VICE-CHANCELLOR :—I have had an opportunity, during the argu-

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ment of this demurrer, of looking a good deal into the act of parliament; and I do not find that there are any sections which relate to the matter, other than the 10th, *the 45th and 46th sections, with the exception [*489] of one section, upon which I shall, presently, make an observation.

The bill before me is, in my opinion, a mere bill of discovery; and the particular mode in which the injunction is asked, does not appear to me to vary its character at all. The form in which the injunction is asked, is certainly very unusual; but I do not think that anything turns upon that. Whether the court would grant such an injunction or not, I am not, now, to determine; but, by the frame of the bill, nothing is asked but discovery and an interim injunction; the bill is, therefore, to be considered as a mere bill of discovery.

I apprehend that, in all respects, that which was the law before the passing of the act, remains the law after the passing of it, except so far as it can be shown that the law has been altered by express words which have taken away a portion of the ancient law or altered it, or that the provisions which the act has substituted are, of themselves, necessarily inconsistent with the former state of the law. I make that observation because it is very well known that a very serious question arose after the act of Parliament was passed which first created the Court of Review, whether that act of Parliament had taken away the jurisdiction which was exercised by the Vice-Chancellor's Court generally, and also by the Lord Chancellor. In that act, there were no express words which took away the jurisdiction of the Vice-Chancellor's Court: but it was held, after very considerable discussion, that, although there were no express words, yet the general provisions of the act, had the effect of taking away that particular jurisdiction: *and that was the opinion [*490] which Lord Brougham gave in the case which was argued, at his request, before himself and me.

It is quite clear, on the face of this act, that there is nothing whatever, in the shape of express provision, which takes away the right of the plaintiff or defendant in the action which the act has directed to be brought in certain cases, to file a bill of discovery. But the question is whether, if there be no express words to take away that right, there is anything to be found in the general provisions of the act, which has that effect. Now what has the act of Parliament done? It, first of all, speaks of some proceedings before the commissioners, which are no farther to be noticed here than by observing that they have taken place, and the result has been that, under the provisions of the act, the present plaintiff in equity (who was dissatisfied with the decision of the commissioners) did, within the time appointed by the act, cause an action to be brought, in one of her Majesty's courts of law at Westminster, against the person in whose favor the decision was made. He has brought his action; and I do not see why, when, under the provisions of the act of Parliament, he has once become a plaintiff in one of the superior courts of law, he is disabled from filing a bill of discovery, in the Court of Chancery, for the

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purpose of supporting his action. The act of Parliament, it is true, does provide that the action shall be tried within a limited time, subject only to this, namely, that liberty is given to the court in which the action has been commenced, or to any judge of his Majesty's courts of law at Westminster (which

I apprehend means a judge acting in the absence of the court,) to extend the time for going to trial. It has been said that the effect of that provision is, or rather may be to prevent the bill of discovery from being useful. But the same objection also lies with respect to filing any bill of discovery at all ; because, in a case where the bill of discovery is to extract that information which a defendant personally has, it is perfectly obvious that the object of the bill may be defeated by the death of the defendant before he puts in his answer ; and, therefore, the mere circumstance that the bill of discovery may not be useful to the plaintiff, has not been held to be a reason why the plaintiff may not file such a bill. I admit that the time for trial might come on before an answer had been put in ; and, in that case, the bill of discovery would be of no avail. But I cannot but suppose that, if this court had thought that there should be an answer to a bill of discovery, the very fact that there was a bill of discovery pending, would be a reason, either with the whole court of law or with a single judge, for postponing the trial of the issue until the answer had been put in to the bill of discovery. Then the act goes on to direct that the parties in such action, shall produce, to each other and to their respective attorneys or counsel, at such time and place as any judge may order before trial, and also to the court and jury upon the trial of any such issue, all books, deeds, papers and writings, terriers, maps, plans and surveys relating to the matters in issue, in their respective custody or power. Now, if an order were made in the terms of the act, the benefit of it would be by no means equivalent to that which the plaintiff might derive from an answer to a bill of discovery. For, suppose that the defendant had, just prior to the making of the judge's order, destroyed any of the documents ; in that case, no order which the [*492] judge could make under this act, would have the effect of bringing that fact to light ; because the judge could only order that the books, deeds, papers and writings in the custody or power of the defendant, should be produced. I mention that, because I observe that it is charged by the bill that the defendant has burnt or destroyed certain documents. Supposing that allegation to be true, it is quite plain that no order of the judge, would have the effect of obtaining, from the defendant, an admission of the fact, or, what is still more important, a knowledge of the contents of the deeds which had been so destroyed.

Then it was said that this action which the act has directed to be brought, is perfectly under the control of the court of law : but to that I do not agree. It seems to me peculiarly not under the control of the court ; because some things are made imperative in the act of Parliament. But, at any rate, it is not an action in the nature of an issue directed by this court, to a court of law. It is an action which the legislature has expressly given to the party

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dissatisfied with the decision of the commissioners. The fact that there can be no writ of error, only goes to show that that proceeding is not allowed by the act of Parliament; but, nevertheless, the action is still an action in one of the superior courts of law at Westminster; and, consequently, it is an action liable to all the incidents of an action, one of which is that the plaintiff in the action, may file a bill of discovery in the Court of Chancery. One thing has occurred to me, in looking over this act of Parliament, which, in my opinion, plainly shows that the legislature did mean that all such rights and remedies should remain, as are not taken away. By the 66th section it is enacted that no confirmed agreement, award or apportionment shall be impeached, after the *confirmation thereof, by reason of any mis- [*493] take or informality therein or in any proceeding relating thereunto: so that the proposition is expressly confined to the ground of mistake or informality. But, notwithstanding that provision, a confirmed agreement, award or appointment, if it was obtained by fraud, might be set aside: and I cannot but think that the marked manner in which this section is expressed, shows that it was the intention of the legislature that all the rights and remedies of the parties to the proceedings under this act of Parliament, should remain so far as they are not expressly taken away by the provisions of the act.

Upon the whole, my opinion is (after the full discussion which I have heard,) that there is nothing so peculiar in the mode in which this action is directed to be carried on, as to authorize me to say the person who, under the provisions of the legislature, has exercised his liberty of bringing his action, shall be deprived of what I conceive to be accessary to bringing the action, that is, the right of filing a bill of discovery in this court in order to support that action. The consequence is that the demurrer must be overruled.

Demurrer overruled.[1]

*MEMORANDUM.

[*494]

After the case *In re Williams*, ante, page 426, was sent to press, Mr. Bird (having obtained leave for that purpose) mentioned the petition again. The Vice-Chancellor said that he must take time to consider the acts of Parliament referred to. [S. C. post, 642.]

[1] Vide *The Attorney General v. Wilson*, ante, 30, 49, and n. *ibid.*

CASES IN CHANCERY

BEFORE

THE VICE-CHANCELLOR.

EVELYN v. CHIPPENDALE.

1839; 24th and 31st January and 22d March.—Practice; Costs.

Motion that the plaintiff, a naval officer on half pay, who had resided sixteen years in Barbadoes, where he held the office of Captain of the Port, under the appointment of the Crown, might give security for costs, refused.

MR. MOORE, for the defendant, moved that the plaintiff, who was a lieutenant in the Royal Navy on half pay, but had resided sixteen years in Barbadoes, where he held the offices of Harbor Master and Captain of the Port, might be ordered to give security for costs.

MR. HEATHFIELD, for the plaintiff, said that every naval and military officer of her Majesty was exempt from giving security for costs. *Colebrook v. Jones*; (a) *Lord Aldborough v. Burton*; (b) *Lillie v. Lillie*. (c)

The Vice-Chancellor directed Reg. Lib. to be searched for the case of *Colebrook v. Jones*.

31st January.—The Vice-Chancellor said that Mr. Bicknell, the [*498] Registrar, had searched Reg. Lib. for the order in **Colebrook v. Jones*, mentioned by Dickens, but had found no entry of it.

MR. HEATHFIELD:—It appears, from Reg. Lib. that, on the 22d of November, 1751, three of the defendants in that cause obtained orders for time to answer, which confirms Dicken's report.—Reg. Lib. A. 1751, fo. 67.

THE VICE-CHANCELLOR:—Mr. Bicknell has a manuscript note of an application made to Lord Eldon, C., by Mr. Wetherell, on the 9th of February, 1810, in *Loft v. —*, that the plaintiff might be ordered to give security for costs, he being absent with his regiment on foreign service; and that his Lordship refused the application, and added that he did not conceive that a person who was abroad, under his Majesty's command, came within the rule.

22d March.—The motion having stood over, it was mentioned again on this day, when it appeared that the title of the offices held by the plaintiff

(a) 1 Dick. 154.

(b) 2 Myl. & Keen, 401.

(c) Ibid. 404.

1839.—*Watson v. Hayes.*

was "Her Majesty's Captain of the Port and Harbor Master," and that the office of Captain of the Port was in the gift of the Governor, and the office of Harbor Master in the gift of the House of Assembly of the Island.

The Vice-Chancellor ruled that, as the plaintiff held the office of Captain of the Port under her Majesty, he was not compellable to give security for costs.

Motion refused, with costs.(a)

**WATSON v. HAYES.*

[*500]

1839: 25th and 30th January.—Legacy; Vesting.

Testator directed all his property to be sold by his executors, and the proceeds to be invested in government or real securities, to be disposed of as after mentioned. He then desired his executors to pay 25*l.* yearly, for the maintenance and education of his natural daughter, until she attained twenty-one or married, when he required them to pay her the sum of 500*l.* The daughter died under age and unmarried: Held, nevertheless, that the 500*l.* vested in her.

J. WATSON, the testator in the cause, by his will, directed all his estates, of what nature or kind soever, to be sold by his executors, and the proceeds to be invested in real or government securities, to be disposed of as after mentioned. He then desired (amongst other things) his executors to pay the sum of 25*l.* yearly, by equal quarterly payments, for the maintenance and education of Sophia, his natural daughter by Sophia Leeson, until she should attain twenty-one, or be married, which should first happen, when he required his executors to pay to her the clear sum of 500*l.* for her own sole use and benefit.[1]

(a) In *Lord Nugent v. Harcourt*, in the K. B. Practice Court, Mr. J. Patteson discharged a rule to show cause why the plaintiff, who was an Irish peer and was abroad [*499] as Commissioner of the Ionian Islands, should not give security for costs, saying: "In the case of an officer in the army, the absence is certainly involuntary. But, I think, if an Englishman is not permanently abroad, but is absent for temporary purposes in the service of his Majesty, he stands in the same situation as if he were compulsory abroad, and, therefore, ought not to be compelled to find security for costs. I do not give this opinion on the ground of his being a peer; but because he is abroad, and also having a residence and property in this country." 2 Dowl. P. C. 578.

In a case in H. T. 1839, reported under the name of *Evering v. Chiffenden*, but which appears, from the statement of it, to have been an action between the parties to the cause mentioned in the text, the same learned judge discharged a similar rule, saying: "He is resident abroad, for a temporary purpose, in the service of her Majesty; and I do not see the difference between this case and that of *Lord Nugent v. Harcourt*. This is not a case of voluntary absence from the country; but the plaintiff is fulfilling a duty which, I take it, is always performed by a naval officer." 7 Dowl. P. C. 536.

[1] The will is more fully stated, 5 Myl. & Cr. 125. The particular clause relating to the point decided by the Vice-Chancellor, and reported *supra*, is as follows: "I also will and desire, that all my other estates of what nature or kind soever, or wheresoever situated, be sold at the discretion of my executors hereinafter mentioned, and the money arising from the sale thereof, be vested in real or government security, to be disposed of in manner following, (that is to say,) that my executors shall pay, or cause to be paid, the sum of 25*l.* yearly, and every year, by equal and quarterly payments, for the

1839.—*Watson v. Hayes.*

The legatee survived the testator, but died under twenty-one[1] and unmarried; and one question in the cause was whether the legacy of 500*l.* thereby became lapsed.

Mr. Jacob, Mr. Piggott, and Mr. T. Turner, for the plaintiff, who represented one of the testator's residuary legatees, said that this was not a case in which a sum of money was given to the legatee at twenty-one or marriage, and the interest of it directed to be paid to her or applied for her benefit in the meantime; and, consequently, that the legacy of 500*l.* did not vest in the testator's natural daughter. *Batsford v. Kebbell.*(a)

[*501] *Mr. Knight Bruce, Mr. Bethell, Mr. Purvis, and Mr. Martin, appeared for the defendants.

THE VICE-CHANCELLOR:—Twenty-five pounds is the amount of interest on 500*l.*, at 5*l.* per cent.: and, as that is the rate of interest which money is usually considered to bear, the 25*l.* directed to be applied for the maintenance and education of Miss Leeson, may be fairly regarded as intended to be the interest of the 500*l.* which is directed to be paid to her on her attaining twenty-one or being married. Therefore, I think that she took a vested interest in the 500*l.*[2]

maintenance and education of Sophia, my natural daughter, by Sarah Leeson, late, &c., until she shall have attained the age of twenty-one years, or day of marriage, which shall first happen, when my said executors are hereby required to pay to Sophia, the clear sum of 500*l.* to and for her own sole use and benefit."

(a) 3 Ves. 363; see also *Puleford v. Hunter*, 3 Bro. C. C. 416; and *Hanson v. Graham*, 6 Ves. 239.

[1] At the age of eight years.

[2] The above case involved another question which is not noticed by Mr. Simons, upon which the decree of the Vice-Chancellor was affirmed; but upon the point above reported, it was varied by &c. of the 500*l.*, except in the direction to the executors to pay that sum to the daughter, when she shall declare that the legacy of 500*l.* had lapsed: 5 Myl. & Cr. 125. Lord Cottenham says: "There is no gift attain twenty-one, or be married. Here is the word "when" distinctly applied to the gift itself, and not to the time of payment, to which Sir W. Grant's judgment in *Hanson v. Graham*, (6 Ves. 239.) is therefore directly applicable; and there is also the absence of any terms of gift, except in the direction to pay at a given time which never arrived, or upon a given event which never took place, to which Sir W. Grant's observations in *Leake v. Robinson*, (2 Mer. 363,) directly apply, and which doctrine has been frequently recognized as a settled rule. This case, appears to me to come so clearly within those rules, that I cannot think that any doubt would have been entertained as to this legacy having failed by the death of the legatee in infancy, if the question had not been supposed to be affected by the gift of the 25*l.* per annum for its maintenance and education. It is well known, that a legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the meantime, whether direct or in the form of maintenance, provided it be of the whole interest; which clearly marks the principle, that it is the gift of the whole interest which affects the vesting of the legacy. In this case, 25*l.* per annum, out of the proceeds of the real and personal estate, after investment in real or government securities, is directed to be paid quarterly, for the maintenance and education of the daughter till twenty-one or marriage, when the 500*l.* is to be paid. That the testator fixed upon the sum of 25*l.* per annum as the interest at 5*l.* per cent. upon 500*l.*, is probable, but it is clearly not given as interest upon that sum. The gifts are perfectly distinct, and the title to the 25*l.* per annum could not be affected by the interest upon 500*l.* not amounting to that sum. In *Batsford v. Kebbell*, (3 Ves. 363,) Lord Rosslyn, there being no gift, except in the direction to pay at a certain

1839.—In the Matter of Kent.

IN THE MATTER OF KENT.

25th January.—Infant; Mortgagee; 11 Geo. 4, and 1 Will. 4, c. 60.

The executors of a mortgagee in fee, who had died intestate, leaving an infant heir, having, in exercise of a power in the mortgage deed, agreed to sell the estate, the heir was ordered, on a petition presented by the executors, under 11 Geo. 4, and 1 Will. 4, c. 60, s. 6, to convey the estate to the purchaser.

This was a petition presented under 11 Geo. 4 and 1 Will. 4, c. 60, *by the executors of a mortgagee in fee*, who had agreed to sell the mortgaged estate in exercise of a power contained in the mortgage deed, praying that the infant heir of the mortgagee might be ordered to convey the estate to the purchaser.

Mr. Barber, for the petitioners, submitted to the court whether the case was within the 6th section of the act, and, if not, whether it was within the 8th section. He added that he entertained some doubt upon the point, as the present Lord Chancellor, when Master of the Rolls, had held, *In re Dearden*,^(a) that "the heir of a mortgagee was not a trustee within [502] the act.

THE VICE-CHANCELLOR:—This is not a case within the 8th section of the act: but it seems to me, as far as the infant is concerned, that it is, expressly, within the 6th section. That section applies to infants who are seised of land either by way of mortgage or upon any trust. Here the mortgage was a mortgage in fee; and the mortgagee died intestate: consequently his heir is a person seised by way of mortgage.

Order made.

age, held the legacy not vested before that time, although the legacy was of 500*l.* 3 per cents. to the legatee, until he should attain the age at which the stock was to be transferred to him. That case necessarily includes and governs that now before me. I am, therefore, of opinion, that this gift of 25*l.* per annum cannot be considered as interest upon the 500*l.* so as to affect the vesting of the legacy, and consequently, that even supposing the legacy to have been payable out of the personal estate, it failed by the death of the legatee under twenty-one and unmarried; but if, as seems probable from the language of the will, the legacy, if payable, would have been to be raised out of the real estate, no ground would remain upon which any argument could be rested in favor of the vesting." See further, *Vaudry v. Geddes*, 1 Russ. & M. 203, 208, n. 3. S. C. Taml. 361. *Saunders v. Vautier*, Cr. & Ph. 240, 248. *Murray v. Addenbrook*, 4 Russ. 407, 419, n. 1; 4x2, n. 1. *Vize v. Storrey*, 2 Dru. & Walsh, 659. *Vivian v. Mills*, 1 Beav. 315. *Brown v. Wooller*, 2 Yo. & Coll. C. C. 134. *Whiting v. Force*, 2 Beav. 571. *Mocatta v. Lindo*, ante, 56, 58 and n, *ibid.* *Newman v. Newman*, 10 Sim. 51. *Blesse v. Burgh*, 2 Beav. 221. *Snow v. Poulden*, 1 Keen, 186. *Bland v. Williams*, 3 Mylne & K. 411.

(a) 3 Myl. & Keen, 508.

 1839.—Elliott v. Remmington.

ELLIOTT v. REMMINGTON.

1839: 25th January—Affidavit; Practice.

A. sold a fund to which his wife was entitled in reversion; and, when it fell into possession, he was resident in Africa. The wife consented to waive her equity to a settlement, and that the fund should be transferred to the purchaser. Held that the usual affidavit that there was no settlement affecting the fund, might be made by the wife alone.

In this case, a fund to which a married woman was entitled in reversion had been sold by her husband: and, on its falling into possession (at which time, the husband was resident at Cape Coast Castle, in Africa,) the wife consented to waive her equity to a settlement out of it, and that it should be transferred to the purchaser.

The only question was whether an affidavit, made by the wife alone, that there was no settlement or agreement for a settlement affecting the fund, was sufficient.

The Vice-Chancellor held the affidavit to be sufficient, and ordered the fund to be transferred to the purchaser.

[*503] *Mr. Heathfield, Mr. Cook, and Mr. Elderton, appeared for the different parties.

JUBBER v. JUBBER.

1839: 26th January.—Will; Construction; Legacy; Uncertainty.

Testator gave to his wife the use of all his property, for the benefit of herself and unmarried children that they might be comfortably provided for so long as she should live; and after her death he disposed of it amongst all his children. The testator left four married and three unmarried children. One of the three, married after his death. Held that the widow and the three children who were unmarried at the testator's death, were entitled equally, to the income of the property during the widow's life.

A request, by a testator, that a handsome gratuity should be given to each of his executors, is void for uncertainty.

GEO. JUBBER made his will, dated the 10th of February, 1836, in the following words:—"First, I will have all my lawful debts paid and discharged: 2dly, I will and bequeath to my wife Martha, at my decease, 500*l.* of lawful money of Great Britain, for her own use and disposal, *also the use of all my property*, whether houses, land, money in the funds or elsewhere, interest of money, rents, or goods or chattels, *for the benefit of herself and unmarried children, that they may be comfortably provided for as long as my wife Martha may remain in this life*; and, when it shall please God to call her hence, I will and bequeath as follows: 3rdly, I will and bequeath to my eldest son, Jas. Morris, 25*l.* sterling, he having had already considerably more than his share of my property, and has no right to have more: 4thly, I will and bequeath to my six remaining children, viz. Henry, Anne, Susan, Emma, Louisa, and George, the remainder of my property, after all my debts and legacies are paid, to be equally divided; and, if any of the six aforesaid sons

1839.—Jubber v. Jubber.

and daughters shall have received any part of my property in advance, for furniture, &c., such sum or sums shall "be deducted from [*504] their share of the remainder: 5thly, that if my two sons, to whom I have granted a lease of the premises in the High street, Oxford, shall be disposed to purchase the premises they now rent in the High street, Oxford, they shall be at liberty so to do for a sum of money not exceeding 2200*l.* including all the fixtures, and shall have three months to consider of their determination after they have received notice in writing of a determination, on the part of my executors, to offer the premises for sale: 6thly, I expect that, after all the debts due to me are collected and my debts paid, there will be a considerable sum over and above all demands on me; I will have all such sum or sums funded for the benefit of my wife and children as aforesaid: 7thly, I have to request that my son Henry, Mr. Bridgewater and Mr. Underhill, will see this my will executed, or any two of them, with liberty to choose a third person."

The testator, shortly afterwards, made a codicil, but without date, and which was as follows: "I request a handsome gratuity to be given to each of the executors: 8thly, I will and bequeath to my grand daughter, 50*l.* of good lawful money of Great Britain, free from duty, &c.: 9thly, I will and bequeath, to Elizabeth Burden, 50*l.* of good lawful money of Great Britain, free of duty, &c.: 10thly, and lastly, that if any one or more should attempt to put this will of mine into Chancery, he, she, or they shall be excluded from the whole of the benefit arising out of it. If any dispute shall occur, it shall be settled by arbitration, which shall be final without appeal and without reference to the law. My meaning is merely this, that all my six remaining children shall equally share alike either in money or "property valued to them, [*505] and that not to take place till after the death of my wife Martha."

The testator died on the 20th of May, 1837, leaving Martha Jubber, his widow, and seven children, all of whom had attained twenty-one, him surviving.

At the testator's death, four of the children, who were defendants, were married. The plaintiff Henry Jubber, afterwards married; but the two other children had never been married.

The bill alleged that considerable doubts had arisen with respect to the nature and extent of the interest which, under the provisions of the will, Martha Jubber was entitled to in the property the use of which was given to her for the benefit of herself and her unmarried children; that Martha Jubber claimed to be entitled to receive, for her life, the rents, issues and profits of all such property, to her own exclusive use, so long as or in case none of the testator's unmarried children, should choose or continue to reside with her and to form part of her family: and that, on the other hand, such of the testator's children as were not married at the time of his death, claimed to be entitled to some share or interest in the rents, issues and profits jointly with Martha Jubber; and they alleged that she was a trustee, for them, of some certain and definite proportion of such rents, issues and profits, and that they were respectively entitled to receive such proportion whether they

1839.—Jubber v. Jubber.

resided with her or not, so long as they continued to be unmarried, and that their rights to such proportion would not be forfeited or lost by reason of any subsequent marriage, inasmuch as they were not married persons; [*506] and answered the description in the will of the testator's "unmarried children, at the date of his will and at the time of his death.

The bill prayed that the will might be declared well proved, and that the trusts thereof and of the codicil might be carried into execution, and that the rights and interests of all persons under the same might be declared and secured.

Mr. *Mylne*, for the plaintiff, said that his client was satisfied that his father intended his mother to have the absolute control over the income of the residuary property; but, if the court should be of opinion that she was a trustee of it for herself and her unmarried children, then that the plaintiff was entitled to one-fourth of it, and that his interest did not cease on his marriage.

Mr. *Knight Bruce* and Mr. *Willcock*, for Geo. Jubber, one of the unmarried children, said that each of the testator's unmarried children was entitled to a share of the residue: that the testator had given a specific portion of his property to his wife for her own use and disposal; but had not used those words in the bequest in question, which showed, strongly, that he intended her to take the property which was the subject of that bequest, in a different manner. *Wetherell v. Wilson* (a) *Woods v. Woods* (b)

Mr. *Craig*, for Mrs. Jubber, and the other children, all of whom were favorable to their mother's claim, contended that the testator had given the whole income of his residuary estate to Mrs. Jubber, in anticipation [*507] that his unmarried children would live with her, which they had a right to do if they thought fit; and he cited *Robinson v. Waddell* (c)

The Vice-Chancellor having said, in the course of the argument, that the word "unmarried" had two significations, one, a person who had never been married, and the other, a person who had ceased to be married, but that a gift to an unmarried person, had never been held to mean a gift to that person so long as he should remain unmarried, delivered judgment as follows:

My opinion is that the children who were unmarried at the death of the testator, are entitled to participate, with their mother, in the income of the fund. The term "unmarried" is *designatio personarum*; and, if once the child is entitled to participate in the fund by filling the character of an unmarried child, he will not lose that right if he subsequently marries.

The testator draws a marked distinction between the legacy of 500*l.*, which he gives absolutely to his wife, to be applied by her as she thinks proper, and the fund which he gives to her for the benefit of herself and her unmarried children; and he has gone on to explain his meaning. He says: "That they may be comfortably provided for." Therefore, he not only confers a bounty, but assigns a reason for it.

(a) 1 Keen, 80.

(b) 1 Myl. & Craig, 401.

(c) Ante, vol. 8, p. 134.

1839.—Warburton v. Edge.

I am inclined to think that the widow and unmarried children take the provision made for them, as tenants in common ; but I will not make any declaration as to whether they take in that character or as joint-tenants, as, at present, it would be premature so to do.

'I am of opinion that the request that a handsome gratuity should [*508] be given to each of the executors, is void for uncertainty ; but I shall not give any such recommendation as was given, by Sir Joseph Jekyll, in *Peck v. Halsey*,^(a) as I do not think I am at liberty so to do.

Declare that the widow and the children who were unmarried at the testator's death, are entitled, equally, to the income of the residuary fund during the life of the widow, and that the bequest to the executors is void for uncertainty.[1]

WARBURTON v. EDGE.

1839 : 26th and 28th January.—Solicitor ; Lien.

A solicitor who had been employed by an administratrix in the administration of the deceased's estate, was also employed as her solicitor in a suit subsequently instituted by a creditor of the deceased. Pending the suit, the administratrix went to reside abroad, and forbade the solicitor to proceed any further with the suit. Afterwards the creditor obtained a decree and a receiver of the estate was appointed. Papers relating to the estate had come into the solicitor's possession, not for the purposes of the suit merely, *but for those and other purposes*, and he claimed a lien on them for his costs of the suit, *and other business*. A petition, by the creditor, praying for a reference to ascertain whether the solicitor had any lien on the papers, and that he might be ordered to deliver them up to the receiver, was dismissed.

By the decree in this cause, made on the 10th of June, 1837, it was referred to the Master to take an account of the sums of money which, in the lifetime of W. P. Warburton, the testator in the cause, were received and paid by Andrew Edge, as the solicitor, agent or attorney of W. P. Warburton. By an order of the 7th of July, 1838, it was referred to the Master to appoint a receiver of A. Edge's personal estate, and it was *ordered that [*509] the defendant, who was his daughter and administratrix, should deliver over, to the receiver, all securities, in her hands, for such personal estate, together with all books, papers and writings relating thereto ; and that the defendant, her solicitors, attorneys or agents, should be restrained, until the further order of the court, from receiving certain sums therein mentioned which were due to A. Edge's estate, and also any moneys, being part of the proceeds of that estate, then in the hands of Messrs. Snow & Co., bankers, or of C. H. Stedman, gentleman, or any agent of the defendant, or any other moneys, securities for money, stocks, funds or effects belonging to A. Edge's estate. On the 6th of August, 1838, a receiver was appointed. By the de-

(a) 2 P. W. 387.

[1] *Vide Hadow v. Hadow*, ante, 438. 1 Keen, 86, n. 1. *Raikes v. Ward*, 1 Haro, 445. *Crockett v. Crockett*, id. 451.

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cree on further directions, made in July, 1838, it was declared that A. Edge was, at his decease, indebted to W. P. Warburton's estate in 7263*l.*, and the defendant was ordered to pay that sum, to the plaintiffs, out of A. Edge's assets come to her hands; and, if she should not admit assets sufficient for that purpose, then an account was to be taken of A. Edge's estate possessed by her.

In 1835 the defendant had gone to reside in France, and, as it was alleged, carried with her large sums the produce of A. Edge's estate.

The defendant had employed Stedman to act as her solicitor in the administration of A. Edge's estate; and she also employed him as her solicitor in this cause until some time in the year 1837, when she wrote to him from Paris, saying that she wished no further proceedings to be taken, or expense incurred in the suit. She, however, continued to employ him to col-

lect A. Edge's personal estate, and to remit the produce to her.

[*510] *Stedman, in the course of his acting as the defendant's solicitor, got into his possession various deeds, &c., relating to A. Edge's estate; and he claimed a lien upon them for costs *in this suit and in other matters* in which he had so acted.

The plaintiffs being unable, owing to the defendant's residing abroad, to make effectual that part of the order of July, 1838, which directed the defendant to produce all the papers in her custody relating to A. Edge's personal estate, presented a petition stating as above, and submitting that Stedman, as the solicitor for the defendant in this suit, and as an officer of the court, was subject to an order of the court in all matters relating to the suit; and praying that he might be ordered to deliver, to the receiver, or to deposit with the Master, all deeds, &c., in his custody or power, belonging or relating to A. Edge's personal estate, subject nevertheless to such his right or interest by way of lien thereon as he might be entitled to make out or establish; and in case he should claim any such lien, then that he might, within ten days subsequently to such delivery or deposit, deliver, into the Master's office, a particular in writing of such lien; and that it might be referred, to the Master, to inquire into the validity, nature and extent thereof; and, in case such lien should be claimed in respect of any bill of costs, then that the Master should be at liberty, if required by the parties, and if necessary, to tax such costs and to take such accounts as might be necessary to ascertain the amount due in respect of such lien, to the intent that the same might be satisfied out of such personal estate of A. Edge as might be recovered, received or made available out of or by means of the deeds, documents or papers so

[*511] being in Stedman's *possession, or, otherwise, out of such personal estate as might come to the hands of the receiver, if deemed proper and just; and that Stedman might account, before the Master, for all sums of money received by him, as such solicitor and agent of the defendant, on account of the personal estate of A. Edge not paid over by him before he had notice of the order of July, 1838: and that, for the better discovery of the

1839.—*Warburton v. Edge.*

matters aforesaid, Stedman might be ordered to produce before the Master, upon oath, all books, papers and writings in his custody or power, relating hereto; and that he might be examined upon interrogatories or otherwise as the Master should direct.

Stedman made an affidavit, in which he deposed that the documents came into his possession, as the defendant's solicitor, for general purposes and not merely for the purposes of the suit.

Mr. *Knight Bruce* and Mr. *Anderdon*, in support of the petition, said that the petitioners wanted those papers only that related to Andrew Edge's personal estate, against which they had established a heavy demand; that Stedman took the papers with notice of the pending suit; that he no longer acted for the defendant Miss Edge; that, if the papers had remained in Miss Edge's possession, she must have delivered them up to the receiver; that a solicitor could not stand in a better situation than his client; but that what the latter was bound to do, the former was bound to do: and they relied on *Baker v. Henderson*,^(a) and *Bell v. Taylor*.^(b)

*Mr. *Jacob* and Mr. *Torriano*, for Mr. Stedman:—The plaintiff [*512] did not claim any specific right against the estate of Andrew Edge, but merely as a general creditor on his estate: the doctrine of *lis pendens*, therefore, has no application; for that doctrine applies only where a party claims by virtue of a specific title. The order for a receiver was obtained in 1838: can that give a prior equity to a lien that attached three or four years before? The appointment of a receiver does not, like an act of bankruptcy, have relation back to some antecedent period. The plaintiffs' counsel have taken it for granted that the documents in question came into Stedman's possession in the course of this cause and for the purposes of this cause: but that is not so. They did not come into his possession for the purposes of this cause merely, but for those and other purposes; and the lien that he claims upon them is for business done in this cause and for other matters. He was Miss Edge's solicitor at the time when she took out administration to her late father: and some portion of the costs for which he claims the lien, arose in respect of business done prior to the filing of the bill. In *Ex parte Shaw*,^(c) (which was a case in bankruptcy where there is more difficulty with respect to the question of lien,) a commission of bankrupt had been superseded, and a new commission was issued; upon which the party who had taken out the new commission, petitioned that the solicitor under the late commission, might be ordered to deliver up the proceedings to the solicitor under the new commission. Lord Eldon said that, if there was a lien for the bill of costs, the assignees would be liable to pay it; and his Lordship declined to make any order upon the petition as it then stood.

*In this case, if the plaintiffs have any equity against Mr. Stedman, [*513] they cannot enforce it, in a summary way, by petition; but ought to

^(a) *Ante*, vol. 4. p. 27.^(b) *Ante*, vol. 8. p. 216.^(c) *Jacob*, 270.

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file a bill for that purpose. *Brown v. Newall*,^(a) *Pentland v. Quar-
rington*.^(b)

THE VICE-CHANCELLOR:—When this case came before me on Saturday last, my attention not having been then called to the nature of Mr. Stedman's affidavit, I was impressed with the notion that it would be governed by the decisions in *Baker v. Henderson*, and *Bell v. Taylor*. But, in *Baker v. Henderson*, the decree had directed the estates to be sold, and the title deeds to be deposited with the Master, in the usual manner: and it was stated, as a fact, that the plaintiff's solicitor was in possession of the deeds, and claimed a lien on them for his costs of the suit, and refused to produce them. And what the court said, was that the solicitor had no lien on the deeds anterior to the suit, and that they were in his hands for the purposes of the suit. In *Bell v. Taylor*, the deeds had been deposited, by the defendant, with his attorney, for the purposes of the suit, and were admitted to be either in his possession or in that of his town agents. Moreover, the deeds were directed, by the decree, to be given up to the plaintiff; so that they must be taken to have belonged to him *ab origine*; and, consequently, no lien could have attached upon them.

This case is totally different from either of those cases; for, here, the deeds did not come into the possession of the solicitor solely for the purposes of the suit, as in *Bell v. Taylor*; nor, as in *Baker v. Henderson*, does the
[*514] solicitor claim a lien on the deeds for the costs of the suit only.

What he says in his affidavit, is that all and every the documents came into his hands, after the death of Andrew Edge, for general purposes as well as the purposes of the suit. Nor does he claim a lien on them for costs incurred in this suit only; but also for other business done for Miss Edge, as the administratrix of her late father. And it appears, from the affidavit, that there was other business done by him, for Miss Edge, in the administration and for the protection of the estate. Therefore, he must have a lien on the deeds prior to the right of Miss Edge to take them out of his hands, and consequently prior to the right of the plaintiffs, who are merely general creditors on the deceased's estate, and who, therefore, can only take the estate as they find it.

It does not at all follow that, because Miss Edge might have asked for the taxation of Mr. Stedman's bills, therefore, the plaintiffs may ask for it. For, if all the debts had been paid and the residue ascertained, and Miss Edge had thought proper to assign the whole of it to A. B.: could A. B. have claimed to have those bills taxed which were not his bills? The plaintiffs come in, incidentally only, by virtue of the decree; and, therefore, the court has no jurisdiction to direct the taxation of the bills on their application. Nor would it, I think, have had that jurisdiction, if this petition had been the petition of the receiver as well as of the plaintiffs: but, in fact, it is not so.

(a) 2 Myl. & Craig, 568, see 573.

(b) 3 Myl. & Craig, 249.

1839 —Hall v. Severne.

Mr. Stedman chooses to stand upon his legal right ; and, therefore, I cannot make any order on this petition.

Petition dismissed without costs.[1]

*HALL v. SEVERNE.

[*515]

1839; 30th January.—Will ; Construction.

Testator, by his will, gave pecuniary legacies to several persons, and directed his residue to be divided amongst his before mentioned legatees in proportion to their several legacies thereinbefore given. By a codicil, which he directed to be taken as part of his will, he gave several pecuniary legacies to persons, some of whom were legatees under his will, and declared that the several legacies mentioned in the codicil, were given, to the therein mentioned legatees, in addition to what he had given to them or any of them by his will. Held, that none of the legatees under the codicil were entitled to share in the residue in respect of their legacies under the codicil.

WILLIAM METCALFE, by his will dated the 20th September, 1831, gave pecuniary legacies to several individuals and charities, and, amongst the former, a legacy of 100*l.* to Henrietta Bannister ; and then expressed himself as follows:—"I give and bequeath, unto my executors and trustees hereinafter mentioned, my leasehold house, No. 45 Fore street, in the city of London, and my leasehold warehouse in London Wall, upon trust to receive the annual rents thereof, and to invest the same, in some or one of the public funds in their joint names, and to pay, distribute and divide the annual interest and dividends of any of my stocks and funds which may remain after paying the before mentioned legacies, during the continuance and term of my said leases of my said house in Fore street, and warehouse in London Wall, unto and amongst all and every the before mentioned individual legatees (but not charities) who shall be then living, in the proportions which their several legacies shall bear to the amount of the said interest and dividends : and from and after the expiration of the said leases, then I direct my said executors and trustees to sell out the said moneys so standing in the funds in their joint names, and to pay and distribute and divide the same, unto and amongst all and every the said individual legatees who shall be *then [*516] living, in the proportions aforesaid : and I give and bequeath, unto

[1] As to the lien of a solicitor upon his client's papers, see *Heslop v. Metcalfe*, 3 Myl. & Cr. 183, 190, n. 1. 8 C. 8 Sim. 622. *In the matter of Rice*, 2 Keen, 181, 183 ; n. 1. 2. *Brassington v. Brassington*, 1 Sim. & Stu. 455, 457 ; n. 1. *Bennett v. Baxter*, 10 Sim. 417. *Christian v. Field*, 2 Hare, 177. Where an order is made for a party to produce papers, if they are in the hands of his solicitor, and he cannot produce them without paying his bill of costs, he must pay it. *Ex parte Shaw*, Jac. 272, 273, n. 1. So, in a later case, Lord Eldon said : "Every attorney has a right to hold papers until his bill is paid ; the language of every order which is made upon the subject is, that upon payment of what is due, the papers shall be delivered over ; but where a party has a pressing necessity for papers, the court will order them to be delivered over upon a deposit being made, which will cover not only what is due upon the bill, but what may be due for the costs of the taxation." *Clutton v. Perdon*, Turn. & Russ. 304.

1839.—Hall v. Severne.

my executors and trustees hereinafter named, the lease of my house in which I now reside, all my household furniture, plate, linen, china and other my effects therein, and all that annuity or yearly sum of about 180*l.* payable to me by one Daniel Alder on his bond, and all other my estate and effects not hereinbefore specifically bequeathed or disposed of, upon trust to sell and dispose thereof as early as convenient after my decease, and to pay and divide the moneys to arise therefrom, after defraying the expenses of such sale and incident thereto, unto and amongst all and every *my before mentioned legatees*, or such of them as shall be then living, in the proportions that their several personal legacies *hereinbefore given and bequeathed unto them*, shall bear to the produce of my said leasehold house, plate, china, annuity and effects."

The testator, by a codicil dated the 4th of October, 1836, which he directed to be added to and taken as part of his will, gave pecuniary legacies to several persons, (some of whom were legatees under his will,) and, amongst them, a legacy of 200*l.* to Henrietta, the wife of John Powell Bannister, to whom he had given a legacy of 100*l.* by his will: and he declared that the several legacies therein mentioned, were given, to the therein mentioned legatees, *in addition to what he had given to them or any of them by his will.*

On the hearing of the cause for further directions, one question was whether the legatees under the codicil, were entitled to share in the residue with the legatees under the will.

Mr. Knight Bruce, and Mr. G. Richards appeared for the plaintiffs.

[*517] *Sir W. Horne, Mr. Lloyd and Mr. Bagshawe, for the testator's personal representative:—The will directs the residue to be divided amongst the *before mentioned* legatees in proportion to the legacies *thereinbefore* given to them: consequently those who are legatees under the codicil only, are wholly excluded from sharing in the residue; and those who are legatees under both the will and the codicil, are excluded from sharing except in respect of their legacies under the will. *Henwood v. Overend*,^(a) *Bonner v. Bonner*.^(b)

Mr. Craig, for Mr. and Mrs. Bannister:—Mrs. Bannister is entitled to a share of the residue proportionate to the aggregate amount of the legacies given to her by the will and codicil; for the testator has directed that his codicil shall be taken as part of his will; therefore, the will is to be read as if it contained a gift of 300*l.* to Mrs. Bannister. Moreover, the testator has declared that the legacies given by the codicil, are to be in addition to the legacies given by the will; and when a legacy is given in addition to a prior one, it partakes of all the incidents of that prior legacy. Consequently, the legacy given to Mrs. Bannister by the codicil, attracts with it a share of the residue. *Overend v. Gurney*,^(c) *Sherer v. Bishop*.^(d)

^(a) 1 Mer. 23.^(b) 13 Ves. 379.^(c) Ante, vol. 7, p. 126.^(d) 4 Bro. C. C. 55.

1839.—*Phillips v. Jones.*

[The Vice-Chancellor:—The opinion attributed to Lord Commissioner Lyne in the report of that case, seems a very extraordinary one.]

That case goes much further than it is necessary for me to contend for. *Lenwood v. Overend* does not resemble the present case. It does not appear that the legatees under the codicil, were also legatees under the will. Besides, real as well as personal estate was devised, by the will, to trustees in trust to sell and pay legacies; and the codicil does not appear to have been attested so as to pass freehold estates. It is plain that the Master of the Rolls decided that case on the authority of *Bonner v. Bonner*, in which the question was whether legacies given by an unattested codicil were charged on real estate, which is quite a different question from that now before the court.

THE VICE-CHANCELLOR:—The testator, by his will, directs his residuary estate to be divided, amongst his before mentioned legatees, in proportion to their several legacies thereinbefore given and bequeathed to them: consequently the persons who are to take the residue, are the legatees named in the will, and the proportions in which they are to take it, are the proportions which the legacies thereinbefore given to them respectively bear to the amount of the residue.

His Honor then read the codicil.

It appears to me that the legacy of 200*l.* given to Mrs. Bannister, is a substantive gift of 200*l.* declared to be in addition to what he had given her by the will, but not to carry a further share of the residue in proportion to itself.

I cannot say that I accede to the decision in *Sherer v. Bishop*.

Declare that the legatees under the will, are entitled to distributive shares of the clear residue of the testator's estate rateably with and in proportion to the amounts of their respective legacies under the will. [*519]

And declare that the legatees under the codicil are not, nor are or is any or either of them, entitled, in respect of their legacies under the codicil, to any distributive shares or share of the said residue.

PHILLIPS v. JONES.

1839; 31st January.—Landlord and Tenant; Lease of Mines; Injunction.

The plaintiff was lessee of a coal mine at the rent of 300*l.* a year and subject to a royalty of 10*s.* for every wey of coals raised, in each year, above 600, that being the quantity considered to be paid for by the 300*l.* a year; and the plaintiff was authorized to determine the lease on the coal being worked out. The plaintiff worked the mine for several years; and, when it was nearly exhausted, he was prevented, by accidents and defects in it, from continuing to work it, except at a ruinous expense. The court refused to restrain the defendant from suing for the rent of 300*l.* a year, although the plaintiff offered to pay him 10*s.* per wey for all the remaining coal.

THE plaintiff was lessee for twenty-one years, under the defendant, of a piece of ground in Monmouthshire, with liberty to dig for coals under it, at

1839.—*Phillips v. Jones.*

the yearly rent of 300*l.*, to be paid whether any coal should or should not be raised, and subject to a royalty of 10*s.* for every wey that should be raised in each year of the term over and above 600, that being the quantity considered to be paid for by the yearly rent of 300*l.* The lease contained a proviso enabling the plaintiff to determine the term in case all the coal should be exhausted before the expiration of it.

After the plaintiff had worked the mines for some years, and had paid the defendant 2730*l.* in respect of the rent and royalty, he discovered that, owing to certain unforeseen defects in the mines and to accidents in [*520] attempting to work them (which were mentioned in the bill,) he could not continue the working except at a ruinous expense; and, thereupon, he gave the plaintiff notice of his intention to determine the lease; but the defendant refused to accept a surrender of it, insisting that the plaintiff was bound to get the remaining coal, and brought an action against him for the rent of 300*l.* a year.

The bill prayed for an injunction to restrain the action, the plaintiff offering to pay the defendant 10*s.* per wey for all the coal which, on a reference to the Master, should be found to have been under the land at the date of the lease, on being allowed what he had already paid.

Mr. *Knight Bruce*, Mr. *Jacob* and Mr. *Puller*, now showed cause against dissolving the injunction:—The object of the parties to the lease, was a sale of the coal at a certain sum per wey, and the price of it is thrown over the whole term, by instalments of not less than 300*l.* a year. By the terms of the lease, the plaintiff will be at liberty to determine it when the coal is exhausted; but, in exhausting it, he will ruin himself. The quantity remaining (if any,) is very small: and ought it not to be considered as exhausted, when it cannot be gotten except at a most ruinous expense? If the plaintiff (as he offers [to do] pays the defendant for the whole of the coal that was under the land, every object of the lease will be answered. Indeed, the defendant will be placed in a better situation than if he had waited for his money until the whole of the coal had been worked out. *Smith v.*

[*521] *Morris.*(a) The argument for the plaintiff in that case, prevailed; and every word of it is applicable to the present case. The plaintiff was to pay for 600 weys of coal yearly, whether he raised that quantity or not and it would be defeating all the purposes of justice, if the 300*l.* a year, which he was so to pay, were not put on the footing of a penalty. *Astley v. Weldon.*(b)

Mr. *Spence* and Mr. *Girdlestone* appeared for the defendant, but

THE VICE-CHANCELLOR, without hearing them, said:—This case is materially different from the case of *Smith v. Morris*: for that case proceeded on this, namely, that, by the terms of the lease, the lessee was bound to work the mine; and, in respect of the produce, a certain royalty was to be paid to the lessor; and it was said that the circumstances of the mine were such that

(a) 2 Bro. C. C. 311.

(b) 2 Bos. & Pull. 346.

1839.—Graver v. Temple.

the lessee would be ruined if he were compelled to work it, and, therefore, it was just that he should be relieved from the covenant to work the mine, if he gave the landlord all that he could have been entitled to if the mine had been worked according to the covenant, that is, a royalty of 9s. 6d. for every wey of coals contained in the land. But this lease is constructed in a different manner. In the first instance, there was to be paid, yearly during the term of twenty-one years, a gross sum of 300*l.*, whether the coal was worked or not; and a royalty of 10s. per wey, was to be paid if more was raised than 500 weys; and there was a covenant in the lease, which bound the lessee to work the mines. Then came a proviso enabling the lessee, on giving notice, *to determine the lease, when all the coal should be worked [*522] out: and, consequently, when all the coal should be exhausted, the tenant might, by giving the required notice, free himself from all the obligations of the lease. If an action had been brought, on the covenant, to compel the plaintiff to continue the working of the mines, and there had been no other reservation in the lease than a royalty of a certain sum per wey on all the coal raised, then the court would have applied the principle of *Smith v. Morris*, and would have relieved the plaintiff from the expense of working an unprofitable mine, on his paying the defendant for all the coal under the land; which would, in substance, be giving him all that he was entitled to under the lease, for he could derive no benefit from compelling the plaintiff to continue the working of the mine. In this case, however, there is a fixed sum of 300*l.* a year to be paid, whether the mines are worked or not: and, therefore, the court cannot relieve the plaintiff from the payment of that sum.

The consequence is that the order for dissolving the injunction, so far as it restrains the action on the covenant to pay the 300*l.* a year, must be absolute.

*GRAVER v. TEMPLE.

[*523]

1839: 31st January.—Practice; Pro Confesso.

An affidavit that the deponent had used all due diligence to discover where the defendant resided or where her last place of residence was, but without success, save that he had been informed and believed that she had assumed male attire in order to disguise herself, and that she was occasionally seen in the neighborhood of a certain place, is sufficient to warrant the court in making an order under 11 Geo. 4, and 1 Will. 4, c. 36, s. 3, with a view to taking the bill *pro confesso*.

Mr. LOVAT, for the plaintiff, moved for the usual order under 11 Geo. 4, and 1 Will. 4, c. 36, s. 3, on proceeding to take a bill *pro confesso*. He said that the plaintiff had been unable to discover where the defendant's usual place of abode was, and, therefore, was unable to depose that he had made the inquiry directed by the act.

The affidavit in support of the motion, after stating an order for service of the subpoena to appear on the clerk in court of the defendant, Mary Ann Temple, and that the subpoena had been served accordingly, but no appear-

1839.—Wardle v. Claxton.

ance was entered for her, whereupon attachments were issued to the sheriffs of London and Middlesex, who had returned *non est inventa*, proceeded thus: "And this deponent verily believes that, at the respective times of suing forth the said writs, the said defendant was in the county of Middlesex, or in the city of London; that, in consequence of no appearance having been entered for the defendant, and previous to the issuing of the said writs, this deponent, by himself and other persons, made inquiries after the defendant and her place of residence; that the result of such inquiries was that this deponent hath been informed and believes that the said defendant did assume and wear male attire in order to conceal and disguise herself, and that she was occasionally seen in or about the neighborhood of the Royal Exchange and Whitechapel; but this deponent was unable, notwithstanding all due [*524] diligence was used, to discover where she resides, or where her last place of residence is."

The Vice-Chancellor held that, under the circumstances of the case, the affidavit was sufficient; and made the order.

WARDLE v. CLAXTON.[1]

1839: 4th February.—Will; Construction; Separate Use.

Testator bequeathed his residuary estate to trustees, in trust to pay the income to his wife, for her life, to be by her applied for the maintenance of herself and such children as he might leave at his death. Held not to be a trust for the separate use of the wife.

TESTATOR bequeathed his residuary estate to trustees, in trust to invest the same in real or government securities, and to pay the interest and dividends thereof to his wife, for her life, to be *by her applied* for the maintenance of herself and such child or children as the testator might happen to leave at his death.

The question, on the argument of a demurrer, was, whether the testator's widow, who had married again, was entitled to the income of the property for her separate use.

Mr. *Knight Bruce* and Mr. *Purvis*, in support of the demurrer, said that it was impossible to give effect to the words: "to be by her applied, &c.," without giving to the lady the sole disposal of the property; that stronger words could not be used for that purpose; and that it was unreasonable to suppose that the testator intended that, in case his widow should marry a second time, the provision which he had made for her and her children by him, should be subject to the control of her second husband. 2 Ro- [*525] per on Hus. and Wife, *157, Jacob's edit.: *Hartley v. Hurle*, (a) *Dison v. Olmius*, (b) *Prichard v. Ames*, (c) *Lee v. Prieaux*, (d)

(a) 5 Ves. 540.

(b) 2 Cox, 414.

(c) Tern. & Rem. 222.

(d) 3 Bro. C. C. 381.

[1] S. C. ante, 412.

1839.—Attorney General v. Wilson.

Mr. Barber and Mr. R. Atkinson appeared in support of the bill ; but THE VICE-CHANCELLOR, without hearing them, said :—I do not think that this is a gift to the separate use of this lady. In all the cases that have been cited, the sole object of bounty was the woman who was married or going to be married. But, in this case, the words : “to be by her applied, &c.,” have reference, not only to the testator’s widow, but to all the children that he might have by her.

Demurrer overruled.[1]

*THE ATTORNEY GENERAL v. WILSON.

[*526]

1839: 5th February.—Witness ; Subpœna duces tecum.

A witness a partner in a bank was required by a *subpœna duces tecum*, to produce all books and accounts in his custody or power, containing any entries relating to £500*l.* consols, or to the dividends thereof, or the application or disposition thereof, or relating to the matters in question in the suit. Held, that the witness was not compellable to produce any books, &c. ; because the language of the subpœna was too general, and because the books, &c. relating to the stock, were partnership property, and his copartners would not consent to his producing them:

THIS case is reported on the argument of a demurrer, ante, page 30.

A commission having issued for the examination of witnesses in the cause, Thomas Blayds, who was one of the partners in the bank of Messrs. Becket & Co. at Leeds, was served by the relators and plaintiffs, with a *subpœna duces tecum*, requiring him to produce before the commissioners, all and every the books and book of account, and other books and accounts, in his custody, possession or power, containing any entries relating to the sum of £500*l.* three per cent. consolidated bank annuities, and the sum of 500*l.* secured on the tolls of the Leeds and Wakefield turnpike road, then, or late respectively belonging to the mayor, aldermen and burgesses of the borough of Leeds, or any part thereof respectively, or the dividends or interest thereof respectively, or the application thereof, or the purchase or investment of the said bank annuities or of any part thereof : and all books, accounts, papers and writings in his custody, possession or power, relating to the said bank annuities and sum of 500*l.* or any part thereof respectively, or the dividends or interest thereof, or containing or showing the sums of money belonging

[1] Vide *Hadow v. Hadow*, ante, 438, *Webb v. Kelly*, ante, 460. The case in the text is referred to and stated by Wigram, V. C., in *Blacklow v. Laws*, 2 Hare, 40, 52. The elaborate judgment of the Vice-Chancellor in that case, (which is too long to extract, and which cannot be abridged without injury,) shows the difficulty and obscurity, in which cases like the above are frequently involved. The above decision, however, is in no way questioned or impugned. The words of a will were, “my property, after my debts are paid, I leave to my beloved wife A., and wish her to educate my two daughters, J. and G. with care, and to treat them with kindness and affection,” without any personal bequest, except a ring to a third person, or other words to explain or control them ; it was held, that the real and personal estate of the testator passed to the wife in fee. *Jackson v. Housel*, 17 Johns. Rep. 281.

1839.—Attorney General v. Wilson.

to the said mayor, aldermen and burgesses invested in the public funds or elsewhere, and the securities for the same, and the proceeds and accumulations thereof, or the application or disposition thereof, or relating to the matters in question in this cause.

[*527] *Mr. Blayds declined to produce before the commissioners, the books mentioned in the subpoena, on the ground that he had none such in his individual possession, and that it was not competent to him to remove or produce the books of the partnership without the assent of his copartners. Whereupon the relators and plaintiffs served him with notice of a motion that he might be ordered to attend before the commissioners at his own expense, and to produce before them all and every the books and book of account, &c., following the words of the subpoena.

Mr. Jacob and Mr. Walker, in support of the motion.

Mr. Knight Bruce, for Mr. Blayds, said that the subpoena was too vague: that it was the duty of the party issuing a *subpœna duces tecum*, to describe with particularity, the documents which he required the witness to produce: and that though a plaintiff had a right to subject a defendant to the trouble of examining all his books in order to discover whether they contained any entries relating to the subject of the suit, yet there was no such right with regard to a mere witness, who was not at all interested in the matter in dispute; that, moreover, Mr. Blayds deposed that he was unable to produce the books without the consent of his copartners, and that they would not give their consent.

Mr. Jacob, in reply, referred to *Bradshaw v. Bradshaw*, (a) and said that the description of the documents in the subpoena, was as particular
[*528] as the parties who had issued it, were enabled to give, and as, under the circumstances of the case, could be reasonably required; and that Mr. Blayds had an unquestionable right to take the partnership books for any lawful purpose.

THE VICE-CHANCELLOR:—No case has been cited to me in which effect has ever been given to a *subpœna duces tecum* couched in such terms as these: for an application is now made to me, not that Mr. Blayds may attend and produce some five or six given, specified documents, but that he may: “attend and produce, before the commissioners, all and every the books and book of account, and other books and accounts, in his custody, possession or power, containing any entries relating to the sum of 6500*l.* three per cent. consolidated bank annuities, and the sum of 500*l.* secured on the tolls of the Leeds and Wakefield turnpike road, now or lately respectively belonging to the mayor, aldermen, and burgesses of Leeds, in the county of York, or any part thereof respectively, or the dividends or interest thereof, or the application thereof, or the purchase or investment of the same bank annuities, or of any part thereof; and all books, accounts, papers and writings in his custody,

(a) Ante, vol. 3, p. 285, and 1 Russ. & Myl. 358.

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possession or power, relating to the said bank annuities and sum of 500*l.*, or any part thereof respectively, or the dividends or interest thereof, or containing or showing the sums of money belonging to the said mayor, aldermen and burgesses, invested in the public stocks or funds, or elsewhere, and the securities for the same, and the proceeds and accumulations thereof, or the application or disposition thereof, or relating to the matters in question in his cause."

In my opinion, this subpoena is much too large and "vague to enable the court to act upon it: for it extends, not by any particular description but by a general description, to all books and accounts in the possession or power of Mr. Blayds which relate to the matters in question in the cause. [*529]

Now I think that, if a *subpœna duces tecum* is issued for a vast variety of documents, it cannot be an objection to the conduct of the party who refuses to produce them, that there were some which he might have produced, and others which he could not produce: because he is not called upon to produce some of the documents, but he is called upon to produce all of them.

I never remember to have seen a *subpœna duces tecum* in this form: and it strikes me that it would be very singular if this court should take upon itself to order the witness to produce these documents, when, if it were called upon to order a defendant to produce documents (though he had admitted every one of them to be in his possession and to be material to establish the plaintiff's case) it would not make an order for the production of any of them, if they were merely described in the manner in which they are described in this *subpœna duces tecum*.

Then Mr. Blayds is called upon to produce those documents which are in his possession or power. But it is as plain as it can be, upon the face of the affidavits in opposition to the motion, that these documents are not in his possession or power, so that he, alone, without the consent of his co-partners, can produce them: and nothing whatever is sworn to on behalf of the plaintiffs, which shows me or induces me to believe that Mr. Blayds has that possession or power over the books, "which will enable him to produce them, his co-partners objecting to their being produced. [*530]

In my opinion, then, this is a case quite of a novel kind. In the first place, the *subpœna* is too general for the court to give effect to it; and, in the next place, it not only does not appear that Mr. Blayds has the documents in his possession or power, but it does most satisfactorily appear that, if I were to make the order, it could not be complied with; because the two Messrs. Becketts, the partners with Mr. Blayds, would not allow the production of the documents; and consequently this motion ought to be refused with costs.

1839.—Hall v. Ellis.

HALL v. ELLIS.

1839: 6th and 16th February.—Jurisdiction; Witness; Arbitrator; Stat. 3 and 4 Will. 4, c. 2. Courts of equity have no jurisdiction under 3 and 4 Will. 4, c. 42, to order witnesses to attend arbitrators.

THIS was a suit for taking the accounts of a partnership.

By an order in the cause, made on the 23d of January, 1838, it was ordered that all matters in difference between the parties, should be referred to an arbitrator, and that his award should be made an order of the court, on the application of either party.

Mr. *G. Richards* now moved that certain persons named, who had refused to attend the arbitrator, might be ordered to attend him, in order to give evidence touching the cause and the other matters referred.

This application was made under the 3 and 4 Will. 4, c. 42, (for the further amendment of the law and the better advancement of justice,) the preamble of which recites that it would greatly contribute to the diminishing [531] of expense in suits in the superior courts of common law at Westminster, if the pleadings therein were, in some respect, altered, and the questions to be tried by the jury left less at large than they then were according to the course and practice of pleading in several forms of action: but that that could not be conveniently done otherwise than by rules or orders of the Judges of the said courts from time to time to be made, and doubts might arise as to the power of the said Judges to make such alterations without the authority of Parliament. Then the 39th sect., after reciting that it was expedient to render references to arbitration more effectual, enacts that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court or Judge's order or order of *Nisi Prius*, in any action then brought or which should be thereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission should be made a rule of any of his Majesty's courts of record, should not be revocable by any party to such reference, without the leave of the court by which such rule or order should be made, or which should be mentioned in such submission, or by leave of a Judge, and that the arbitrator or umpire should and might and was thereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation should not afterwards attend the reference, and that the court, or any Judge thereof, might from time to time enlarge the term for any such arbitrator making his award. The 40th section enacts that, when any reference should have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid, it should be lawful for the court by which such rule or order [532] should be made or which should be mentioned in such agreement, or for any Judge, by rule or order to be made for that purpose, to com-

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mand the attendance and examination of any person to be named or the production of any documents to be mentioned in such rule or order, and that the disobedience to any such rule or order should be deemed a contempt of court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators or by the umpire before whom the attendance was required, should also be served either together with or after the service of such rule or order: provided always that every person whose attendance should be so required, should be entitled to the like conduct money and payment of expenses and for loss of time as for and upon attendance at any trial: provided also that the application made to such court or Judge for such rule or order, should set forth the county where such witness was residing at the time, or satisfy such court or Judge that such person could not be found: provided also, that no person should be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days to be named in such order.

Mr. *Richards* said that the statute applied to courts of equity as well as law, as it used the word "order," which was applicable to a court of equity, as well as the word "rule," which was applicable to a court of law, and that the Court of Chancery, on one side of it, was a court of record.

THE VICE-CHANCELLOR, after taking time to consider the point, said:—There is but one section in the act, in which express mention is made of courts of equity, that is the 42d: "and with the exception [*553] of the 30th, 40th and 41st sections, which may be called the debatable sections, there is not one which, on the face of it, is not solely and exclusively applicable to courts of law. The whole of the preamble too has reference to courts of law only: and it is remarkable that, in the 42d section, where the object was to include courts of equity, there is no ambiguity whatever. That section recites that it would be convenient if the power of the superior courts of common law and equity at Westminster to grant commissions for taking affidavits to be used in the said courts respectively, should be extended: and then it enacts "that the Lord High Chancellor, Lord Keeper or Lords Commissioners of the Great Seal, the said courts of law and the several Judges of the same, shall have such and the same powers of granting commissions for taking and receiving affidavits in Scotland and Ireland, to be used and read in the said courts respectively, as they now have in all and every the shires and counties within the kingdom of England and dominion of Wales and town of Berwick-upon-Tweed, and in the Isle of Man, by virtue of the statutes now in force."

Looking at the whole statute together, my opinion is that, with the exception of the 42d section, it must be taken as having reference to courts of law only: and the submission to arbitration must be taken to have reference to courts of law; and, therefore, this court, as a court of equity, cannot inter-

1839—*Spry v. Bromfield.*

tere; especially as the subject of the reference is not one that is cognizable on the common law side of this court.

Motion refused.

[*534]

*SPRY v. BROMFIELD.

1833; 12th February.—Will; Construction.

Testator gave all his estates, real and personal, to his executors, in trust to be disposed of by them as after mentioned. He then gave all his real estates, houses and lands to his wife for life; "and, after the decease of my wife, I give my houses, lands and estates in B. to J. B., but, at his death, I will that the whole shall be for the use of the said J. B.'s wife and children, and which children, at the death of their mother, shall inherit the same jointly during their lives; and, if the said children shall die before they arrive at the age of twenty-one, I will that my houses and estates in B., go to H. S." Held that J. B.'s children took the B. estate for their lives only; and, they having attained twenty-one, that the inheritance was undisposed of.

PHILLIP BROMFIELD made his will, dated the 14th of February, 1799, and which was partly as follows:

"To my executors in trust who shall hereafter be named, I give all my estates, real and personal, moneys in the funds, outstanding debts due to me, and all other chattels, goods and effects whatsoever I may die possessed of, to be disposed of by them as follows: to my wife, Celia Bromfield, I give all my real estates, houses and lands, furniture, plate, books, clothes and linen, for her sole use and benefit as long as she shall live; and, within one year after my death, I give the following legacies; 100*l.* each to my cousins, Anne and Elizabeth Bromfield, formerly of Gerrard street, Soho; 100*l.* to my cousin, Mary Bromfield, daughter of my uncle, the Rev. John Bromfield; 100*l.* to the Rev. Hume Spry, son of the Rev. Benjamin Spry, of Bristol: and I charge my estates at Lymington and Boldre, real and personal, with a rent charge of 100*l.* per annum to my sister, Mary Bromfield, of Lymington, to be paid to her half yearly, during her life, by my wife; and, after her decease (if my sister outlives her) the said rent charge to be continued to my said sister for the term aforesaid by whoever may possess my houses,

[*535] lands and estates in Boldre parish; and, at and after the decease of my wife, I give, my houses, lands and estates in the parish of Boldre, to my cousin, the Rev. John Bromfield, subject to the rent charge above mentioned, but, at his death, *the whole shall be for the use of the said John Bromfield's wife and children*, and which children, at the death of their mother, *shall inherit* the same jointly during their lives; and, if the said children shall die before they arrive at the age of twenty-one, I will that my houses and estates in the parish of Boldre, go to the Rev. Hume Spry, and to the use and benefit of him and his children:" and, after bequeathing a few specific legacies, the testator appointed his wife and two other persons the executors of his will.

1839.—*Spry v. Bromfield.*

The testator died in 1799, leaving his wife and the other persons named in his will him surviving.

The Rev. John Bromfield and his wife had three children at the date of his will and at the testator's death; and one who was born afterwards.

The bill was filed, against those children, by Hume Spry, who was the testator's heir at law: and the question which was discussed on the argument of a demurrer, was whether the defendants took the Boldre estate in fee, or for their lives only.

Mr. Jacob, Mr. Wilbraham, and Mr. Hodgson, in support of the demurrer:—The testator sets out with giving all his estates, both real and personal, to his executors, in trust to be disposed of by them as after mentioned: and he then proceeds to deal with the fee in his real estates, which he had thus given to his trustees. The devise of all his "houses, lands and [*536] estates in the parish of Boldre, to the Rev. John Bromfield, would, if it stood alone, pass the fee: but that devise is followed by the words "but at his death," which show that John Bromfield was intended to take a life estate only. Then follow these words: "The whole shall be for the use of the said John Bromfield's wife and children;" and then, in order to show how the wife and children are to take, the testator adds: "and which children, at the death of their mother, shall inherit the same, jointly during their lives." The words, "jointly during their lives," are merely modal or formal, and ought to be read as if they were in a parenthesis, and then the will is clear of all doubt. The children take joint estates for their lives with several inheritances. The gift over to the plaintiff confirms the construction which we are contending for. The testator says: "And if the said children shall die before they arrive at twenty-one, I will that my houses and estates in the parish of Boldre, go to the Rev. Hume Spry:" that is, in that event, and in that only, they shall go to Dr. Spry. These last words were unnecessary, unless the testator meant to give estates of inheritance to the children. *Fegmorton v. Holyday*; (a) *Doe v. Cundall*; (b) *Doe v. Stenlake*; (c) *Doe v. Green*. (d)

Mr. Knight Bruce and Mr. Malins appeared in support of the bill; but, THE VICE-CHANCELLOR, without hearing them, said.—The question raised by this demurrer is a question of law; but I will give my opinion upon it, if the parties desire that I should do so. It seems to [*537] me, on looking at the whole scope of the will, that the testator had no notion of any one taking beyond an estate for life. First, there is a disposition of all his real and personal property to trustees; then he gives to his wife all his real estates, houses and lands, as long as she shall live. That is a gift of one life estate. Then, after giving some pecuniary legacies, he charges his estates at Lymington and Boldre with a rent charge of 100*l.* per annum to his sister, Mary Bromfield, to be paid to her half-yearly, during her life, by his wife, and, after his wife's decease, if his sister should outlive his wife,

(a) 3 Burr. 1618.

(b) 9 East, 400.

(c) 12 East, 514.

(d) 4 Mees. & Wels. 229.

1839.—*Gingell v. Horne*.

he directs the rent charge to be continued to his sister, for the term aforesaid, by whoever may possess his houses, lands and estates in Boldre parish: and, after the decease of his wife, he gives his houses, lands and estates in that parish to his cousin, the Rev. John Bromfield. There the words used would, of themselves, have carried the fee: [1] but it is clear, from what the testator afterwards says, that he intended John Bromfield to take for his life only; for he proceeds in these words: "But, at his death, the whole shall be for the use of the said John Bromfield's wife and children." Those words, if they had stood alone, might be construed to pass the fee; [2] but then he adds: "And which children, at the death of their mother, shall inherit the same jointly during their lives." Therefore the real construction is that the father takes for life, the wife takes for life, and the children take for their lives jointly: and, in my opinion, there is nothing extraordinary in the testator giving the estate over in the event of the children dying under twenty-one.

In *Frogmorton v. Holyday* and *Doe v. Cundall*, the property [*538] was given to the devisees generally, without any words of restriction or limitation; and, therefore, those cases are not applicable to a case like the present, where the gift is to the children for their lives expressly.

My opinion is that, according to the true construction of this will, there is a gift of the Boldre estate to the children of John Bromfield jointly during their lives, with a gift over in the event of their dying under twenty-one: and, as all the children have attained twenty-one, the consequence is that the inheritance is undisposed of.

Demurrer overruled.(a)

[*539]

*GINGELL v. HORNE.

1839: 12th February.—Will; Jurisdiction; Demurrer.

After a will of personalty had been proved, *per testes*, in the Ecclesiastical Court, a bill was filed, by the next of kin, alleging that the testator's signature to the will was obtained when he was not of sound and disposing mind; that his medical attendants were not called as witnesses when the probate was obtained; and that the evidence of the testator's incompetency did not come to the knowledge of the plaintiffs until after the time allowed for appealing from the sentence of the Ecclesiastical Court, had expired; and praying that the will might be declared to have been fraudulently obtained, and that the residuary legatee might be declared a trustee for the plaintiffs. A demurrer to the bill was allowed, a Court of Equity having no jurisdiction to relieve against the probate of a will, unless the consent of the next of kin to the granting of it, was fraudulently obtained.

JOHN SIMMONS, by his will dated in 1833, gave legacies, to certain indi-

(a) On the 7th of March, 1839, a case was sent, on the application of the defendants, for the opinion of the Court of Exchequer. [For the case sent to the Barons of the Exchequer, and the certificate returned, see 10 Sim. 94. As to the subsequent disposition of the case, see *id.* 224.]

[1] Vide *Wilkinson v. Chapman*, 3 Russ. 145. *Bradstreet v. Clarke*, 12 Wend. 602. 2 Russ. 351, n. 1. 1 Sim. 291, n. 2.

[2] Vide *Thomas v. Phelps*, 2 Russ. 348. *Dover v. Gregory*, 10 Sim. 393.

1839.—*Giagell v. Horne.*

iduals and charities, and appointed J. Towne and two other persons his executors. By a codicil dated the 3d of January, 1835, which was a few days before his death, he gave all his property not disposed of by his will, to A. Towne, the daughter of J. Towne. The will and codicil were proved, *per testes*, by all the executors.

The bill, which was filed by the testator's next of kin against the executors and A. Towne, alleged that J. Towne prepared the codicil and procured the execution of it at a time when the testator was not of sound and disposing mind; that the testator's medical attendants were not called as witnesses when the will and codicil were proved; that the testator's incompetency was unknown to the plaintiffs until the time allowed for appealing from the sentence of the Ecclesiastical Court, had expired; and, consequently, they were wholly without remedy in that court. The bill prayed that the codicil might be declared to have been fraudulently obtained, and that the executors might be declared to be trustees of the testator's residuary estate for the plaintiffs.

The defendant, A. Towne, demurred to the bill, "on the ground that [*540] the case was not within the jurisdiction of the Court of Chancery.

Mr. Jacob and Mr. Bethell appeared in support of the demurrer: but the Vice-Chancellor desired to hear the counsel in support of the bill.

Mr. Knight Bruce, Mr. Cooper and Mr. Elderton, in support of the bill:—A notion has been entertained that the Ecclesiastical Courts possess exclusive jurisdiction, in all matters relating to the personal estate of deceased persons: but that opinion has been formed too hastily. We admit that those courts do possess exclusive jurisdiction, in all cases where the only question is whether a paper is testamentary or not: but, in all cases of fraud, Courts of Equity may interfere with the judgments or sentences of all other courts, whether of common or civil law. *Barnesly v. Powel*; (a) *Glascott v. Lang*; (b) *Jarvis v. Chandler*. (c) The case of *Welles v. Middleton* (d) also shows that Courts of Equity possess a most extensive jurisdiction in cases of fraud. Here the demurrer admits, not only that the codicil was obtained by fraud, but also that the fraud was not discovered until the time for making that defence available in the Ecclesiastical Court, had expired.

In *Segrave v. Kirwan*, (e) Sir A. Hart says: "It has been argued that the relief prayed in this bill, if granted, "would, in fact, set aside [*541] the will: that a Court of Equity is not the proper forum for such a purpose; and that the plaintiffs ought to be left to the Ecclesiastical Court, which has the sole jurisdiction. That the Ecclesiastical Court has, exclusively, the power to decide what is or is not a will of personalty, cannot be controverted. Its seal to a probate is conclusive in every court of justice: but it is equally clear that to this court belongs the authority to give construction and effect

(a) 1 Vez. 119 and 284; and see Belt's Supplement, 74 and 143.

(b) Ante, vol. 8. p. 358, and 3 Myl. & Craig, 451.

(c) Turn. & Russ. 219.

(d) 1 Cox, 112.

(e) 1 Beatt. 157; see 163.

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to the will; and that there may be circumstances attaching, personally, on those who take by force of it, which will authorize this court, to engraft an equity on the gift, and convert them into trustees for other persons. The rule of equity by which an executor having a legacy, is made a trustee for the next of kin, is founded on this principle. Other implications arising from particular expressions in the will, which convert an executor into a trustee of an undisposed residue, are the same. The will still remains operative in all its legal effects, as established by the Ecclesiastical Court; but the Court of Equity controls it according to rules of conscience. The law of the court in this respect, is not confined to implications arising on the face of the will: it extends to all cases wherein fraud or other circumstances peculiarly cognizable in equity, occur. The case of *Marriot v. Marriot*(a) is an authority for this position. The following are there laid down as the rules which the court adopts on this head: "Courts of Equity may declare a legatee, who has obtained a legacy by fraud, to be a trustee for the amount: as, if the drawer of a will should insert his own name instead of the name of a legatee, no doubt he would be a trustee for the real legatee." Then, after [*542] adverting to the cases in which "the court, by reason of a legacy given to the executor, declared him a trustee of the residue for the next of kin, the case proceeds thus: "The court, to answer the real intention of the testator, may declare a trust upon a will, though it be not contained in the will itself, in these three cases: first, in that of fraud upon a legatee before mentioned: secondly, where the words imply a trust for the relations, as in the case of a specific devise to executors and no disposition of the residue: thirdly, in the case of a legatee promising the testator to stand as trustee for another: and nobody has thought that declaring a trust in any of these cases, is an infringement of the ecclesiastical jurisdiction." The case of *Barnesly v. Povel* carries the doctrine still further. That case arose upon a paper on which the defendant claimed the property, and which had been proved under a consent obtained from the sole next of kin by misrepresentation. Lord Hardwicke lays down the law of the case in the following terms: "As to the sentence of the Prerogative Court, as at present advised, that will create no difficulty if the will is found forged: for then, the plaintiff's consent appearing to have been obtained by the misrepresentation of that forged will, that fraud infects the sentence against which the relief must be here. I should not scruple decreeing the defendant, who obtained that probate, to stand as a trustee in respect of the probate, which would not overturn the jurisdiction of that (the Ecclesiastical) Court." In the same case, which came on after a trial had, and the will shown to be a forgery, Lord Hardwicke repeated this doctrine as to the court having authority to declare the defendant a trustee for the plaintiff, and added: "The Court of Equity, though it could not set aside a fine levied by fraud, as the Court of

(a) 1 Stra. 666; see page 673.

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Common Pleas might do; yet, in a conveyance so obtained, it "would [*543] not send the party to the Common Pleas to set it aside, but consider the person so obtaining the estate, a trustee, and decree him to reconvey." In *Barnesly v. Powel*, Lord Hardwicke did not immediately decree the defendants trustees for the plaintiff; because it was alleged there were other wills which might be good, and he would not deprive the parties of the opportunity to establish them, if they could. But it is clear, from the whole context of his judgment, that had it not been for the alleged prior wills, he would not have sent the plaintiff, to the Ecclesiastical Court, to revoke the probate, but would have declared the defendants trustees of the probate for the plaintiff. It would be superfluous to add further authorities to confirm Lord Hardwicke; and, as the court has gone to that extent in contracting the legal operation of a will, without considering itself as interfering with the constitutional jurisdiction of the Ecclesiastical Court, the question is whether the inherent principles of equity found in those cases, do not exist in this." The language of Sir A. Hart, and of Lord Hardwicke in *Barnesly v. Powel*, goes the whole length of our argument.

It may be said that, if the party has had an opportunity of going through his case in a court of competent jurisdiction, this court cannot grant a new trial or revise the sentence of that court. But, in this case, the proceedings in the Ecclesiastical Court were had when the party was ignorant of the circumstances of fraud; and he did not discover them until it was too late to avail himself of them.—[The Vice-Chancellor: I know no case in which the lateness of discovery has been made a ground for the interference of this court. Lord Redesdale says: "A will and probate, even in the common form, in the proper Ecclesiastical Court, which is in the [*544] nature of a sentence, is a good plea to a bill by persons claiming as next of kin to a person supposed to have died intestate. And if fraud in obtaining the will is charged, that is not a sufficient equitable ground to impeach the probate, for the parties may resort to the Ecclesiastical Court, which is competent to determine upon the question of fraud. But where the fraud practised has not gone to the whole will, but only to some particular clause, or if fraud has been practised to obtain the consent of the next of kin to the probate, the Courts of Equity have laid hold of these circumstances to declare the executor a trustee for the next of kin. Where there are no such circumstances, the probate of the will is a clear bar to a demand of personal estate."(a)]—There is no authority in support of the distinction drawn, by Lord Redesdale, between fraud affecting part of a will, and fraud affecting the whole of it. *Segrave v. Kirwan*, *Barnesly v. Powel*, and *Jarvis v. Chandler*, are at variance with that distinction. The Ecclesiastical Court does deal with part of a will which is affected by fraud, and leaves the rest of the will untouched. Where is the difference, in principle, between a

(a) Treat. on Plead. 4th edit. 257.

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partial intestacy on the ground of fraud, and a total intestacy on the ground of fraud? *Jarvis v. Chandler* is at direct variance with any such notion. Moreover, the reason assigned by Lord Redesdale for the negative proposition which he lays down, is that the parties may resort to the Ecclesiastical Court: but in this case, the parties cannot resort to the Ecclesiastical Court, and consequently his Lordship's reason does not apply.

[*545] The other cases cited in support of the bill, were, **Podmore v. Gunning*, (a) *Marriot v. Marriot*, (b) *Taylor v. Sheppard*, (c) *Haly v. Goodson*, (d) *Andrews v. Powys*, (e) *Thynn v. Thynn*, (f) *Devenish v. Baines*, (g) *Herbert v. Lowns*. (h) And the statutes 24 H. 8, c. 12, 25 H. 8, c. 19 and 3 and 4 W. 4, c. 41, s. 20, were referred to in order to show that the time allowed for appealing from a sentence of the Ecclesiastical Court, was only fifteen days: and it was said that, by 2 and 3 W. 4, c. 92, s. 3, commissions of review, which, before that act passed, might have issued at any time, were abolished.

On *Podmore v. Gunning* being cited, the Vice-Chancellor said that the question in that case, was whether Sir Thomas Staines had not left his property to Lady Staines, on an undertaking, on her part, that she would dispose of it in a particular way: and that, in that case, the court did not act against the will, but in furtherance of a trust appearing on the face of it. With respect to *Andrews v. Powys*, his Honor observed that there appeared to him to be an irreconcilable difference between that case and *Kerrich v. Bransby*. (i)

Mr. Jacob in reply:—In *Barnesly v. Powel*, the defendant had practised a fraud, not on the testator, but on his next of kin. The probate had been granted, to the defendant, with the consent of the next of kin, and that consent had been fraudulently obtained: and Lord Hardwicke declared [*546] that the benefit of the fraud should be taken from the "defendant" and that a Court of Equity was the proper tribunal for that purpose and he decreed the defendant to go to the Ecclesiastical Court and consec to the probate being revoked. The judgment in *Segrave v. Kirwan* contains some expressions which may be considered, perhaps, as going too far but it is sufficient to observe that the objects of that suit and of this, were totally different from each other. In that the object was to have the executor declared a trustee of the residue for the next of kin: in this the court is asked to strike out part of a testamentary disposition, on the ground that it was introduced by fraud.

The probate is conclusive of the fact that the testator did make this codicil, and that, at the time when he made it, he was competent to do so consequently, every word in this bill, is an averment against the record.

It was said that this court has a concurrent jurisdiction with the Eccles:

(a) Ante, vol. 5, p. 485, and vol. 7, p. 644.

(d) 2 Mer. 77.

(g) Prec. Ch. 3.

(b) Ubi supra,

(e) 2 Bro. P. C. 504.

(h) Rep. Ch. 12.

(c) 1 Youn. & Coll. 271.

(f) 1 Vern. 296.

(i) 7 Bro. P. C. 437.

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stical Court, in a case like the present. Supposing that to be so, still, as the Ecclesiastical Court has exercised its jurisdiction and pronounced a decree, this court cannot interfere. This court has a concurrent jurisdiction with the Court of Exchequer; but if that court has made a decree, this court cannot alter it.

Lord Redesdale, in that part of his work which has been referred to, lays down, as a general rule, that, if fraud in obtaining a will is charged, that is not a sufficient equitable ground to impeach the probate. It is true that he mentions two cases of exceptions to that general rule; but no one can fail to observe that he speaks of those two excepted cases in a very doubting way.

'There are two other grounds on which this case is attempted to [*547] be supported. One is that the *probate* of the will and codicil was obtained by fraud. If that were so, then the plaintiffs ought to have asked the same relief as was granted in *Barnesly v. Powel*. But the relief which they have prayed is of a totally different nature; and therefore, it is not open to them, on this bill, to say that they are entitled to the same relief as was given in *Barnesly v. Powel*. Then what is the fraud which they allege to have occurred in obtaining the probate? It is that the executors did not call the testator's medical men, as witnesses, when the probate was applied for. But it is quite idle to make such an allegation.—[The Vice-Chancellor: Upon that principle, every order made by this court on motion, might be set aside on the ground that the party who obtained the order, did not produce affidavits from those persons who could have deposed against him. A party is at liberty to establish his case by such evidence as he thinks best; and it was never before contended that it was incumbent on him to produce evidence against as well as for himself.]—The remaining ground on which the plaintiffs have rested their case, is that the evidence was not discovered until the time for appealing had expired. But all courts are open to applications to appeal, on special grounds: and, though there may be a certain time fixed for appealing, it does not follow that that time would not be enlarged, if a proper case were made for granting the indulgence. The case, however, made by the bill, is not a case for an appeal on account of an erroneous judgment on the facts before the court, but for a proceeding in the nature of a bill of review; as the bill alleges that new evidence has been discovered. The time allowed for bringing a bill of review in this court, is twenty years; and there is no allegation, in this bill, *that the plaintiffs may [*548] not now institute a proceeding, in the Ecclesiastical Court, analogous to a bill of review. But suppose that the time is expired, and that, by the rules of the court, no further proceedings can be had; then it is part of the law of the land. The rule that there can be no new trial after a certain time, may be a bad rule, but it cannot be relieved against.

THE VICE-CHANCELLOR:—I entertain the same opinion as I did at first, with respect to this case, and that is that the demurrer ought to be allowed.

1839.—*Jarvis v. Pond.*

The impression which has been fixed in my mind for several years, is that it is settled law that there is no method of escaping from the effect of probate when granted, unless in a case like that of *Barnesly v. Powel*, in which Lord Hardwicke set aside the ground on which the probate was obtained. In this case, however, no fraud was practised, on the plaintiffs, in obtaining the probate. It is alleged, indeed, that the testimony of the testator's medical men was withheld; but that allegation is perfectly futile; for no party to any legal proceeding whatever, is bound to produce evidence against himself, or any evidence except such as he thinks proper to produce. This bill, therefore, does not afford any such materials for the interference of the court, as there were in that case of *Barnesly v. Powel*, in which Lord Hardwicke made a decree, which afforded an opportunity of having the matter reconsidered in the Ecclesiastical Court.

My opinion is, on the authority of *Kerrich v. Bransby*, which was so much considered by Lord Hardwicke, and on the authority of Lord Redesdale, that this demurrer must be allowed.[1]

[*549]

*JARVIS v. POND.

1839; 15th February.—Will; Construction.

Testatrix having two sons and two daughters living, gave a legacy to each of them, and then gave the residue to Mary, one of her daughters, for life: "and, after her decease, I will that the said property be equally divided amongst such of my sons and daughters as may be living at the decease of the said Mary: and in case of the decease of any of my said sons or daughters, the surviving children of any of my sons or daughters, to have their fathers' or mothers' part." The testatrix had had another son and daughter, both of whom were dead at the date of her will, leaving children. Held that their children were entitled to shares of the residue.

MARY POND made her will, dated in the year 1807, in the following words: "I give and bequeath, unto my son-in-law John Gurr, the sum of 200*l.*; to my daughter-in-law, Hannah Pond, widow of my late son Gilbert Pond deceased, the sum of 200*l.*; to my son William Pond, the sum of 200*l.*, to be paid to them within six months next after my decease: also I give and bequeath, to my son Samuel Pond, the interest of 200*l.*, being 10*l.* a year, to be paid to him or his present wife, during the term of their or either of their natural lives: to my daughter Elizabeth Such, the interest of 200*l.*, being 10*l.* a year, to be paid to her during the term of her natural life. The last two legacies I leave in the manner mentioned, in consideration that neither of the parties have children. Also I give and bequeath to my daughter Mary Pond,

[1] As to the conclusiveness of the probate of a will of personalty, see further, *Van Rensselaer v. Morris*, 1 Paige, 13. *Clark v. Fisher*, id. 171. *Colton v. Ross*, 2 Paige, 396. *Gaines v. Chew*, 2 Howard, 645, 647. *Morrell v. Dickey*, 1 Johns. Ch. Rep. 176. *Tompkins v. Tompkins*, 1 Story's Rep. 547, 552.

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all the residue and remainder of my property, goods and chattels, subject to the payment of the above mentioned legacies, during her natural life; and, after her decease, I will that the said property be equally divided amongst such of my sons and daughters as may be living at the time of the decease of the said Mary Pond: and, *in case of the decease of any of my said sons or daughters*, the surviving children of any of my sons or daughters to have *their fathers' or mothers' part*, to be equally divided amongst them."

The testatrix died in 1809. Four of her children survived her, [*550] namely, Samuel, William, Elizabeth the wife of J. Such, and Mary, but none of them had any issue. The testatrix had had three other children, Gilbert, John, and Sarah the wife of John Gurr, all of whom were dead at the date of her will. Gilbert and Sarah left children, but John left no issue. Mary Pond, the daughter, died in 1837; at which time all the testatrix's children, except William, were dead. The plaintiff claimed a share of the testatrix's residue, under an assignment from a child of Sarah Gurr.

Mr. *Knight Bruce* and Mr. *Romilly*, for the plaintiff:—There is nothing in this will which necessarily requires that the words, "in case of the decease of any of my said sons and daughters," should be held to mean either a future or a contingent event. Those words mean, "in any case of the death of any of my said sons and daughters, whether it has happened or may happen." *Tytherleigh v. Harbin*, (a) *Giles v. Giles*. (b) There was more difficulty in arriving at the conclusion in those cases, than there is here: but there the decisions were founded on the presumed natural intention of the testator, and the words were considered sufficient to enable the court to give effect to that intention.

Mr. *G. Richards* and Mr. *Lewis*, for a defendant in the same interest as the plaintiff, relied on the expression, "the surviving children of *any* of my sons and daughters," (not "*said* sons and daughters,") as showing an intention to include all the testatrix's sons and daughters.

Mr. *Younge* and Mr. *Sydenham Clarke* appeared for other defendants in the same interest as the plaintiff. [*551]

Mr. *Jacob* and Mr. *Piggott*, for the defendant William Pond:—This case is different from those that have been referred to. Those cases proceeded on the rule of adhering to the strict meaning of the words in the will. In *Tytherleigh v. Harbin*, the gift was to the children of Robert Tytherleigh who should be living at the time of his decease, and the issue of such of them as should be then dead leaving issue; referring, in plain terms, to any one who should be then dead, without regard to the period of death. The expression in this will, "in case of the decease of any of my said sons or daughters," means, "in case of any of my sons or daughters whom I have before named, dying in the lifetime of Mary Pond." The words, "in case," naturally refer to futurity and not to an event that has happened many years

(a) Ante, vol. 6, p. 329.

(b) Ante, vol. 8, p. 360.

1839.—Jarvis v. Pond.

before. Besides, the testatrix says, "the surviving children of any of my sons or daughters to have their father's or mother's part." It is true that the parts of the sons and daughters who were living, were contingent. Those words, however, are applicable to presumptive parts; but they are entirely inapplicable to the part of a son or daughter who was dead at the date of the will, and, therefore, never, in any event, could have taken a part. In *Tytherleigh v. Harbin*, the issue were not to take their father's or mother's part, but the part which their parents or parent *would have been entitled* to if then living. It is obvious that the only difficulty in that case, was as to the construction to be put upon the words, "if then living." In *Giles v. Giles*, the testator bequeathed his residue in trust for all and every the children and child [*552] of his body living at the decease of "his wife; and, if any of such children should be dead at the decease of his wife and should leave issue, then the children of such his son or daughter were to be entitled to their parents' share; and your Honor held that no meaning could be affixed to the words, "such son or daughter," except, "child or children;" and there was nothing, in that case, to refer to a future death; and, consequently, there was no reason why the children of a daughter who was dead at the date of the will, should not be included in the bequest. In *Smith v. Smith(a)* the son who died was precisely within the words of the will; as he died in the lifetime of the testator's wife.

In this case it is impossible to hold that the words, "in case of the decease of any of my said sons or daughters," refer to the death of children who died several years before.

THE VICE-CHANCELLOR:—This is a very simple case.

The testatrix made her will at a time when one of her children, John, was dead; and of him no notice is taken. At the date of her will she also had two other children who were dead, and those were the only ones who left issue. She had also four other children, and then she makes her will [his Honor here read the bequests to John Gurr, Hannah Pond, William Pond, Samuel Pond, and Elizabeth Such,] and she takes notice that neither of the two last mentioned legatees had children. This affords a reasonable presumption that she was aware that Sarah and Gilbert had left children. [*553] Then she says: "also I give and bequeath to my daughter, Mary Pond, all the residue and remainder of my property, goods and chattels, subject to the payment of the above mentioned legacies, during her natural life." Now, it is plain, under this bequest, that neither Mary Pond, nor any of her children, could be intended to take any share of the residue. Then she says: "And after her decease, I will that the said property be equally divided between such of my sons and daughters as may be living at the time of the decease of the said Mary Pond." Now, there were no children who could answer the description of daughters, in the plural number, except

(a) Ante, vol. 8, p. 353.

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Elizabeth, who was alive, and Sarah, who was dead. Then the testatrix says: "And, in case of the decease of any of my said sons or daughters, the surviving children of any of my sons or daughters to have their father's or mother's part." It has been argued that the words, "in case of the decease," cannot be held to include predeceased children, but must be considered as applicable to living children alone. But it appears to me that the expression, "in case of the decease of any of my said sons or daughters," exactly comprehends a predeceased child. But you are not to take only those words, "in case of the decease," for, if you go on to what follows, you find what she means to do, namely, to provide for the contingency of children living at the death of Mary Pond, who should be children of sons or daughters who were then deceased; and then the expression, "in case of the decease," means only this: "in case any child or children shall be then alive who are the issue of any of my children who are then dead." So that it seems effectually to include the children of all those who were then dead, as well of those who were then living. And then she says: "To have their father's or mother's part to be equally *divided between them:" and though there is some [*554] violence in assigning a share to the father or mother, when they never would have taken any, yet it is plain that she intended that the children living at the decease of Mary Pond, should take a share of her property, and also that the children of such of her sons and daughters as should be then dead, were to take the shares which their parents would have been entitled to if they had been living at the death of Mary Pond.

There is not half so much difficulty in this case as there was in the case of *Collins v. Johnson*, reported in the note to *Smith v. Smith*,^(a) and yet it was held, there, that the children of deceased children took. *Tytherleigh v. Harbin*, and *Smith v. Smith* do not immediately apply to this case; but *Giles v. Giles* does, for there there was a child entitled to a portion, and it was held that the children of a deceased child would have taken; and, therefore, it appears to me that, on the plain words of this will, there is no difficulty.

Declare that such of the children of Gilbert Pond and Sarah Gurr as survived Mary Pond, the testatrix's daughter, are entitled respectively to such shares of the testatrix's residuary personal estate as their respective parents would have taken if they had survived Mary Pond.

(c) Ante, vol. 8, p. 356.

 1839.—Ex parte Marshall.

[*555]

*EX PARTE MARSHALL.

1839 ; 15th February.—Will ; Construction ; Mortgaged Estate.

A. being seized of the equity of redemption of lands in N., and also of the legal estate, as heir to his father, to whom he had mortgaged the lands in fee, devised his estates in N. and elsewhere, to trustees in trust to sell. Held, that the *legal estate* in the mortgaged property did not pass by the will.

IN 1796, R. Marshall made a mortgage of an estate situated in North Killingholme to his father in fee. The father died intestate as to the mortgaged estate, leaving R. Marshall his heir at law, and having appointed his wife and another person his executors. R. Marshall died in 1824, having, by his will dated in 1824, devised his estates in North Killingholme and all other his real estates to trustees in trust to sell. The mortgage was not paid off until after R. Marshall's death.

The question, on the hearing of a petition presented under 11 Geo. 4, and 1 Will. 4, c. 60, was whether the legal estate in the mortgaged premises was vested in the son and heir of R. Marshall, or in the devisees under his will.

Mr. *Sidebottom* and Mr. *Dugmore*, for the petition, contended that the equity of redemption in the estate of North Killingholme passed by the devise, but that the legal estate did not pass. *Fausset v. Carpenter*.(a)

THE VICE-CHANCELLOR :—The Lord Chancellor was not present when that case was decided in the House of Lords.(b)

[*556] *A will is a mere voluntary instrument ; and, it appears to me to be plain enough, in this case, that R. Marshall, could not intend to have a sale made of that estate which he could not have sold without committing a breach of trust : (c) therefore I shall declare that, according to the true construction of the will, the legal estate did not pass to the trustees, but descended to the testator's son and heir at law ; and that he is a trustee of it within the act.

(a) 2 Dow & Clark, P. C. 232.

(b) The Vice-Chancellor, on the case of *Fausset v. Carpenter* being cited, said that some important words, which he had added in his copy of the report, were omitted in the statement of the conveyance to Fausset. Those words were : " They and each of them granted the lands, and all the estate, right, title, trust, inheritance, property, claim and demand, either at law or in equity, of them and each and every of them, of, in, or to the said lands, &c."

(c) R. Marshall being, as it seems, a trustee of the mortgaged estate for the executors of his father.

1839.—*Stainbank v. Fernley.*STAINBANK *v.* FERNLEY.

1839; 13th February.—Joint Stock Company; Fraud; Parties.

The directors of a joint stock company, in order to sell their shares to advantage, represented in their reports and by their agents, that the affairs of the company were in a very prosperous state, and declared large dividends at a time when the affairs of the company were greatly embarrassed. A person who had been induced, by those means to purchase shares of one of the directors, filed a bill against that director, praying to be paid his purchase money, and offering to re-transfer the shares: a demurrer for want of equity, and because all the other partners ought to have been made parties, was overruled.

In 1834, a joint stock banking company called the Northern and Central Bank of England, was established at Manchester, and the defendant Fernley was appointed one of the directors. By the deed of settlement it was provided (amongst other things) that the capital of the company should be divided into 50,000 shares of 10*l.* each; that no subscriber should be considered as a proprietor until he had executed the deed; and that [*557] no transfer of shares should be made, without the consent of the directors being first obtained, nor until all calls thereon had been paid up, and all debts and engagements from the proprietors thereof to the company had been paid and satisfied.

At a general meeting of the company, held in April, 1836, the directors produced their accounts up to the 31st of December preceding, and made a report, in which they represented that the affairs of the company were in a most flourishing state, and that a dividend of 7*l.* per cent. could then be paid out of the clear profits: and a dividend to that amount was accordingly declared. In the early part of August, 1836, Mr. Johnston, a share broker at Manchester, strongly recommended the plaintiff to purchase shares in the bank, and, in order to overcome the disinclination which the plaintiff felt to become a purchaser of shares at that particular period, assured the plaintiff that he had private information, upon which he could depend, and which proceeded from the fountain head (meaning, as the plaintiff understood, the directors or their agents) that the bank was one of the most prosperous concerns in England, that a most favorable report of its affairs was then in preparation, and that a half yearly dividend of 8*l.* per cent. on each share would be declared at the next general meeting to be held at the end of the month, and that the shares would soon be at a premium of between 6*l.* and 7*l.* The plaintiff, confiding in these representations, which he was the more readily induced to believe in consequence of the previous favorable report of the directors and the declaration of the previous dividend, purchased of Johnston twenty-five shares at a premium of 5*l.* 7*s.* 6*d.* each. When the deed of transfer of these *shares, was brought to the plaintiff, he observed [*558] that the name inserted in it, as that of the vendor, was W. Robinson, upon which he asked Johnston who W. Robinson was: to which Johnston replied that he did not know, but that it was of no consequence as the bank

 1839.—*Stainbank v. Fernley.*

had accepted the transfer. At a meeting held on the 25th of August, 1836, a half yearly dividend of 8l. per cent. on each share was declared; and a report, by the directors, was printed and circulated, containing a still more favorable account than the prior one of the state of the company's affairs. The plaintiff received the dividend and executed the deed of settlement. In November, 1836, the directors were under the necessity of applying, for a large loan, to the Bank of England; and, upon the investigation which took place on that occasion, it appeared that the company's affairs owing, principally to the misconduct of the directors, were in a very embarrassed state, and that they had never been in such a state as to justify the directors in making the reports and declaring the dividends before mentioned; those reports and dividends having been made, and other fraudulent practices resorted to by the directors, in order to raise and keep up the price of shares in the market, so as to enable them to sell their own to advantage, to which the defendant Fernley and many of the other directors (to each of whom 1000 shares were originally allotted,) had done; and, in order to conceal such sales from the public, they, acting in concert together, effected the sales in the names of other persons as the owners.

The bill, to which W. Robinson as well as Fernley, was made a defendant, alleged, after stating as above, that the plaintiff had discovered that the shares which he had purchased, were not placed in Johnston's hands for [559] sale, by the owner thereof, but in the hands of T. Tesseyman, another share broker at Manchester, for that purpose: that Fernley employed Tesseyman as his broker for the sale of shares, and *that the shares sold to the plaintiff, together with many other shares belonging to Fernley, were placed, in Tesseyman's hands for sale, by Fernley, or by W. Robinson on his behalf:* that Fernley and Robinson, acting in privity and concert together, *or one of them*, gave instructions, to Tesseyman, to conceal from the purchaser, the name of the real owner thereof, and, for that purpose, to cause the name of Robinson or some other person to be inserted, as the vendor, in the deed of transfer: that, for better effectuating such concealment, Tesseyman, with the privity and at the instigation of Fernley and Robinson, *or one of them*, employed other brokers to effectuate sales of such shares, without communicating to them the name of the real owner thereof: that the twenty-five shares sold to the plaintiff, were part of the shares in the bank belonging to Fernley, which Tesseyman was instructed to sell as aforesaid in the name of Robinson, and Johnston and Tesseyman divided the usual commission on the sale thereof: that Johnston paid the purchase money, for the twenty-five shares, to Tesseyman, and Tesseyman paid it over to Fernley, and Fernley, or some one on his behalf, caused the deed of transfer to be prepared and the name of Robinson to be inserted therein as the vendor: that Johnston was induced to recommend the plaintiff to purchase the twenty-five shares in consequence of the representations, made by Fernley and the other directors, as before mentioned, and also by reason of the manager of the bank having, at the in-

1839.—*Stainbank v. Fernley*.

igation of Fernley, informed Johnston that the affairs of the bank were very prosperous, and advised him to purchase and to recommend his customers, to purchase shares, stating that they would shortly be at a premium of 6*l.* or 7*l.*: but if the plaintiff had known that the twenty-five shares belonged to Fernley, or any other director of the company, he would not have [*560] purchased them without further inquiry, and, if he had found that Fernley and other directors had disposed of their shares to any great extent, his confidence in the prosperity and stability of the bank would have been shaken, and he would not have purchased shares therein: that Fernley and the other directors, were privy to and approved of the reports and dividends made in April and August, 1836: that those reports and dividends were made by Fernley and the other directors, for the fraudulent purpose of serving their own private interest, and that they then well knew that the affairs of the bank were not in a condition to justify the making of them.

The bill prayed that it might be declared that the plaintiff was induced to purchase his shares by the aforesaid fraudulent representations and practices of the defendants; and that such purchase, as between him and the defendants, might be declared void, and that the defendants might repay to him the purchase money and the expenses of the transfer of his shares, with interest: the plaintiff being willing to pay or allow, to the defendants, the dividend which he had received and to re-transfer the shares; and that the defendants might indemnify the plaintiff from any losses that might arise to him in consequence of his having purchased the shares.

Fernley demurred for want of equity, and because all the partners in the bank ought to have been made parties to the bill.

Mr. *Knight Bruce* and Mr. *Koe*, in support of the demurrer:—No fraud on which this court can act is alleged, by this bill; and, if it were, it is not alleged with *sufficient certainty with respect to the party [*561] for whom we appear. It is not stated that any communication passed, between the plaintiff and Fernley, at the time of the sale. What took place after the sale, cannot be of any importance. The representations as to the prosperity of the bank, were vague, and were made, not to the plaintiff individually, but to the public at large; and even, if those representations had been made by Fernley to the plaintiff, the plaintiff would not be entitled to any relief on that account; for every vendor is at liberty to praise the article which he offers for sale, and it is the duty of the purchaser not to trust to the vendor's representations, but to ascertain, from other quarters, whether those representations are correct.

The plaintiff has no right to complain on account of Robinson's name having been used instead of Fernley's; for he never inquired who was the seller of the shares, until the deed of transfer was brought to him for signature, which was some time after he had purchased the shares; and if he had been told, at the first, that Fernley was the seller, that information would not have put him on his guard, as the twenty-five shares were a very small pro-

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portion only of the shares held by Fernley, and the plaintiff would not have known that any of the other directors were disposing of their shares. *Fellows v. Lord Gwydyr.* (a) Supposing, however, that any fraud has been practised on the plaintiff, he is not without remedy, as a court of law may give him damages. *Dobell v. Stevens.* (b)

[*562] This case is one of a joint stock company allowing the transfer of shares under certain restrictions. The plaintiff, on his own showing, has become a partner in the bank: for he states, in his bill, that he has purchased shares, executed the deed of settlement, and received a dividend: and he asks that his purchase may be declared void, and offers to re-transfer his shares to the defendants. But the retirement of one partner from a concern, and the introduction of a new partner, are, both of them, transactions in which all the other partners are interested. The deed of settlement too, in this case, expressly stipulates that no transfer of shares shall take place, without notice having been given to the directors and their consent obtained: but there is no allegation, in this bill, that any such consent has been obtained. A party who seeks to rescind a transaction, in a Court of Equity, must be able to restore the party with whom he has dealt, to his original position: but the property which the plaintiff has acquired, is so circumstanced that it is not in his power, in the absence of the other partners, to relinquish it, nor is it in his power to vest it in either of the defendants; for, in no case can a partner, without the concurrence of his copartners, withdraw from a partnership and admit another person into it. The plaintiff, therefore, cannot, in the absence of the other shareholders in this company, rescind the purchase which he has made; for he cannot place the party from whom he purchased, in the situation in which he originally was.

The case of *Blain v. Agar* (c) also shows that, in a case like the present the other partners are necessary parties.

[*563] *Mr. Jacob and Mr. Geldart appeared in support of the bill: but

THE VICE-CHANCELLOR, without hearing them, delivered judgment as follows:—Although the statements in this bill are not very methodically arranged, yet the different portions of it when taken together, are quite sufficient to make a very clear case against the defendant Fernley.

First, the bill represents that, at a general meeting of the company, held at Manchester, on the 28th of April, 1836, a report of the directors was read, giving an account of the affairs of the company, for the year ending the 31st of December, 1835, and representing them to be in so flourishing a state, that a dividend of 7l. per cent. could properly be paid out of the clear profits, and that such dividend was accordingly declared by the directors, on the amount of capital subscribed, being 10l. on each share. Then Mr. Johnston is introduced into the narrative, as the agent of Mr. Fernley, for the purpose of sell-

(a) Ante, vol. 1, p. 63, and 1 Russ. & Myl. 83. [90. n. 1.]

(b) 3 Barn. & Cres. 623.

(c) Ante, vol. 1. p. 37.

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ing some of his shares; and the bill alleges that, in the early part of August, 1836, Mr. Johnston, who was a respectable share broker at Manchester, strongly recommended the plaintiff to purchase shares in the company, and, in order to overcome the disinclination which the plaintiff expressed to become a purchaser of any shares at that particular period, he assured the plaintiff that he had private information, upon which he could depend, and which proceeded from the fountain head, (meaning, as the plaintiff then understood, either the directors of the bank or their agents,) that the bank was one of the most prosperous concerns in England; that a most favorable report of its affairs was then in preparation, and that a half yearly dividend would be declared, of, 8*l.* per cent. per annum, at the general meeting to be held at the end of that month, and that, after payment thereof, there would be a large surplus arising from the profits of the bank, and that the shares thereof would soon be at a premium of between 6*l.* and 7*l.*: that, confiding in the representations of Johnston, the truth whereof the plaintiff was more readily induced to believe by reason of the previous favorable report of the directors, and the declaration of the previous dividend, the plaintiff was induced by reason of such representations and the aforesaid previous report and the dividend thereby declared, to purchase, and, accordingly, agreed with Mr. Johnston, to purchase twenty-five shares in the company, at the price of 15*l.* 7*s.* 6*d.* each, being a premium of 5*l.* 7*s.* 6*d.* on every share beyond the amount of capital paid up. Then follows the report of the 26th of August, 1836, which verifies the predictions of Mr. Johnston. Then it is stated that, notwithstanding the allegation in that report respecting the steady and increasing prosperity of the bank, to the great surprise and disappointment of the plaintiff and the other purchasers of shares, the affairs of the bank became, shortly afterwards, so embarrassed, that the directors found it impossible to meet the engagements of the company without large pecuniary assistance, and they accordingly, in November, 1836, applied to the Governor and Company of the Bank of England, to make them large advances for that purpose, which the Governor and Company of the Bank of England agreed to do, and have, since, accordingly done to a large amount upon certain terms, one of which was, that the affairs and all the books and accounts of the said joint stock banking company, should be submitted to the investigation of certain directors of the Bank of England, and their solicitor [*564] and such persons as they should think fit to appoint as inspectors, to investigate the same; that the affairs of the joint stock banking company were accordingly investigated by the persons appointed by the Bank of England, and that, by means of such investigation, it was discovered, as the fact is, that the embarrassments of the bank had been occasioned, principally, by the misconduct of the directors; that the affairs thereof were never in such a condition as to justify the directors in making the reports and declaring the dividends aforesaid, and that such reports were made, and such dividends declared, and various other fraudulent practices were adopted by them, to

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raise the price of shares in the market, in order that they might benefit themselves by the sale of those allotted to them, at high premiums, and, in other ways, to benefit themselves individually. Then there is a distinct statement that, at the time when the report of April, 1836, was made, the clear profits of the bank, as was well known to the defendant Fernley, were not sufficient for the payment of a dividend of 7*l.* per cent. upon the subscribed capital, and, in order to make up the apparent profits sufficient for that purpose, the defendant Fernley and the other directors, estimated the value of 29,000 reserved shares of the bank then in hand, at 11*l.* each, or 1*l.* premium each, and, accordingly, included the sum of 29,000*l.* in the apparent profits of the year, although, in fact, none of those reserved shares had then been sold, and about 20,000 thereof still remain on hand. Then there is a charge as to the report of August, 1836, similar to the one before made respecting the report of April, 1836; and then there is a distinct charge, that 1000 shares were originally allotted to the defendant Fernley, and each of the other [*566] directors, and that the shares which were *sold were part of those shares. Then it is alleged that, at the time when Johnston recommended to the plaintiff, the purchase of the shares aforesaid, he had, in fact, been informed by Thomas Evans, the manager of the bank at Manchester, that the affairs thereof were in a very prosperous state and that a most favorable report of its affairs, which was then in preparation, would be made at the general meeting in August, 1836; and that Mr. Evans strongly advised Mr. Johnston to purchase and to advise his customers to purchase shares in the bank at the then current price, stating that they would soon be at a premium of between 6*l.* and 7*l.*: that such representations were made, to Mr. Johnston, and also to other brokers and persons at Manchester, by Mr. Evans as the agent, and with the privity and at the instigation of the said John Fernley and other directors of the said bank, for the purpose of raising the price of the shares in the market: that, by means of such fraudulent contrivances, the said John Fernley has been enabled to effect sales of, and has, in fact, sold at a high premium, nearly the whole of the shares allotted to him, and has, thereby, realized profits to the amount of many thousand pounds.

Now, putting all these statements together, it appears to me to be distinctly alleged that false representations were made, by the directors and their agents, to induce the public to purchase their shares at a price which they were not justified to ask, having regard to the foundation on which that price was asked. Therefore, in my opinion, quite a sufficient case is stated, on this bill to induce the court to relieve as against the defendant Fernley.

[*567] Next, with respect to the objection for want of *parties. The bill asks that the transaction between Fernley and the plaintiff may be rescinded, and that Fernley may be ordered to repay, to the plaintiff, the purchase money for the shares, that the plaintiff may re-transfer the shares to him, and that he may indemnify the plaintiff against any losses that he may sustain by reason of his having become the purchaser of the shares. Now, what

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y of the other partners has to do with this, I confess that I am at a loss to understand.

My opinion, therefore, is that the demurrer must be overruled.[1]

 SHEPPARD v. DUKE.

39; 19th February.—Legacy; Statute of Limitations.

The 40th section of the statute of limitations, 3 and 4 Will. 4, c. 27, applies to legacies payable out of personal estate as well as to legacies charged on real estate.

THE bill was filed, against the executors of a testator whose will had been proved more than twenty years before the commencement of the suit, to compel payment of pecuniary legacies given to the plaintiffs, and payable out of the testator's personal estate only. The defendants pleaded the 3 and 4 Will. 4, c. 27, s. 40.

That act is intitled "an act for the limitation of actions and suits *relating to real property*, and for simplifying the remedies for trying the rights thereto." It enacts, amongst other things: that, after the 31st day of December, 1833, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to "some person capable of giving" [568] a discharge for or release of the same, unless, in the meantime, some part of the principal money or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent; and, in such case, no such action or suit or proceeding shall be brought, but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given. Sect. 40. That, after the said 31st day of December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided, nevertheless, that, where any prior mortgagee or other incumbrancer shall have been in possession of any land or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any

[1] Vide *Seddon v. Connel*, 10 Sim. 79, 86.

CASES IN CHANCERY.

Sheppard v. Davis

this I confess that I am at a loss to
not be overruled. [X]

Dearman v. Wyche.

WYCHE.(a)

Answers; Plea and Pleading.

may be pleaded to a bill of foreclosure.
The money secured by the mortgage.
ought not to deny, by answer, state-
ments necessary to support the plea;
confined to those statements in the bill which
are of statements which are directly negated by

of lease and release by way of mortgage, dated
1811, whereby certain freehold premises were con-
veyed, redeemable on payment of 3000*l.* and interest at
months from the date of the indenture of release: that
the 3000*l.* having been paid off, the above mortgage was on the
2d of April, 1812, at the request and by the direction of Andrews, assigned to
his heirs and assigns, redeemable on payment of 2000*l.* and
interest at the end of twelve months from the 2d of April, 1812: [*571]
that the sum of 2000*l.* was not paid at the time lastly specified:
that, upon the marriage of Andrews, the mortgagor, the equity of redemp-
tion of the premises, was, by an indenture dated the 23d of April, 1812, con-
veyed to trustees, of whom Reeve, the mortgagee, became the survivor, upon
certain trusts for securing 6000*l.* to the trustees, for the benefit of Andrews,
his intended wife and the issue of the marriage, subject nevertheless to the
mortgage debt of 2000*l.*: that Reeve died in September, 1829, having by
will appointed the plaintiffs Dearman and Hancock, his executors, but,
without having devised the legal estate in the mortgaged premises. The
will then stated that the legal estate in the mortgaged premises had become
vested, by devise from Reeve's heir, in the plaintiffs Hancock and Chipchase:
that, in October, 1829, the plaintiffs Dearman and Hancock, proved the will
of Reeve in the proper Ecclesiastical Court: that, in September, 1834, a fiat
in bankruptcy was issued against Andrews, under which he was declared a
bankrupt, and all his estates and effects were, by the usual bargain and sale,
vested in the defendants Wyche and Graham: that Andrews, after the date
and execution of the indentures of mortgage and up to the time of his bank-
ruptcy, was, as mortgagor, in the possession and receipt of the rents and pro-
fits of the mortgaged estates, save only that *Reeve was, for a short time
after the year 1820, in the possession and receipt of such rents and profits:*
that the defendants Wyche and Graham had, ever since the bankruptcy,
been in the possession and receipt of the rents and profits: that Andrews
was in the possession of the premises up to the 24th of July, 1833, and his
possession was not adverse to the right or title of Reeve or of the
plaintiffs. The bill then charged, in detail, that the sum of 2000*l.* [*572]

(c) The Reporter is indebted to his friend Mr. Nicholl for the above report.

1839.—*Sheppard v. Duke.*

person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover, in such action or suit, the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years. Sect. 42. That, after the said 31st day of December, 1833, no person claiming any tithes, legacy, or other [*569] property for "the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same, but within the period during which he might bring such action or suit at law or in equity." Sect. 43.

Mr. *Lowndes*, in support of the plea:—Although the title of the act relates to real estate, and the general tendency of the act is to real estate, yet, in the 40th sect. are introduced these words, "or any legacy," on which this plea depends. The act does not say that it shall be a legacy charged on real estate, nor is there anything to restrict it to a legacy charged on real estate.

Mr. *Wakefield* and Mr. *Jemmett*, in support of the bill:—The title of the act shows that it was meant to apply to real estate only; and, until we come to the 42d sect., we find nothing but what relates to real estate. *Phillipo v. Munnings*, (a) *Paget v. Foley*. (b)

THE VICE-CHANCELLOR:—The 40th sect. of the act introduces the words, "or any legacy," after it has enumerated those things which are charged on land. Therefore those words come in quite separately from those things which are charged on land.

Is not the use of the word "legacy," in the 43d sect. evidence that, when the Legislature uses that word, it must mean a legacy capable of being sued for in the Ecclesiastical Court, that is, a legacy payable out of personal estate only? It seems to me impossible to get "over the inference that arises on that section. For it would be absurd to say that, when that section limits the time for instituting a suit in the Ecclesiastical Court for a legacy, it means a suit for payment of a legacy charged on land; when, if an attempt were made to enforce, by a suit in the Ecclesiastical Court, the payment of a legacy charged on land, a prohibition would issue as a matter of course.

Plea allowed.[1]

(a) 2 Myl. & Craig, 309.

(b) 2 Bin. N. C. 679.

[1] Vide *Dinsdale v. Dudding*, 1 Yo. & Coll. C. C. 269; *Portlock v. Gardner*, 1 Haro, 604.

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DEARMAN v. WYCHE.(a)

19: 19th February and 24th July.—Statute of Limitations; Plea and Pleading.

A statute of limitations (3 and 4 Will. 4, c. 27, sect. 40,) may be pleaded to a bill of foreclosure. A foreclosure suit being, in fact, a suit for the recovery of the money secured by the mortgage. A plea of the statute of limitations (3 and 4 Will. 4, c. 27,) ought not to deny, by answer, statements in the bill which are in direct contradiction to the averments necessary to support the plea; but an answer in support of the plea, ought to be confined to those statements in the bill which allege facts ancillary to or as affording evidence of statements which are directly negated by the requisite averments in the plea.

THE bill stated indentures of lease and release by way of mortgage, dated the 19th and 20th of July, 1811, whereby certain freehold premises were conveyed, by Andrews to Gore, redeemable on payment of 3000*l.* and interest at the end of twelve months from the date of the indenture of release: that 1000*l.* part of the 3000*l.* having been paid off, the above mortgage was on the 1st of April, 1812, at the request and by the direction of Andrews, assigned to Reeve, his heirs and assigns, redeemable on payment of 2000*l.* and interest at the end of twelve months from the 2d of April, 1812: [*571] that the sum of 2000*l.* was not paid at the time lastly specified: that, upon the marriage of Andrews, the mortgagor, the equity of redemption of the premises, was, by an indenture dated the 23d of April, 1812, conveyed to trustees, of whom Reeve, the mortgagee, became the survivor, upon certain trusts for securing 6000*l.* to the trustees, for the benefit of Andrews, his intended wife and the issue of the marriage, subject nevertheless to the mortgage debt of 2000*l.*: that Reeve died in September, 1829, having by his will appointed the plaintiffs Dearman and Hancock, his executors, but, without having devised the legal estate in the mortgaged premises. The bill then stated that the legal estate in the mortgaged premises had become vested, by devise from Reeve's heir, in the plaintiffs Hancock and Chipchase: that, in October, 1829, the plaintiffs Dearman and Hancock, proved the will of Reeve in the proper Ecclesiastical Court: that, in September, 1834, a fiat in bankruptcy was issued against Andrews, under which he was declared a bankrupt, and all his estates and effects were, by the usual bargain and sale, vested in the defendants Wyche and Graham: that Andrews, after the date and execution of the indentures of mortgage and up to the time of his bankruptcy, was, as mortgagor, in the possession and receipt of the rents and profits of the mortgaged estates, save only *that Reeve was, for a short time after the year 1820, in the possession and receipt of such rents and profits*: that the defendants Wyche and Graham had, ever since the bankruptcy, been in the possession and receipt of the rents and profits: that Andrews was in the possession of the premises up to the 24th of July, 1833, and his possession was not adverse to the right or title of Reeve or of the plaintiffs. The bill then charged, in detail, that the sum of 2000*l.* [*572]

(a) The Reporter is indebted to his friend Mr. Nicholl for the above report.

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had been duly and *bona fide* advanced by Reeve; that the same had never been repaid or in any manner acknowledged to have been repaid to him, and that, if any part had been repaid, the same had been so repaid within twenty years of the filing of the bill: that, previously to and on the 24th of July, 1833, and subsequently thereto, negotiations were going on, between the plaintiffs and Andrews, as to payment by him of what was due on the mortgage, and, in such negotiations, he treated himself as mortgagor and the plaintiffs as mortgagees, and admitted that he held the premises as mortgagor subject to their right: that, previously to and on the 24th of July, 1833, an agreement in writing had been drawn up, to which Andrews was a party, and, therein, the title of Reeve, as mortgagee, and of the plaintiffs, as representing him, was admitted by Andrews: *that the defendants had formerly and have now in their possession, custody, or power, &c., divers deeds, &c., whereby, if produced, the truth of the several matters aforesaid would appear, and they ought to set forth a list thereof*: that Andrews, in 1834, before he became bankrupt, and at various other times within twenty years before his bankruptcy and the time of filing this bill, admitted, in writing the right of Reeve to the sum of 2000*l.*: that Andrews, shortly before the year 1834 and in the years 1830, 1831, 1832, 1833, and within twenty years before he became bankrupt and the time of filing this bill, paid interest upon the sum of 2000*l.* to Reeve, or Reeve was allowed such interest in account between them. The bill prayed the usual decree of foreclosure, and that all title deeds, &c. in the hands of the defendants might be delivered up to the plaintiffs, and for further relief.

[*573] *To this bill the defendants, Wyche and Graham, put in the following plea:—These defendants, by protestation, &c. to all the discovery and relief sought by the bill, do plead, and for plea say, “That by an act of Parliament made and passed in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled an act for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto, it is enacted that, after the 31st day of December, 1833, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless, in the meantime, some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given, in writing, signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent, and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given. And these defendants further say, that the principal sum of

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2000*l.* and the interest thereof, secured by the indentures of lease and release of 1st and 2d April, 1812, were, by the same indenture of release, made payable to Reeve on the 2d day of April, 1813: and that a present right to receive the same principal and interest did accrue to Reeve, being a person capable of giving a discharge for or release of the same, more than twenty years before the filing of the "original bill in this suit; but these [*574] defendants aver that no part of the principal sum of 2000*l.*, or the interest thereof, nor any sum of money in respect of principal and interest or of either of them, was ever paid, by these defendants or either of them, or by any person as their or his agent or on their or his behalf, or by Andrews, or by any person as his agent or on his behalf, or by any person or persons whomsoever by or from whom the principal sum of 2000*l.* or the interest hereof or any part thereof, was payable, unto Reeve or unto any person as his agent or on his behalf, or unto the plaintiffs or either of them, or unto any person or persons as the agent or agents, or on behalf of the plaintiffs or any or either of them, or at any time within twenty years next before the filing of the bill of complaint: and these defendants do further aver that no acknowledgment of the right of the plaintiffs or of any or either of them, or of Reeve, to the principal sum of 2000*l.* secured by the last mentioned indentures or the interest thereon or to any part thereof respectively, has ever been given in writing signed by these defendants or either of them, or by any agent of them or either of them, or by Andrews or his agent, or by any person or persons interested in the hereditaments and premises comprised in the last mentioned indentures or in any part thereof, to the plaintiffs or any or either of them, or any agent of them or of any or either of them, or to Reeve or any agent of his at any time within twenty years next before the filing of the original bill of complaint in this suit. All which, &c."

The above plea now came on to be argued.

Mr. *Jacob* and Mr. *Bethell*, in support of the plea.

Mr. *Knight Bruce* and Mr. *Richards*, for the bill.

"THE VICE-CHANCELLOR:—It seems to me, although I am sorry [*575] to be obliged to do so, that I must allow this plea. For, although it has been said that a bill of foreclosure only seeks the exclusion of an equity, yet it is, in substance, a suit in equity for the recovery of money.[1] If the opinion of any counsel were asked how money due upon mortgage could be recovered or got in, he would, at once, advise a bill of foreclosure. It is a suit to recover money; and, notwithstanding all the objections which have been made to this plea in point of form, I think that the plea is good; but I that, upon the case itself, the plaintiffs should have leave to amend; and it also seems to me that I ought not to give costs. It is a new question upon the statute. There is a further reason for this (of course, I am influenced by

[1] *Acc. Du Vigier v. Lee*, 2 Hare, 239. Therefore, in a decree for selling mortgaged estate, provision ought to be made for the payment of the surplus to the mortgagor. *Downing v. Palmateer*, 1 Monroe's (Ky) Rep. 66.

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what appears on the face of the bill,) and, according to the case there stated, this is no plea of merits; but, as the case stands on the face of the bill, there is nothing whatever to prevent the plaintiffs from bringing an ejectment. Then the assignees of the mortgagor, would be driven to file a bill to redeem, and would be obliged to offer to pay the money really due as the terms of ransoming their estate.

It certainly appears to me that the framers of this statute did not sufficiently consider what they were about :[1] for, although there is this restriction upon a suit to recover the money, yet, if the decision in *Doe v. Williams*(a) as to adverse possession, be correct, and I confess it appears to me to be so, there is no commensurate restriction upon a corresponding suit for recovery of the land.

Plea allowed without costs.—Leave to amend.[2]

[*576] *The bill was amended in March, 1839.—The amendments stated:

that the right to receive the mortgage money did not accrue to any person until the end of twelve months after the date of the indenture of assignment of the mortgage: that, within four months after the date and execution of that indenture, Reeve became and was incapable of giving a discharge for or a release of the mortgage money, and so continued until after the year 1820: that Andrews did not, at the execution of the indenture of assignment of the mortgage, deliver, to Reeve, all the title deeds to the premises, but retained divers of them in his own possession: that the plaintiffs intended to bring an action of ejectment to recover possession of the premises, but they were and would be unable to proceed effectually therein, partly from want of the said title deeds, and partly from their having lately discovered that, at and before the execution of the indenture of mortgage, there were certain outstanding satisfied terms and legal estates vested in other persons, but on trust to attend the inheritance of the premises: that Andrews concealed from Reeve the existence of such outstanding terms; and that the defendants had, within the last six years, fraudulently procured the same to be conveyed to them, and intended to set up the same in bar to any proceedings at law which might be taken by the plaintiffs, to recover possession of the premises: that Andrews promised to sign and execute an agreement of reference: and, on that promise, the plaintiffs abstained from instituting proceedings touching the mortgage, and delivered over to Andrews, such of the

(a) 5 Adol. & Ell. 291.

[1] Wigram, V. C., in *Du Vigier v. Lee*, 2 Hare, 332, hints a similar opinion, in no equivocal language. "That the greatest care is necessary in construing the act, must, I think, be admitted by every one who has attended to its history, &c." Crude and hasty legislation has no locality.

[2] This portion of the above case was elaborately reviewed by Wigram, V. C. in *Du Vigier v. Lee* (2 Hare, 326,) who appears to give his sanction to the judgment of Sir L. Shadwell. The decision turned, however, so much upon the construction of the statutes, 3 and 4 Will. 4, c. 27, and 3 and 4 Will. 4, c. 42, that the Editor does not deem it of importance to introduce a statement of the case, or any abstract from the judgment.

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title deeds of the premises as were in their possession; but, Andrews afterwards fraudulently evaded signing the agreement: that, subject to the mortgage in which Reeve was beneficially interested, he was a trustee of the premises and of the charges *thereon, created by the before mentioned indenture of the 23d of April, 1812, for Andrews, his wife and children: *that Reeve was, for a short time after the year 1820, in the receipt of the rents and profits of part of the mortgaged premises, and he applied part of the rents and profits in satisfaction of part of the interest then due to him on the first mentioned mortgage, and other part thereof, in satisfaction of interest due on the said second charge: that, afterwards, Andrews was permitted to enter into the possession and receipt of the rents and profits of the premises, and he continued in such possession or receipt by an arrangement with Reeve; and, in consideration of his being permitted to receive the rents and profits, Andrews promised to account for the same to Reeve; but he fraudulently omitted to do so: that, between 1820 and 1830, various payments were made, by or on behalf of Andrews, to Reeve, in respect of the interest on the mortgage and of the interest on the charge created by the indenture of the 23d of April, 1812, but the precise amount of the sums to be applied towards the satisfaction of the interest due on each of those incumbrances, was not fixed; and disputes had arisen between the parties to the two incumbrances, as to the proportions of the sums which were to be credited as against each of the incumbrances: that one Green had many dealings with Andrews; and that Green was in partnership with and had many dealings with Reeve; and it was arranged, between Andrews, Green and Reeve, that Green should give, and he accordingly, at divers times after the year 1820, did give credit to Reeve, in the accounts between Reeve and Green, for certain sums in respect of the interest due to Reeve on the mortgage, and Green afterwards debited Andrews with those sums: that, after 1820, accounts were settled between Green and Reeve, in which *Reeve had credit for sums due to him for [577] interest on the mortgage, and the balances of the accounts were paid to Reeve, and, thereby, part of the interest due on the mortgage was satisfied: that Green was the agent of Andrews touching the mortgage: That, in 1820 and subsequently, a part of the interest due on the mortgage to Reeve, was paid and satisfied to Reeve by Andrews: that, in 1820 and subsequently, part of the interest due on the mortgage was paid and satisfied to Reeve, by or on behalf of other parties interested in the equity of redemption: that, subsequently to the year 1820, acknowledgments, in writing, of Reeve's right to the principal money were signed by Andrews, and the other parties interested in the equity of redemption, and also by the agents of Andrews and the said other parties, and, particularly, by Green, and were given to Reeve; but Andrews, afterwards, got such acknowledgments into his possession fraudulently, whilst the negotiations for the agreement of reference were going on; and he had since destroyed divers of the same: [578]*

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*that the defendants had frequently admitted that such written acknowledgments were so signed and given: that, in the deeds and documents of title relating to the premises which were in possession of the defendants, there were endorsements and memoranda which evidenced and showed the title of the plaintiffs to the premises, and their right to the principal money secured thereon; and the truth of the several matters therein alleged, and which showed, in particular, that the principal sum of 2000*l.*, with a large arrear of interest, was still due and owing to the plaintiffs on the security of the premises: that, after 1820, arrangements were made, between Reeve, Andrews and Green by which it was agreed between them, that* [*579] *part of the interest due on the mortgage should be considered and treated as paid and "satisfied; and the same was, accordingly, so considered and treated: that there formerly had been, and then were, books of account in which entries were made touching the mortgage and the dealings and transactions connected with the same, and such entries established and made out the matters and things therein alleged; and the said books then were in the possession of the defendants: that a full and true discovery, by each and every of the defendants, of the matters therein alleged, would make out and establish the divers matters and things therein alleged.*

The prayer of the bill was amended by praying, in addition to the original relief sought, that the defendants might be restrained from setting up any outstanding term or legal estate as a defence to any proceedings at law which the plaintiffs had instituted, or should thereafter institute, in order to obtain possession of the premises.

To the bill thus amended, the defendants, Wyche and Graham, put in a second plea and answer as follows:—The plea of, &c., to part, and the answer of the same defendants to the residue of the amended bill of complaint. These defendants, &c., to all the relief sought by the bill, and also to all the discovery thereby sought, except the discovery sought by or in respect of so much of the bill as prays that these defendants may answer and set forth. [The plea then excepted all the passages in the original and amended bills which are marked in italics, following, in such exception, the] [*580] *language of the interrogating part of the bill.* These *defendants do plead in bar, and for plea say, &c. The plea of the statute of limitations was then set forth in the same language as that used in the first plea. The defendants then, by answer, denied all the excepted passages.

Mr. Jacob and Mr. Bethell in support of the second plea.

Mr. Knight Bruce, Mr. Richards, and Mr. James Russell for the bill:—When this case was before the court, on a former occasion, your Honor was of opinion that no impediment was shown preventing the plaintiffs from proceeding in a court of law; and you decided that a bill of foreclosure is, in substance, a bill to recover the mortgage money, and is not, as was then contended, a proceeding ancillary to the recovery of the money by

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excluding an equity attendant on the recovery of it at law. The bill, as now amended, states grounds for equitable interference, namely, that the plaintiffs cannot proceed at law by reason of outstanding terms; and it seeks relief in that respect. There are also allegations of fraud, which exclude the operation of the statute; fraud being, in equity, an exception to a legal bar.

The statute 3d and 4th Will. 4, c. 27, received the royal assent on the 24th of July, 1833. The original bill was filed on the 2d of June, 1837, within the period limited by the 15th section. *Doe v. Williams.*(a) This case is peculiarly circumstanced. Reeve was first *mortgagee: and [*581] he was also, as surviving trustee of the marriage settlement of the mortgagor, a second mortgagee of these premises. The possession of Andrews was the possession of a *cestui que trust*, and, therefore, was not adverse to his trustee. There are various particular charges of dates and sums which would avoid the plea, which are neither traversed or denied.

Mr. Jacob, in reply:—This is a plea of a statute creating a bar to a claim, and is in the nature of a negative plea. Such a plea requires averments to support it, and a denial by answer, of statements in the bill directly negatived by the averments in the plea, would overrule the plea. A plea of this kind must deny, by answer, facts stated as ancillary to, or as affording collateral evidence of those statements in the bill which, being in direct contradiction to the requisite averments of the plea, are met by those averments: but must not deny the averments themselves. *Denys v. Locock.*(b) It is said that this bill can now be sustained as seeking to restrain the setting up of outstanding terms. The discovery of those terms is first stated in the amended bill, which is dated in March, 1839. At that time the five years allowed by the 15th section of the act, had passed, and all proceedings at law were completely barred. The *plaintiffs have shown no impediment pre- [*582] venting them, previously to such discovery, from proceeding at law. Amendments of this nature cannot have reference back, in point of date, to the time of filing the original bill.

The bill prays a delivery up of the title deeds. That it is only relief ancillary to the real and substantial relief sought, which is the recovery of the mortgage money. The court, seeing that the substantial relief is gone, will not grant ancillary relief, which would be useless.

24th July.—THE VICE-CHANCELLOR:—When the objections which have been urged against the validity of this plea, were first brought to my atten-

(a) 5 Adol. & Ell. 291. The 15th section of the act enacts: that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not, at the time of the passing of this act, have been adverse to the right or title of the person claiming to be entitled thereto, then such person or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited, shall have expired, make an entry or distrain, or bring an action to recover such bond or interest, at any time within five years next after the passing of this act."

(b) 3 Myl. & Cr. 205.

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tion, I own that I considered them forcible and valid objections; they have however, been removed by Mr. Jacob in his reply.

Where it is evident that the only claim which a party has to the assistance of a Court of Equity, is this, namely, that as a mortgagee, he is entitled to require the interference of the court to remove legal impediments to his recovering, what he is entitled to, in a court of law, and the court sees that his remedy at law is barred, it will not interfere to assist him, as it would to assist a plaintiff who, no legal bar existing, was bringing an action of ejectment and asking the court to restrain the setting up of legal obstacles to that action.[1] If the plea is right, the plaintiffs are precluded from recovering the mortgage money in a court of law; and this court will not assist them to recover what it sees they have no right to recover.[2]

I certainly think that this plea has very properly denied, by answer, [*533] those matters, and those matters *only which, had they not been so denied, would have avoided the plea. And I am only surprised, considering the various statements which have been introduced into the bill for that purpose, that the pleader has succeeded in answering only those passages of the bill, which, in my opinion, he was alone bound to answer, leaving those, which, if answered, would have overruled his plea, to be met by the averments of the plea.

I think that the plea is right, and that it must be allowed.

Plea allowed.[3]

[1] Vide *Jermy v. Best*, 1 Sim., 373.

[2] Vide *Du Vigier v. Lee*, 2 Hare, 326.

[3] "A pure plea of the statute [of limitations] is no bar, where there are circumstances stated in the bill, which take the case out of it, as an offer to account, an acknowledgment of the debt, a promise to pay, or to do what was right and just, or a promise to pay when assets came to hand, unless the plea be accompanied with an averment or answer, destroying the force of these circumstances." Kent, Ch., *Kane v. Bloodgood*, 7 Johns. Ch. Rep. 134. Story, J. speaking of the plea of the statute of limitations in the particular case before him, says: "It is a dry, naked plea of the statute of limitations, without any averments negating the special matters set up in the bill, which, if true, would avoid the operation of the statute. I take it to be clear, that the plea should contain in itself such averments; and the answer in support thereof should also contain a full discovery of the matters so set up in avoidance of the bar. It is not sufficient for the answer alone to negative such matters; for it is mere matter of discovery; but the plea should in itself, if true, contain a complete bar." *Stearns v. Page*, 1 Story's Rep. 212. As to the plea of the statute of limitations, and the answer by which it should be supported, see further, *The People v. Everest*, 4 Hill, 72. *Foley v. Hill*, 3 Myl. & Cr. 475, 481; n. 2. *Harpending v. The Minister, &c. of the Reformed Protestant Dutch Church of the City of N. Y.*, 16 Peters, 455. *Goodrich v. Pendleton*, 3 Johns. Ch. Rep. 384. *Kane v. Bloodgood*, 7 Johns. Ch. Rep. 90. *Bogardus v. Trinity Church*, 4 Paige, 178. *Jermy v. Best*, 1 Sim. 373. *MacGregor v. The East India Co.*, 2 Sim. 452. *Forbes v. Skelton*, 8 Sim., 335. As to answer overruling plea, see further *Denys v. Locoek*, 3 Myl. & Cr. 235. *Kay v. Marshall*, 1 Keen. 197, and n. 1, *ibid.* *Bogardus v. Trinity Church*, 4 Paige, 196. *Weed v. Smull*, 7 Paige, 573. *Chadwick v. Broadwood*, 3 Beav. 540. Story's Eq. Plead. § 688.

 1839.—Allison v. Herring.

*ALLISON v. HERRING.

1830: 25th and 26th February.—Account; Solicitor and Client; Jurisdiction.

A committee appointed by the inhabitants of M., employed the plaintiffs, as their solicitors, to apply, to Parliament, for an act for constructing a dock. The plaintiffs, in the course of their employment, paid considerable sums to engineers, witnesses, parliamentary agents, and various other persons; and a large sum became due to them for their own costs, and several liabilities were existing against them. The plaintiffs at different times received, through bankers and others, various sums on account of what was due to them, but were unable to obtain payment of the balance: upon which they filed a bill against some of the members of the committee, alleging that, of the other members, some were out of the jurisdiction, and others were dead and their personal representatives unknown, and praying that the defendants might come to an account with them, and pay to them the balance, (which was stated to be 3232*l.* 1*s.* 4*d.*.) or such balance as, on taking the account, should be found due, and also to indemnify them against the existing liabilities. A demurrer to the bill was allowed.

At a meeting of inhabitants of Monkwearmouth, held in November, 1831, a committee was formed consisting of certain persons, some of whom were the defendants to the bill, for the purpose of constructing a dock on the north side of Sunderland Harbor; and the plaintiffs, Messrs. Allison & Abbs, were appointed by and *as the solicitors of the committee, to [*584] take the preliminary steps and to conduct an application to Parliament, during the then ensuing session, for obtaining an act for carrying the undertaking into effect; and they were also instructed, by the committee, to take the requisite measures for opposing a bill which had been introduced, into the House of Commons, by other parties, for constructing a dock on the south side of the harbor. The plaintiffs succeeded in procuring that bill to be rejected by a committee of the House of Commons, and also in getting their own bill passed by that House: but it was rejected, by the House of Lords, on the 16th of July, 1832.

The bill which was filed against twenty-five members of the committee, alleged, after stating as above, that the plaintiffs, in the progress of such proceedings, up to, and after that day, incurred considerable costs, charges, and expenses, and laid out divers sums of money, and became entitled to considerable sums for their fair and just charges, and remuneration for their pains, trouble and professional services as such solicitors of the committee, amounting to 7068*l.* 13*s.* 5*d.*, besides existing liabilities to the amount of 293*l.* 1*s.* 5*d.*, against which the committee ought to indemnify the plaintiffs: that the committee had paid the plaintiffs, in respect thereof, divers sums of money, amounting, in the whole, to 3856*l.* 12*s.* 1*d.*, and there still remained due, to the plaintiffs, the balance of 3232*l.* 1*s.* 4*d.*, besides the said existing liabilities: that the plaintiffs, on the 25th and 26th days of June, 1838, caused a statement of account, signed by them, (a true and correct copy whereof was annexed to the bill,) to be delivered to each of the defendants. The bill charged that the defendants and the other members of the committee alone *employed the plaintiffs, on their own account; and that the [*585]

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committee obtained certain voluntary subscriptions of specific amounts in aid of their own liability towards the general expenses of the said proceedings, and not merely the expenses of the plaintiffs, in respect of which subscriptions, they had received more than they had paid to the plaintiffs, and some of which subscriptions they had neglected to recover, and that such subscriptions were obtained by and as liabilities incurred to the committee and not the plaintiffs, and the plaintiffs never had any remedy for the recovery thereof: that, of the other members of the committee, some were dead and their personal representatives were unknown to the plaintiffs, and the others were residing out of the jurisdiction of the court, in places unknown to the plaintiffs, and such representatives and other members, were too numerous to be made parties to the suit. The bill contained the usual charge as to the defendants having, in their possession, books, &c., relating to the matters aforesaid: and it prayed that they might be decreed to come to a just and fair account with, and to pay to the plaintiffs, the balance of 323*l.* 1*s.* 4*d.*, or such balance as should, on taking such account, be found due to the plaintiffs, and also to indemnify them against the liabilities amounting to 293*l.* 1*s.* 5*d.*

The copy of the account which was annexed, by way of schedule, to the bill, contained, on the debit side, sums paid to engineers, surveyors and witnesses, and to different persons for printing and advertisements, boring for foundations, coach hire, tavern expenses, &c. The largest items were the parliamentary agent's bill, bill of costs, charges and expenses including counsels' fees *and bill of costs exclusive of agency. On the credit side were entered sums remitted to the plaintiffs through different bankers and received by them from different individuals, not parties to the suit. The largest item on this side of the account was, "By cash for subscriptions paid to Wm. Allison, 650*l.* 14*s.*" The items in the list of liabilities were of the same description as those contained on the debit side of the account.

Twenty-three of the defendants demurred to the bill for want of equity, and because the personal representatives of such of the late members of the committee as were stated, in the bill, to be dead, were not made parties to the suit.

Mr. Jacob and Mr. Stevens, in support of the demurrer:—There is nothing in this case which affords any ground for coming into equity. The object of the plaintiffs is, merely, to obtain payment of their bill of costs, but there is no privilege which entitles a solicitor or a parliamentary agent to sue, in this court, for that purpose. The plaintiffs ought to have brought an action, selecting two or three of the most wealthy members of the committee as defendants. There is no pretence of any disputed account, or that there is any impediment to the plaintiffs proceeding at law, nor are there any cross demands. It is laid down, in *Dinwiddie v. Bailey*,(a) that, in order to sus-

(a) 6 Ves. 136.

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tain a bill for an account, there must be mutual demands. The allegation that some of the members of the committee are dead and that their personal representatives are unknown to the plaintiffs, is not sufficient to dispense with their being made parties. *The plaintiffs ought to have [*587] added, that the defendants knew, but refused to discover who the personal representatives were. Besides, the allegation is in the conjunctive, and is quite consistent with the plaintiffs knowing who are the representatives of all the deceased members except one.

Mr. Knight Bruce and Mr. Willcock, in support of the bill:—The subject of the demand is a bill of costs not taxable. In a case between principal and agent, the mere statement of a bill of such magnitude as is due to these plaintiffs, is quite sufficient; and, moreover, there have been receipts and payments on both sides. The schedule annexed to the bill, shows that various payments have been made by the plaintiffs, and that sums have been received, by them, from different individuals; and also that there are several liabilities outstanding against them: so that it is not the common case of a bill of costs, but it is a fit subject for a bill for an account. Besides, an order for taxation is equivalent to a decree for an account; and, as the plaintiffs are precluded from taxation, they are entitled to a decree for an account; more especially as the case is of such a nature that no jury could do the plaintiffs justice. *Cockburn v. Thompson*,^(a) *Cullen v. The Duke of Queensberry*,^(b) This latter case shows that, when there is a great number of persons liable to be sued, a court of equity, in order to prevent the remedy from being lost, will act against some of them. *Horsley v. Bell*,^(c) *Meriel v. Wymondsold*,^(d) *Douglas v. Horsfall*,^(e) **Meux v. Maltby*,^(f) [*588] *Eaton v. Bell*,^(g) *Horsley v. Bell* is this very case; and, if the court allows this demurrer, it will overrule that case.

The allegation that some of the members of the committee are dead and their personal representatives unknown to the plaintiffs and that others are resident out of the jurisdiction, is in the ordinary language, and effectually disposes of all the members except the defendants.

On the case of *Meriel v. Wymondsold* being cited his Honor said he doubted whether that case would be followed at the present day.

THE VICE-CHANCELLOR:—I do not see how this case differs from the common case of an attorney suing for the amount of his bill of costs; and it is quite new to say that, because part of the amount has been paid, the attorney is at liberty to file a bill for an account. The relief asked, is in fact, nothing more than taxation and payment.

The bill, merely, represents that business has been done by the plaintiffs, as solicitors to the committee, in soliciting one bill in Parliament and opposing another, which involves the necessity of procuring evidence to be laid

(a) 16 Ves. 321.

(c) 1 Bro. C. C. 101, note; and Amb 770.

(g) 2 Swanst. 277: see 283.

(b) 1 Bro. C. C. 101, and 1 Bro. P. C. 396.

(e) Hard. 205. (f) 2 Sim. & Stu. 184.

(c) 5 Barn. & Ald. 34.

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before the two Houses of Parliament: and I see nothing that carries this case beyond that of an attorney acting for his client. There is no representation that the plaintiffs received any moneys as agents for or on the account of the committee, but only on account of their bill of costs.

[*589] *In the case in *Hardres*, the bill was filed not only against the two undertakers for the parish in respect of their liability under the agreement which they had entered into with the plaintiff, but also against other parties who had agreed, with the undertakers, to pay their own shares of the expenses of the work: and one ground upon which the court seems to have entertained the suit, was that the plaintiff required a discovery of the agreement between them and the undertakers.^(a) This, however, is not a case of discovery.

In the case of *Cullen v. The Duke of Queensberry*, the principal point, certainly, was whether those noblemen and gentlemen who instituted the club, could be made liable in the absence of the other members of it. The subject matter of that suit was of so complicated a nature, that it was fitter for a court of equity than a court of law: and the relief that was asked as to the sale of the house, the payment of the mortgage and other matters, could not have been had at law. That, case, however, stands as an insulated case.

In *Horsley v. Bell*, it is admitted that the defendants employed the plaintiff to make the cuts and do the works in prosecution of the scheme, at certain prices; and gave orders for that purpose at their several [*590] *meetings: and it is stated that the sums which had been paid, to the plaintiff, being upon account generally, it would be difficult to proceed at law. According to the report in *Ambler*, the Judges and the Lord Chancellor were of opinion that the commissioners who acted under the trust, were personally liable to all the contracts, as well those that were made at the meetings when they were not present, as at the meetings when they were present. Whether that could be done at law was a very nice question. It appears then that both in *Cullen v. The Duke of Queensberry* and in *Horsley v. Bell*, relief was asked which could not have been had at law. Neither of those cases at all approaches this: and, if I were to allow this bill, the consequence would be that, whenever a dispute arose between a solicitor and his client respecting the amount of his bill of costs, a bill would be filed for an account, for the purpose of annoying the client.

My opinion is that the authorities which have been cited in support of this bill, do not apply; and that the demurrer ought to be allowed.[1]

(a) The report of the case alluded to in the text, concludes thus: "And, *per curiam*, the plaintiff must have relief against the undertakers, especially in this case, because the written agreement, which is his evidence, is in the hands of one of the defendants; and the undertakers must have their remedy against the rest of the parish." The court, therefore, seems to have decided that the bill was not sustainable against any of the defendants, except the undertakers for the parish.

[1] "To sustain a bill for an account, there must be *mutual demands*, and not merely payments by way of set-off. A single matter cannot be the subject of an account. There must be a series of transactions on one side, and of payments on the other." Kent, Ch., *Porter v. Spencer*, 2 Johns.

1839.—Grimshawe v. Pickup.

*GRIMSHAWE v. PICKUP.

[*591]

1839; 1st March.—Will; Construction; or read *and*.

Testator devised his estates to his son, if he should attain the age of twenty-three years or should be married with the consent of his trustees, which should first happen, and to his heirs and assigns, absolutely, for ever. And in case his son should die without attaining such age, or, being married with such consent as aforesaid, should die without lawful issue, or such issue should die under the age of twenty-one years, then to the testator's daughters, as tenants in common, and the heirs of their bodies. The son married, under the age of twenty-three with the consent of the trustees, and, afterwards, attained that age. Held that the son was seized of an absolute estate in fee; or, if not, that, under the words of the gift over, "shall die without lawful issue," he was seized of an estate tail, those words not being confined by the words, "or such issue shall depart this life under the age of twenty-one years," to dying without issue living at his death; and, consequently, that he could make a good title to the devised estates.

NICHOLAS GRIMSHAWE, the plaintiff's father, by his will, dated the 11th of January, 1830, devised his real estates unto Thomas Brooks and Richard Eastwood, their heirs and assigns, to the use of the said Thomas Brooks and Richard Eastwood, their executors, administrators and assigns, for the term of 1000 years, to be computed from the day of his decease, without impeachment of waste, upon and for the trusts, intents and purposes thereafter expressed and declared of and concerning the same; and, after the expiration or other sooner determination of the said term of 1000 years, and, in the meantime, subject thereto and to the trusts thereof, to the use of the plaintiff, *if he should attain the age of twenty-three years or should be married with the consent in writing of the trustees for the time being of the will, (which should first happen,) and to his heirs and assigns absolutely for ever: and, in case the plaintiff should depart this life without attaining such age, or, being married with such consent as aforesaid, should die without lawful issue, or such issue should depart this life under the age of twenty-one years,* *then to the use of the tes- [*592]
 tator's daughters, Jane, Elizabeth and Ann, equally to be divided between and among them, share and share alike, and they to take as tenants in common and not as joint tenants, and the heirs of the body and bodies of all and every the said daughters issuing; with cross remainders amongst them upon failure of issue of any or either of them; and, if there should be but one such daughter, to the use of such remaining or only daughter and the heirs of her body; and, for default of such issue, to the use of the said T. Brooks and R. Eastwood, and their heirs, in trust for the only benefit of Wm. Heap, the natural son of the testator, during his life, without impeachment of waste; and, from and after the determination of that estate, in trust for such person and persons, and to and for such estates or interests and ends, intents and purposes, as the said Wm. Heap, should, in manner therein men-

Ch. Rep. 171. And see *Fowle v. Lawraeson's Ex'r*, 5 Peters, 495. *Hunter's Ex'rs v. Spotswood*, 1 Wash. 145. *Smith v. Marks*, 2 Randolph's (Va.) Rep. 449. Am. Ch. Dig. Account, L Jurisdiction, VII.

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tioned, appoint, and, in default of such appointment, in trust for the right heirs of the said Wm. Heap for ever.

The testator died in 1830, leaving the plaintiff, who was then under age, his heir at law. The term of 1000 years was afterwards merged, the trusts of it having been performed. The plaintiff attained twenty-three in 1838; but, previously thereto, he had married, with the consent in writing of Eastwood, who had survived his co-trustee, Brooks.

The bill was filed to compel the specific performance of an agreement, between the parties, for the sale of part of the estates devised to the plaintiff. It prayed (amongst other things,) that it might be declared that the plaintiff, upon his attaining twenty-three, became and was entitled, under the [*593] will, to an absolute and indefeasible estate of inheritance, in the property agreed to be sold.

The answer objected that the devise in the will, was not sufficient to vest, in the plaintiff, an absolute estate of inheritance in fee simple in the premises: for, as he had married with the consent of the surviving trustee of the will, his estate, in case he should die without lawful issue or such issue should depart this life under the age of twenty-one years, would be defeated by the limitation or executory devise over in favor of his sisters, and, failing such sisters and their issue, then in favor of Wm. Heap.

Mr. *Knight Bruce* and Mr. *Wilbraham*, for the plaintiff:—The testator first devises his estates to the plaintiff and his heirs, absolutely for ever, if he should attain twenty-three or should be married with the consent in writing of the trustees: therefore, in either of those events, the plaintiff takes the fee. The testator then proceeds to give the estates over, in case the plaintiff should die without attaining twenty-three, *or*, being married with such consent as aforesaid, should die without lawful issue or such issue should die under twenty-one: and the question is whether the word, *or*, which precedes the words, “being married,” must not be read, *and*? If it is taken literally, the issue would be excluded if the plaintiff married, with consent, and died under twenty-three; and he would be placed in a worse situation by marrying with consent, than if he had married without consent: for on attaining twenty-three, he takes the fee although he may have married without consent. It cannot be supposed that the testator intended anything so irrational. All that the testator meant was to postpone the absolute power of disposition [*594] “until his son attained twenty-three; and, when his son attains that age, the contingency ends, and he takes an absolute interest. *Fairfield v. Morgan*.(a)

If the plaintiff does not take a fee simple absolute under the first words, he takes an estate tail under the words of the gift over: and, therefore, he can acquire the fee, if he has not got it already.

Mr. *Jacob* and Mr. *Lewin*, for the defendant:—If the words, “die without

(a) 2 New Rep. 38.

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lawful issue," had stood by themselves, then they might have had the effect of giving the plaintiff an estate tail; but they are followed by the words, "or such issue, shall depart this life under the age of twenty-one years," and, as the latter event is included in the former, the testator must be held to have meant to limit the estates over in the event of the plaintiff not leaving any issue *living at his death* who should attain twenty-one, that is to give the plaintiff an estate in fee, with an executory devise over in that event. *Merest v. James*.(a)

It is true that there are many cases in which the word *or* may be read *and*: but that cannot be done in a case like the present, where it would have the effect of making the language of the will less grammatical or less sensible. In which ever way that word is read, it leads to consequences which the testator, if he was a sensible man, could not have intended.

THE VICE-CHANCELLOR:—The case stands in this situation.

The testator has, in the first instance, given his estate: "To the use of my son Thomas Grimshawe, if he shall *attain the age of [*595] twenty-three years or shall be married with the consent in writing of the trustees for the time being of this my will, which shall first happen, and to his heirs and assigns absolutely for ever." There he has made, if I may use the expression, two devises in fee simple by one sentence. He has used the words, "his heirs and assigns for ever," once only: but he has spoken of two contingencies in one sentence. Then the difficulty seems to me to arise from his having given the estate, absolutely, to his son, in the event of his attaining twenty-three, or in the event of his marrying before that age with the consent of the trustees. He then proceeds to consider, in the first instance, the case of his son not attaining twenty-three, that is, to consider what shall be done in the event of the son not taking at all under the first contingency; considering, therefore, the negative of the case in which he had made the first gift. The second part of the sentence, if it be taken as it stands, would go to show that the testator was not considering the negative of the second contingency; but that he was considering what should happen in case that contingency should take place (in which he had expressed that his son should have an interest, absolutely,) and something additional should happen: and it seems to me a very singular thing that, after having given the estate to his son, in fee absolutely, in the event of his marrying with consent, he should give it over (according to the construction contended for), in the event of his son being married with consent but dying without leaving lawful issue living at his death.

Now I cannot but think that the court would rather struggle to make the word *or* be read there as *and*. I admit that there would be some awkwardness in the phrase, but it would certainly be English.[1] It would be an *allusion, if I may use the expression, to a double death; be- [*596]

(a) 1 Brod. & Bing. 484.

[1] Vide *Hawkes v. Baldwin*, ante, 361, and note, *ibid*.

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cause there would be an allusion to a departing this life without attaining the age of twenty-three, and to being married with consent and dying without leaving issue. But still I think that that construction might be supported.

Then, as to the other construction, that is, taking the words, literally, as they stand. The testator says: "I give, in case my son shall be married with the consent in writing of the trustees for the time being of this my will, all my estates to him, his heirs and assigns absolutely for ever; and, if he die without leaving lawful issue, then over." That would create an estate tail.[1] But it is said that, by using the words that follow, the testator has not necessarily shown that he is speaking of a failure of issue at the death of his son: but I do not think that that necessarily follows. He says: "Or, being married with such consent as aforesaid, shall die without leaving lawful issue, or such issue shall depart this life under the age of twenty-one years." That does not necessarily show that he is speaking of a failure of issue at the death of his son. He is speaking of a general failure of issue: and then he alludes to the case of their being issue and their dying under the age of twenty-one, which is a limited portion of the contingency which is expressed, generally by the preceding words. But it is not, by any means, necessary that, because he has used words which have very little meaning, therefore the words, "dying without leaving lawful issue," which signify a general failure of issue,[2] must signify a leaving of lawful issue living at his death.

Upon the whole, I cannot but think that, supposing the first construction is not adopted, then the son is tenant in tail and can make a good title. [*597] "If the parties wish that I should send the case to law, I will do it."

On the 16th of April, 1839, a case was sent, on the application of the defendant, for the opinion of the Court of Common Pleas.

COSTER v. COSTER.

1839: 1st, 13th and 16th March.—Husband and Wife.

A husband having, without sufficient cause, separated from his wife, leaving her unprovided for, three-fourths of a fund in court, arising from property bequeathed to the wife, was ordered to be settled on her and her issue, generally, and the remaining fourth, to be paid to her husband.

A PETITION was presented, by a married lady, one of the parties to the suit, praying that the Accountant General might be ordered to pay to the petitioner, for her maintenance, the dividends of 4560*l.* three and a half per cent. stock and 1834*l.* three per cent. consols, and the sum of 45*l.* cash, standing to the account of the share of the residuary estate, of the testatrix in the cause, bequeathed to the petitioner.

[1] Vide *Roosevelt v. Thurman*, 1 John. Ch. Rep. 220. *Burnet v. Dennison*, 5 John. Ch. Rep. 35. *Kingsland v. Rapelye*, 3 Edw. Ch. Rep. 1.

[2] Vide *Macomb v. Miller*, 9 Paige, 265. *Graves v. Hicks*, 11 Sim. 549, 550.

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The grounds on which the petition was supported, were that the husband had run away with the lady and married her when she was only fourteen years and ten months old; that, after having lived with her for about five years, during which time he treated her with great violence, he deserted her without having made any settlement or provision either for her or for a child she had had by her, and was living in adultery with another woman.

Shortly before the lady's elopement, the bill in this cause was prepared for the purpose of making her a ward of court; but the marriage took place, in Guernsey, about four days before the bill was filed.

The husband also presented a petition, in which he alleged that [*598] he had separated from his wife on account of her improper conduct; and prayed that one moiety of the before mentioned funds might be transferred to him, and the other moiety might be settled on his wife and the issue of the marriage.

Mr. *Knight Bruce* and Mr. *Stuart*, in support of the wife's petition, cited *Aguilar v. Aguilar*,(a) *Oxenden v. Oxenden*,(b) *Ball v. Coutts*,(c) and *1 Roper, Hus. and Wife*, Jacob's edit. 277, 278.

Mr. *Jacob* and Mr. *Willcock*, in support of the wife's petition, cited *Steinmetz v. Halthin*,(d) *Beresford v. Hobson*,(e) *Wright v. Morley*,(f) *Green v. Otte*.(g)

THE VICE-CHANCELLOR:—Before I decide the question as to whether the whole or a certain portion only of the funds ought to be settled on the wife, I should like to have an opportunity of looking into the cases.

The facts of the case appear to be these: The marriage took place when the young lady was between fourteen and fifteen years of age. The bill in this suit was then about to be filed, for the purpose of making her a ward of court: but I cannot, in deciding as to what shall be settled on her, take into consideration that the husband married her, as has been stated, in order to prevent her being made a ward of court. She was not, in fact, a ward of the court,[1] and, therefore, the case must be *considered as [*599] that of a person who was not a ward of court.

The parties lived together for about five years; and then the husband, owing to some circumstances, the particulars of which are not very fully disclosed, thought proper to abandon his wife. I cannot but suppose that there were some circumstances which were deserving of inquiry, because an inquiry was made; but the result of it was, that the husband was satisfied that there was no ground for imputing improper conduct to his wife. He

(a) 5 Madd. 414. (b) 2 Vern. 493. (c) 1 V. & B. 292; see 303. (d) 1 Glyn & Jam. 64.

(e) 1 Madd. 362. (f) 11 Ves. 12. (g) 1 Sim. & Stu. 250.

[1] But where the defendant married an infant under twelve years of age, who immediately declared her ignorance of the nature and consequences of the marriage, and her dissent to it; the court on a bill filed by her next friend, ordered her to be placed under its protection, as a ward of the court, and forbade all correspondence or intercourse with her, by the defendant under pain of contempt. *Aymar v. Raff*, 3 Johns. Ch. Rep. 49. As to contempt in cases of marriage of ward of court, see authorities cited 2 Russ. & M. 669, n. (a)

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states, however, in one of his affidavits, that circumstances afterwards came to his knowledge which confirmed his opinion of the guilt of his wife. But it is to be observed that he does not mention one of those circumstances. The statement which he makes is vague and general, incapable, therefore, of being met by any other counter statement.

In the letter which he wrote to his wife, after the inquiry which I before alluded to had taken place, he says that, after the fullest investigation, he thinks it but an act of justice to declare, that he attributes the calumnies which had been circulated respecting her, to the invention of some mischievous and malicious person in the neighborhood: and adds: "I am aware that circumstances not under our control, oblige us to live apart:" but what those circumstances were, it is impossible to conjecture. There is nothing whatever to explain them. But, when we see how he conducted himself immediately after he had freed himself from his wife, that he immediately took another woman to cohabit with him, and, after living with her for some time, sent her back to her parents, and that he is now living in adultery with another woman, I cannot but think that there were some other motives than those with respect to which he wrote that letter, which induced him to separate himself from his wife.

With respect to his violent behavior, there is, certainly, some variation of testimony. Certain acts of violence are stated; but it is said they were owing to the sudden irritation produced on his mind by the communication made to him of the circumstances to which the letter relates. Now he has produced no fewer than eleven affidavits relating to this part of the case, some made by members of his family, and others by persons who were only acquainted with him: and it is very remarkable that, in those affidavits which are made by the former, no allusion is made to the fact of his having a mild and easy temper and a peaceable demeanor. Those who, necessarily, must have known him best, make no allusion to the subject.[1] It is his acquaintance only, who speak of his mild and amiable disposition.

[His Honor here observed upon an admission which the husband had made in one of his letters, which confirmed the statements as to the violence of his temper and disposition, and then continued as follows:]

It is manifest that very soon after the separation from his wife, he lived with one woman and then with another, and that his conduct has been of the foulest kind: and where I find these marks of character, I must be very strongly disposed to think that the separation, on his part, was not well grounded, and that I shall have to consider this as a case in which the husband has separated himself from his wife, not on any clear or assignable grounds, but has so separated himself, and has so conducted himself since

[1] A similar idea appears to have weighed with Lord Eldon in *Wellesley v. The Duke of Beaufort*, 2 Russ. 27.

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the separation, *that it is almost impossible to suppose that they [601] can ever live together again.

Therefore, the question is whether, under such circumstances, the husband having made no provision for his wife, it will be right for this court, in the first place, to refer it to the Master generally, or to make some specific declaration, now, as to what shall be done with the whole income or the whole capital. And I cannot but think that it would be most convenient to all parties (considering the length of these affidavits and the expense of them) that the court should, in the first instance, declare what should be done, unless there is any reason to suppose that there are circumstances which may be developed before the Master, which would cause some other line of proceeding to be adopted by the court than that which would appear right to be adopted, on the evidence now before the court.

I shall, however, take some time for consideration, before I declare what will be my final decision on these petitions.

16th March.—THE VICE-CHANCELLOR:—In this case the husband has presented a petition, in effect, asking for one moiety of the fund for himself; and he asks that there should be a settlement made, of the other moiety, on his wife and the issue of the marriage. The wife's petition asks, in effect, to have the whole income of the funds in court standing to her account, paid to her; and she submits, if the court thinks it right, that there should also be a reference to approve of a settlement: and the real question is what, under the circumstances of the case, the court ought to do.

'I apprehend, from the cases on the subject, that the court has a [*602] discretion in cases like the present. But, at the same time, I am of opinion that that proposition which Sir Thomas Plumer laid down in the case of *Beresford v. Hobson*, is true, with a slight limitation. That learned Judge says: "In no case has the whole of the property been settled on the wife and children." [1] And, in a subsequent part of his judgment, he says: "In no case has the court given the whole to the wife." Now it is not exactly true that, in no case, that has been done; for certainly it was done in the case of *Jacobs v. Amyatt*; (a) with respect to which case, however, Sir T. Plumer infers, though it does not appear on the face of the report itself, that the order that was there made was an order by consent. It certainly was a peculiar case; and the order might have been made, not strictly with consent, but without opposition on the part of the assignees; and, with that exception, I take it to be generally true that the court never gives the whole of the property to the wife, in a case where the husband has deserted the wife, and no means of subsistence for her can be obtained from him. The

[1] Kent, Ch. referring to this decision of Sir T. Plumer says: "These observations of the Vice-Chancellor must be taken under some qualification, arising out of that case, for several authorities which have been already referred to, are in contradiction to them, if taken in their utmost latitude." *Kenny v. Udall*, 5 Johns. Ch. Rep. 479.

(a) 1 Madd. 376, note.

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court has, when there has not been a question before it as to the settlement of the wife's *choses in action*, certainly ordered the whole of the income of the fund to be paid to the wife till further order; and many such orders have been made from time to time; [1] and I have made some in the course of this very year; but in this case, I have both parties applying, and I do not think that the discretion, which it is clear from the cases, the court has, would be a discretion much worth having if, in fact, in every case, the discretion was to be exercised by giving a moiety to the husband and a moiety to the wife: and it does appear, from what has actually been done, that the system (which is pretty general, I admit,) of giving a moiety to the husband and placing the other moiety in settlement for the wife and children, has not always been pursued: because in the case of *Wright v. Morley*, (which is alluded to by Sir T. Plumer, and in which he states what Sir William Grant did,) it appears, on looking at the case, that what Sir W. Grant is stated to have done, was not exactly the thing that he did; but he would have done it, provided only a certain fact had been made out in evidence. He says, in page twenty-three: "there is no difficulty in giving her the remainder for her separate use during the absence of the husband:" and, in a prior part of the case, in page twenty-one, he says: "I should think they (*i. e.* the assignees) dealt fairly and even favorably towards her, if, out of 260*l.*, the produce of this fund, they allowed her to retain 160*l.*" The husband had previously assigned 100*l.*; and what, therefore, was that but giving to the wife eight-thirteenths of the whole fund, in a case where the husband had previously made an assignment, for valuable consideration, of five-thirteenths?

Now, in this case, I do not wish to repeat the circumstances which are contained in the affidavits; but though there has been certainly something of misconduct on the part of the wife, yet I cannot but think that this case is a case to which the observation, made by Lord Eldon in the case of *Ball v. Coutts*,^(a) is applicable. His Lordship says: "As to the conduct of this lady herself, it would require much more attention if it was not to be urged, in her favor, that the transactions which took place in the circumstances of her marriage, might have led her into that misconduct which is now made the subject of complaint." I mean that the spirit of the observation applies, and not the circumstances to which Lord Eldon alludes; because, in this case, we have these circumstances unquestioned, namely, that the husband obtained the hand of his wife under circumstances which certainly show that he had contributed to weaken the moral principle in her before marriage; and, if he had not induced his wife to desert her mother and go to Guernsey, there is reason to suppose the marriage would not have taken place: and I do not think that the consent which the mother gave, on application made by him to her for that purpose, can at all be considered

(a) 1 Ves. & Bea. 304.

[1] Vide *Rishton v. Cobb*, post, 620.

1839.—*Miles v. Thomas.*

as weakening the effect of the general observation; because the daughter was placed in such a situation that, morally speaking, the mother had no choice; and, unless she had consented to the marriage, it is pretty obvious that a much worse fate would have awaited her daughter. I think, therefore, that in a case where the marriage begins under such inauspicious circumstances with regard to the conduct of the husband, less weight ought to be attributed to anything like subsequent levity or indiscretion in the wife, or something perhaps deserving a worse name, though it must be observed that there is no evidence, in this case, to show that anything more than levity or indiscretion did take place on the part of the wife.

I cannot but think that, having a due regard to the general proposition, that the court never gives the whole to the wife,[1] and having a due regard to the exercise of the discretion which this court unquestionably has, it will be right to make this order now; and I say to make it now, because I really think that, after the very ample *discussion which the case [*605] has met with, both in statement of circumstances and affidavits and a lengthened discussion at the bar, there is no reason to hope that a better conclusion would be arrived at, by sending the matter to the Master, than the court can now make for itself.[2]

I think, therefore, the right order to make, will be that the husband should have one-fourth of the whole fund paid to him, and he must pay the costs of his petition: and the wife shall have the remaining three-fourths settled on her and her issue, generally; but, out of those three-fourths, the costs of her petition and her costs to be incurred by the reference as to the settlement, must be paid; and it appears to me that it would be most convenient to make one order on each petition; which will prevent any question as to who shall have the carriage of the order.[3]

*MILES v. THOMAS.

[*606]

1839; 26th and 27th February.—Demurrer; Joint Stock Company; Partnership; Jurisdiction. After a demurrer had been filed, two of the plaintiffs procured their names to be struck out of the bill. Held that, as that act was not done by the remaining plaintiffs, the bill must be considered, on the argument of the demurrer, as if the names of the two remained on the record. Certain persons entered into an agreement, in writing, for forming themselves into a joint stock company, to be called the Medway Commercial Shipping Company; and, by one of their rules, the affairs and concerns of the company, were to be under the management of a committee; but no time, was fixed for the duration of the company. Four of the members of the company took upon themselves the exclusive management of a ship belonging to the company, and, being about to send her on a voyage which some of the members disapproved of, those members filed

[1] But see *Kenny v. Udall*, 5 Johns. Ch. Rep. 464. S. C. on appeal, 3 Cow. 590.

[2] For cases in which the usual course has been dispensed with, and an order made without reference to the Master, see *Russ. & M.* 112, n. 2. Am. ed.

[3] As to the wife's equity, see cases cited, 1 Keen, 72, 73, in *notis*, Am. ed.

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a bill, praying that the four might be restrained from interfering with the ship, or causing her to sail on the intended voyage, and from laying in or agreeing for any cargo or freight, otherwise than under the direction of the committee, and that they might deliver up, to the committee, all books, &c., in their possession, belonging to the ship or to the company.

A demurrer for want of equity was allowed.

Semble, that the court will interfere, between co-partners, to prevent the destruction of the partnership property, although a dissolution of the partnership may not be prayed.

By an agreement dated in April, 1838, it was declared and agreed that the parties thereto should, from thenceforth, be and continue bound to each other, in co-partnership, under the title or denomination of, The Medway Commercial Company, subject to the rules and regulations thereafter declared; one of which was that the affairs of the company should be managed and conducted by a committee, consisting of five trustees and fifteen shareholders. But no time was fixed for the duration of the partnership.

The company built a ship, in the port of Rochester, for the purpose of trading for coals, grain, timber and other articles as might be deemed advantageous to the company: and the committee appointed E. Ridge, one of the shareholders, the captain of the ship.

The bill was filed by nine of the shareholders, (some of whom were members of the committee,) on behalf of themselves, and all the other shareholders (except the defendants *qu.*) against C. Thomas, T. Scrimmes and T. Beaumont, three of the five shareholders in whose name the ship was registered,^(a) and against E. Ridge the captain, alleging that, after the ship had made six voyages under the direction of the committee, the defendants, in violation of the rules and regulations of the company, took upon themselves the exclusive management and control of it: that the ship had recently returned with a cargo of coals, from a voyage performed under the orders of the defendants; and they threatened and intended, as soon as she should have discharged her cargo, to send her, in ballast, on another voyage, but where or to what port, or for what cargo she was to sail, or by whom such cargo was to be laid in, or what freight she was to earn, the defendants refused to divulge; that the company had sustained a loss of 77l. 10s. on the last voyage of the ship, and, if she were allowed to sail again under the direction of the defendants, the injury done to the company would be irreparable. The bill prayed that the defendants Thomas, Scrimmes and Beaumont might be restrained from interfering or intermeddling with the ship or her intended cargo, and from taking any measures for the purpose of causing her to sail from the port of Rochester, or for laying in or contracting or agreeing for any cargo or freight, otherwise than under the direction of the committee; and that the defendant Ridge might also be restrained from sailing from the said port on board the ship, or doing any act or entering into any agreement or arrangement respecting her or her cargo, otherwise than under the direction of the committee; and that the de-

(a) See 3 and 4 Will. 4, c. 55, s. 33.

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ndants might be ordered to deliver up to the committee, all books and papers in their hands belonging to the ship and to the company.

The defendant Ridge demurred to the bill for want of equity.

After the demurrer was filed, two of the plaintiffs procured their names to be struck out of the bill. On the demurrer coming on to be argued, the Vice-Chancellor ruled that, as the striking out of the names of the two plaintiffs, was not the act of the remaining seven, they ought not to be prejudiced thereby; but that, on the argument of the demurrer, the bill must be considered as if the names of the two still remained on the record.

Mr. *Jacob*, Mr. *Stuart*, and Mr. *Palmer*, appeared in support of the demurrer.

One of the grounds on which they relied, was, that the bill did not pray for a dissolution of the partnership, and, therefore, it would be contrary to the established practice of the court to grant any relief.

Mr. *Knight Bruce* and Mr. *Stinton*, in support of the bill, contended that the court would interfere, between co-partners, in order to preserve the property of the partnership, although a dissolution was not prayed.

THE VICE-CHANCELLOR having observed, in the "course of the argument, that the company was a mere voluntary society; and, as no time was fixed for the continuance of it, it was dissoluble at the pleasure of any of the members, delivered judgment as follows:

I am of opinion that the court ought to interfere between co-partners, whenever the act complained of is one that tends to the destruction of the partnership property, notwithstanding a dissolution of the partnership may not be prayed.[1] In this case, however, I am not asked to interfere because the ship, which is the subject of dispute, is in danger of being lost, but because she is about to be sent on a voyage which some of the members of the company disapprove. So that, in effect, I am asked to enforce the evanescent authority of a certain number of persons, which authority ceased as soon as any one of the members chose to rebel. That act was, in itself, a dissolution; and, *rebus sic stantibus*, I have no sort of jurisdiction to interfere.[2]

The demurrer must, therefore, be allowed.

[1] The Vice-Chancellor, in a previous case, held that a bill praying for an account between partners, without praying for a dissolution, was demurrable. *Loscombe v. Russell*, 4 Sim. 8. He fortifies himself by previous decisions of Lord Eldon, and by strong reasoning from expediency. Whatever hints may be suggested to the contrary, it does not appear to the Editor that there is any discrepancy between the case in the text, and the case cited in this note. It must be admitted, however, that some shade of doubt has been cast on the decision in the case cited. *Wallworth v. Hoyt*, 4 Myl. & Cr. 619; and see, 1 Story's Eq. § 667, 671 and n. 1; 2 Story's Eq. § 722, a; Story on Partnership, § 202 and n. 1.

[2] Vide *Wheeler v. Van Wart*, ante 193. *Nerot v. Burnand*, 4 Russ. 260. It is an established principle in the law of partnership, that if it be without any definite period, any partner may withdraw at a moment's notice, when he pleases, and dissolve the partnership. The Civil Law contains the same rule on the subject. 3 Kent's Comm. 53. Story on Partnership, § 269.

1839 —Corporation of the Sons of the Clergy v. Mose.

[*610] **THE CORPORATION OF THE SONS OF THE CLERGY v. MOSE.**

1839: 7th March.—Attorney General; Parties; Charity.

Testatrix gave 6000*l.* stock to the governors of the charity for the relief of poor widows and children of clergymen, the dividends to be, from time to time, applied for the benefit of poor widows and maiden daughters of clergymen of the Church of England who should have attained the age of thirty years, in such shares and proportions as the governors of the said charity should, in their discretion, think fit. A bill claiming the legacy, was filed, against the executors, by "The Governors of the corporation of the Society for the relief of poor widows and children of Clergymen, commonly called the Corporation of the Sons of the Clergy :—" Held that the Attorney General was a necessary party to the suit, the legacy not being given upon trusts corresponding with the trusts upon which the corporation held their general property.

THE plaintiffs were described in the bill as : "The Governors of the Corporation of the Society for the Relief of Poor Widows and Children of Clergymen, commonly called 'The Corporation of the Sons of the Clergy,' and they sued on behalf of themselves and all other members of the corporation. The bill stated that Hannah Phelps, by her will, dated the 8th of June, 1821, gave 6000*l.* consols and also her residuary personal estate, to the defendants Mose and Holmes, in trust for her three sisters, during their lives, and, after the death of the survivor of them, to the Governors of the Charity for the relief of Poor Widows and Children of Clergymen, to be continued in the said funds, and the dividends to be, from time to time, applied for the benefit of *poor widows and maiden daughters of clergymen of the Church of England who should have attained the age of thirty years*, in such shares and proportions as the governors of the said charity should, in their discretion, think fit : that the testatrix died in the year 1822, and that two of her sisters had since died : that, subject to the life estate therein of the defendant Char-

lotte Williams, the testatrix's surviving sister, the plaintiffs were [*611] entitled, absolutely, to the 6000*l.* consols, and "the sums of stock in which the testatrix's residuary estate had been invested : that Mose and Holmes had, on several occasions, stated, to the plaintiffs and their agents, that they did not intend to transfer the sums of stock to the plaintiffs, and that they threatened to transfer the same to persons not named in the will, and not entitled thereto : that they pretended that the plaintiffs were not the persons intended in the will under the description of "The Governors of the Charity for the relief of Poor Widows and Children of Clergymen," and that some other society or some other persons were intended, by the testatrix, under that description : that the plaintiffs were the governors of a charity or society for the relief of poor widows and children of clergymen, and that that society was incorporated under the title and description of "The Corporation for the relief of Poor Widows and Children of Clergymen, and was commonly called The Corporation of the Sons of the Clergy ;" and that the testatrix, under the title and description of "The Governors of the Charity for the relief of Poor Widows and Children of Clergymen," intended and expressly pointed out the plaintiffs as the persons to take the benefit of the

1839.—Corporation of the Sons of the Clergy v. Mose.

bequest of the 6000*l.* stock and of her residuary estate, after the decease of the survivor of her three sisters; and that no other corporation or society other than that of which the plaintiffs were the governors, in any manner answered to or corresponded with the title or description of the society mentioned and described in the will; and that, in fact, no other corporation or society had ever made application, to the defendants Mose and Holmes, or claimed any benefit under the will.

The bill prayed that the usual accounts might be taken of the testatrix's estate, funeral and testamentary *expenses, debts and lega- [*612] cies, and that the clear residue of the personal estate might be ascertained, and that the plaintiffs might be declared to be entitled, absolutely on the decease of the defendant Charlotte Williams, to the 6000*l.* stock and other funds in which the residuary estate had been invested, and that those funds might be transferred into the name of the Accountant General, and secured for the benefit of the plaintiffs.

The defendant, Charlotte Williams, demurred to the bill, because the Attorney General was not made a party to it, and on other grounds.

Mr. *Wigram* and Mr. *Bird*, in support of the demurrer, said that the plaintiffs had not stated facts from which the court could infer that they were, necessarily, the society to whom the 6000*l.* stock and the residue were bequeathed: that it was not enough to say that they were the society who might possibly be entitled to the benefit of the bequests; that, in fact, there were other charities founded for the benefit of widows and children of clergymen, and who also might claim the benefit of the bequests: that the charity created by the will was intended for the benefit of the daughters, and not the sons of clergymen: and that, the question being which of several societies was entitled to the property in question, the Attorney General was a necessary party; and that he was also a necessary party in order to see the accounts prayed by the bill, properly taken.

Mr. *Knight Bruce* and Mr. *N. Wetherell* contended that there was no necessity for making the Attorney General a party where, as in the present case, the property was given to the officers of a charity, and was to be applied *by them for the benefit of a certain class of persons, [*613] as the officers of the charity should think fit.

Mr. *Wigram*, in reply, referred to *Wellbeloved v. Jones*.(a)

THE VICE-CHANCELLOR:—I confess it appears to me that the Attorney General is a necessary party.[1]

I do not understand that the testatrix meant to give the 6000*l.* stock and her residuary estate, to the Corporation of the Sons of the Clergy, so as to form part of the general funds of that corporation. There is nothing to identify

(a) 1 Sim. & Stu. 40.

[1] Vide ante, *The Attorney General v. Wilson*, 30, 49.

 1839.—*Kebel v. Philpot.*

the trusts of the will with the trusts upon which the general funds of that corporation are held.[1]

The demurrer must, therefore, be allowed; but I shall, of course, give the plaintiffs leave to amend their bill, by making the Attorney General a party to it.

[*614]

*KEBEL v. PHILPOT.

1839; 11th March.—Practice; Trial; Issue.

Where a decree directs an issue to be tried at the next assizes, an application to postpone the trial on account of the illness of a material witness, must be made to the court which directed the trial.

THE decree in this cause had directed an issue to be tried at the next spring assizes for the county of Kent.

Mr. *Barber* now moved to postpone the trial on account of the illness of a material witness. He said that the decree peremptorily directed his client to try the issue at the next spring assizes.

Mr. *Jacob* appeared in opposition to the motion.

THE VICE-CHANCELLOR :—As the decree expressly directs the issue to be tried at the next assizes, I do not see how it could be tried, under the authority of these words, otherwise than at the next assizes. As the decree is in that form, this court must interfere.

Motion granted.[2]

[1] As to the validity of a bequest of this description—where, the purposes of the trust are not directly applicable to the objects for which the corporation was created—see *Vidal v. Girard's Ex'rs*, 2 Howard, 127, 189.

[2] The deduction from the case appears to be this :—that under the form of the order directing the issue it would not be competent for the judge at *nisi prius* to postpone the trial. It has been held that it was competent for the court of law to relieve against a verdict on an issue out of chancery. *Den v. Fen*, 1 Caines' Rep. 487. *Doe v. Roe*, 1 Johns. Cas. 402. In the cases last cited the Supreme Court of N. Y., exercised the authority; but in *Doe v. Roe*, 1 Cow. 116, and *Doe v. Roe*, 6 Cow. 55, it declined acting, without however expressly renouncing jurisdiction. It is, certainly, very questionable, whether the court of law can make any order in relation to the subject; but it is very certain that no proceedings at law can prevent or impede the direct action of the Court of Equity, which has undoubted jurisdiction over its own records and its own suitors. In a very recent case the Supreme Court refused costs against the plaintiff for not bringing a feigned issue to trial, on the ground that the matter more properly belonged to chancery. *Doe v. Roe*, 5 Hill, 376.

1839.—*Rishton v. Cobb.*

**RISHTON v. COBB.*

[*615]

1839; 19th March and 16th April.—Will; Construction.

Testator gave 2000*l.* to trustees, in trust to invest the same in government securities, and to empower Lady C. the widow of Sir N. C., to receive the dividends so long as she should continue single and unmarried; but, in case she should sell, assign, dispose of or anticipate such dividends, the testator revoked the bequest, and directed that the 2000*l.* should become part of the residue of his estate, which he gave to J. C. At the date of the will and at the testator's death, Lady C. was married to one R.; but he had deserted her and gone abroad; and she always called herself Lady C., and represented herself to be a single woman and the widow of Sir N. C.; and the testator and others always considered her so to be. Held that she and her husband in her right, were absolutely entitled to the 2000*l.*

THOMAS COBB made his will, dated the 1st of March, 1834, and which was partly as follows: "I give and bequeath, to William Cobb, William Edmunds and Charles Cook, the sum of 2000*l.* sterling, upon trust to invest the same in government securities, upon trust to authorize and empower *Lady Fanny Campbell, widow of the late Major General Sir Neil Campbell, to receive the dividends as they become due thereon, so long as she shall continue single and unmarried*; but, in case she sells, assigns, disposes of or anticipates such dividends, I do hereby revoke the bequest so made for her benefit, and thereupon do will and direct that the said sum of 2000*l.* shall become part of the residue of my estate. I also give and bequeath, to the said Lady Fanny Campbell, the sum of 500*l.* sterling, to be paid to her within two months after my decease; but in case there is any debt then due from her on a warrant of attorney lately given to Messrs. Rice & Goodyer, I direct my executors, out of the legacy, to pay such debt, and to pay the residue of such 500*l.* to Lady Campbell only: I also give her back the diamond ring she gave me, and request her to have the diamond reset in a mourning ring, and wear it for my sake." The testator gave the residue of his personal estate and effects to J. M. Cobb and William Cobb, and appointed them and William Edmunds his executors.

"The testator died in February, 1836. The plaintiff was the per- [*616] son mentioned in the will as Lady Fanny Campbell, widow of the late Major General Sir Neil Campbell: but, on the 20th of October, 1829, which was about tho years after the death of Sir Neil Campbell, she married the defendant Henry Rishton, who, shortly after, deserted her and went to reside in Africa. The plaintiff, however, concealed her second marriage, and always called herself Lady Campbell, and represented herself to be a single woman and the widow of Sir Neil Campbell; and she was considered so to be by the testator, (who had repeatedly offered her marriage,) and by all other persons who had any acquaintance or dealings with her.

The bill was filed by the plaintiff, by her next friend, against the executors and trustees of the will, and against her husband: and, after stating that, at the testator's death, nothing was due on the warrant of attorney; and that the plaintiff had requested the executors to invest the legacies of 2000*l.* and

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500*l.*, and to transfer the funds to some proper person or persons, in trust for her separate use, or to pay to her or to authorize her to receive the dividends thereof, or otherwise to carry the will into effect, it prayed that the usual accounts might be taken of the testator's personal estate, funeral and testamentary expenses, debts and legacies; that the personal estate might be applied in a due course of administration; that the rights and interests of the plaintiff in and to the legacies of 2000*l.* and 500*l.*, might be ascertained and declared, and that the same might be raised, applied and secured according to such rights and interests; and, if necessary, that a sufficient settlement might be made thereof, regard being had to the facts and circumstances aforesaid.

[*617] *The executors, in their answer, said that they had been advised that inasmuch as the testator was, as they believed, induced to make the bequests in the plaintiff's favor, under the impression and belief, from her representations and conduct, that she was the widow of Sir Neil Campbell, and in ignorance that she was the wife of the defendant Rishton, and as it appeared that the plaintiff did not, at the date of the will or at the testator's death, fill the character which she assumed and led the testator to believe she filled, she was not nor was her husband entitled to claim the benefit of the bequests: that inasmuch as the dividends to arise from the investment of the 2000*l.* were payable to the plaintiff as long only as she continued single and unmarried, and she was then under coverture, she was not, under any circumstances, entitled to the said dividends; but that the 2000*l.* had sunk into the testator's residuary personal estate.

Mr. *Wakefield* and Mr. *Randall*, for the plaintiff, said that, as the will contained an unlimited gift of the dividends of the 2000*l.* to the plaintiff, she was entitled to the capital absolutely; and, consequently, the words which were added for the purpose of preventing her from alienating that sum, were repugnant and void: that, as the 2000*l.* was not given over in the event of the plaintiff marrying again, the words "so long as she shall continue single and unmarried," were used *in terrorem* merely. *Bird v. Hunsdon*;(a) *Marples v. Bainbridge*;(b) *Elton v. Elton*;(c) *Rhenish v. Martin*;(d) *Bellasis v. Ermine*;(e) *Brown v. Peck*;(f) *Poor v. Mial*;(g)

[*618] *Mr. *Rudall*, for the defendants, the executors:—It is plain, from the evidence and even from the will itself, that the testator believed the plaintiff to be a single woman; and the bequest is made to her as filling that character. The testator says: "so long as she shall *continue* single and unmarried." The witnesses state that he had a great affection for her, and made her repeated offers of marriage, which she declined, not because she was a married woman, but because, as she alleged, the testator was of a violent and overbearing disposition. It is plain, therefore, that, if he had known that she was married, he would not have given her anything.—[The

(a) 2 Swanst. 342.

(b) 1 Madd. 590.

(c) 1 Wils. 159.

(d) Ibid. 130.

(e) 1 Ca. Ch. 22.

(f) 1 Eden, 140.

(g) Madd. & Geld. 32.

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Vice-Chancellor: It is not the law that, where a testator makes a gift and assigns a reason for it, the gift fails if the reason does not exist.[1] It does not appear that there was any fraudulent assumption of character on the part of the plaintiff.]—Whether she committed a fraud or not, she is not entitled, under the language of the will, to the provision intended for her.

This case is distinguishable from those that have been cited; for there is no gift of the 2000*l.* to the plaintiff in the first instance. The first gift is to the trustees; and they are to pay the dividends to her, so long as she shall continue single and unmarried. She was married both at the date of the will and at the death of the testator, and, consequently, the trust never has and never can come into operation. *Giles v. Giles.*(a)

THE VICE-CHANCELLOR:—The question that has been argued in this case, is one of some difficulty; and I shall take time to consider it.

April 16th.—**THE VICE-CHANCELLOR*:—In this case, it is plain [*619] that the plaintiff must take the legacy of 500*l.*, deducting from it such sums as would legally have been due on the warrant of attorney, provided she had been *sui juris*, and not a married woman when she gave the warrant of attorney.

Then, with respect to the sum of 2000*l.*, the case stands in this manner. I must first remark that no case of fraudulent representation has been established against the plaintiff; but it is clear, on the evidence, that the testator supposed that she was not a married lady at the time when he made his will: and it seems to me that the right way is to construe the will on that supposition.[2] Then the bequest is this: "I also give and bequeath, to the said Wm. Cobb, Wm. Edmunds, and Chas. Cook, the further sum of 2000*l.* sterling, upon trust to invest the same in government securities, upon trust to authorize and empower Lady Fanny Campbell, widow of the late Major General Sir Neil Campbell, to receive the dividends as they become due thereon, so long as she shall continue single and unmarried. But, in case she sells, assigns, disposes of or anticipates such dividends, I do hereby revoke the bequest so made for her benefit, and, thereupon, do will and direct that the said sum of 2000*l.* shall become part of the residue of my estate."

Now that, as far as it goes, is a mere attempt to make a condition in restraint of marriage; and I conceive that it is void. I conceive, also, that, on the true construction of this will, the gift of the 2000*l.*, is not a gift to this lady's separate use; but it is a gift to her, simply, as a woman supposed not to be married; and, therefore, the testator supposed that she would have power to sell, assign, dispose of or anticipate the *subject of [*620] the gift. I must, therefore, take it that the plaintiff and her hus-

(a) 1 Keen, 685; see 692.

[1] Vide 1 Story's Eq. § 183.

[2] If a legacy be given to a person by a correct name, but with a wrong description or addition, the latter will not vitiate the bequest, but will be rejected. *Smith v. Smith*, 1 Edw. Ch. Rep. 189. & C. 4 Paige, 271.

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band, in her right, are entitled to the legacy of 2000*l.* The consequence is that it must be brought into court and laid out: and, the situation of the legatee being that of a married woman whose husband has deserted her, the court may direct the dividends to be paid to her until further order.[1] Any application which may be made for dealing with the capital of the fund, will be disposed of according to the usual course of the court.(a)

Declare that the plaintiff is absolutely entitled to the legacies of 500*l.* and 2000*l.*: and the defendants, the executors, having admitted assets, let them pay those sums into the bank, in the name of the Accountant General, in trust in this cause; and let the same, when so paid in, be invested, by the Accountant General, in three per cent. annuities, to be carried to an account intituled, "the plaintiff's account:" and let the Accountant General pay the dividends, as the same shall be received, on such three per cent. annuities, to the plaintiff, until the further order of the court: refer it to the Master to compute interest, at 4*l.* per cent., on the 500*l.*, from the end of two months after the testator's death, and on the 2000*l.*, from the end of one year after the testator's death, until those sums shall be paid into the bank: let the Master inquire whether there is any debt due, from the plaintiff, on the warrant of attorney in the will of the testator mentioned: and let him deduct what (if any thing) he shall find due thereon, from the interest so to be computed as aforesaid; and let the defendants, the executors, pay the residue of such interest to the plaintiff. The plaintiff's costs to be taxed and paid by the executors. Liberty to apply.

[*621] *STONE *v.* THE COMMERCIAL RAILWAY COMPANY.

1839; 20th March.—Railway Act; Construction; Yard.

By a railway act, it was enacted that, if the railway company should be desirous of purchasing part of any house, garden, yard, warehouse, building or manufactory, and the owner should signify his inclination to sell the whole of such house, garden, yard, &c., he should not be compelled to sell, to the company, part only or less than the whole of such house, garden, yard, &c. Held, that a yard for bonding foreign timber, in which there were a deal shed and two buildings containing saw pits, was not a yard within the meaning of the enactment.

An act was passed in the 6th and 7th Will. 4, intituled: "an act for making a railway from the Minories to Blackwall, with branches, to be called The Commercial Railway."

The plaintiffs were the proprietors and occupiers of an extensive timber yard situate in the parish of St. Anne, Limehouse, in the county of Middlesex. The defendants gave the plaintiffs notice of their intention to take a part of the yard for the purposes of their act. The yard was used for bond-

(a) Affirmed by the Lord Chancellor.

[1] Vide *Coster v. Coster*, ante, 597, 602.

 1839.—*Stone v. Commercial Railway Company.*

ing foreign timber and wood, and was surrounded and inclosed, partly, by high and substantial brick walls, partly, by the back of a shed situate within the yard, and, partly, by a high wooden fence: and, within the yard, there were several deal sheds for stowing timber, and two buildings containing saw pits.

By the 50th section of the act, it was enacted that, if any person or corporation by the act authorized to sell and convey any lands, should be applied to, by or on behalf of the company, to treat for, sell, dispose of or convey any part of any house, garden, *yard*, warehouse, building or manufactory in the actual occupation of one person, or several persons jointly, and should signify his inclination or desire to treat for, sell, dispose of, and convey the whole of such house, garden, *yard*, warehouse, building, or manufactory, and, if it should happen that the said company should not think proper or be willing to purchase the whole of such house, garden, *yard*, warehouse, building or manufactory, then *and in every such case, nothing [*622] in the said act contained, should extend or be construed to extend to compel such person or corporation interested therein, to treat for, sell, dispose of or convey, or to authorize the said company to take or use part only or less than the whole of such house, garden, *yard*, warehouse, building or manufactory.

The defendants having given the plaintiffs notice of their intention to take a certain part only of the yard, the bill was filed, praying, amongst other things, that it might be declared that, according to the true construction of the act, the plaintiffs were not bound or compellable to treat for, sell, dispose of or convey, and that the defendants were not authorized to take or use, under the provisions of the act, part only or less than the whole of the said timber or bonding yard; and, if necessary, that an action or issue, or a case might be brought, or directed to a court of law, for the purpose of ascertaining the true construction of the act; and that the defendants, their agents, servants and workmen, might be restrained from entering upon or taking possession of the yard or any part thereof, and from cutting up and removing the soil thereof, and from abating and destroying any part of the walls of the yard, and from committing or doing any other waste, spoil or damage unto or upon the same or any part thereof.

Upon the hearing of a motion for the injunction prayed by the bill, one question was, whether the yard, of which the plaintiffs were the proprietors and occupiers, was a *yard* within the meaning of the 50th section of the act?

Mr. *Knight Bruce*, Mr. *Wigram*, and Mr. *Walker*, for the plaintiffs, in support of the motion.

*Mr. *Jacob*, Mr. *G. Richards* and Mr. *Bigg*, for the defendants. [*623]

THE VICE-CHANCELLOR :—The important question in this case is that which relates to the yard, that is, whether the defendants, under the powers of their act of Parliament, can compel the plaintiffs to sell to them that portion only of the yard which is described in their notice, or whether the plain-

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tiffs are not at liberty to say that they will not sell, to the defendants, less than the whole of the yard.

The true way of construing this act of Parliament, is to look at the different sections in which the word "yard" is used, either alone or in connection with any other word which is meant to give it a particular qualification, and then to see whether it is not pretty plain, on the face of the act, that the word must have different significations in different parts of the act.

The second section says: "that, where the word 'railway' is used, the same shall be understood to include the branch railways, yards, stations, wharfs, and other works hereby authorized to be made." There, it is observable that the Legislature is speaking, prospectively, of non-existing things; and a yard might be such a yard as the company might choose to construct, of any description whatever; and there is nothing there to restrain the character of the yard except that opinion which the company's engineers might entertain about the usefulness or the mode of making any particular yard. The eighth section is the first section that alludes to the schedule, which describes the property through which the company were authorized to

[*624] make their railway: "and, when you look at the schedule, you find not only a very great number of instances in which the word "yard" is used, but you find, besides that word, the following expressions, namely, timber yard, stone yard, chapel yard, livery stable yard, open yard, feeding yard for cattle, cattle yard, dung yard, yard to workshops, yard or vacant ground, covered yard, mill yard. I cannot but think that the persons who framed this schedule, must have meant to make a distinction between the term "yard" used *simpliciter*, and the term "yard" adjoined as it is to certain other words which are found in the schedule. Then, in the ninth section, you find that for the purposes and subject to the provisions of the act, the company are empowered to enter into and upon the land of any person whatsoever, and to survey and take levels of the same, and to set out and appropriate, for the purposes of the act, such parts thereof as they are by the act empowered to take or use; and, in or upon such lands or any lands adjoining thereto, not being houses, buildings, yards or gardens, to bore, dig, cut, embank and sough, and to remove or lay, and also to use, work and manufacture any earth, stone, rubbish, trees, gravel or sand, or any other materials or things which may be dug or obtained therein or otherwise in the execution of any of the powers of the act, and which may be proper or necessary for making, maintaining, altering, repairing or using the railway and other works by the act authorized, or which may obstruct the making, maintaining, altering, repairing or using, the same respectively, according to the true intent and meaning of the act. Now, in my opinion, the word "yards," accompanied, as there is, with the terms "houses, buildings and gardens," has a reference to houses and buildings. By that section the company are not empowered to enter upon lands generally, but only upon those lands which are not houses, buildings, yards or gardens; and it seems to me that

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the Legislature meant to pay that respect to the houses and buildings of her Majesty's subjects, which the law of this country always does pay to the inhabited buildings of man. Then the 43d sect. recites that, in making and executing the railway and the several other works authorized by the act, it might be necessary, for the company, their agents and workmen, to enter upon and take temporary possession of some parts of the lands, not being houses, buildings, yards or gardens: and it proceeds to direct that there shall be compensation made for that temporary damage which may be done under the 9th section. It is evident, therefore, that, where the Legislature speaks of lands, it has, as a matter of caution, introduced, parenthetically, the same expression, "not being houses, buildings, yards or gardens," as it had introduced in the 9th sect.: because, if those words had not been introduced, it might have been said that there was a variance between the two sections, and that the true effect of both together was to allow the company to do temporary damage on lands generally; which clearly was not the meaning of the Legislature. It seems to me, therefore, that, whatever is the meaning of the word "yard" in the 9th sect., the same meaning must be attributed to it in the 43d sect. Then the 45th section enacts; "that nothing herein contained shall authorize the said company, or any person acting under their authority, to take, injure or damage, for the purposes of this act, any house or other building which was erected or built on or before the 30th November, 1835, or any ground which was then set apart and used as and for a garden, orchard, yard, park, paddock, plantation, planted walk or avenue to a house, or any inclosed ground planted as "an ornament or shelter to a house, or [*626] planted and set apart as a nursery for trees, other than and except such as are specified in the schedule to this act annexed, without the consent in writing of the owner or occupier thereof." There also the term "yard" must be taken with reference to a house; because all the other things which are mentioned in that section have reference to a house, except a nursery for trees, which is a thing of a very precise and determined character, and is so described, in the act, as that there can be no mistake about it; nor can there be any doubt as to the reason why the Legislature thought fit to except it, namely, because of its value, and of the great injury that would be done by making the railway through it. I do not, however, think that that section very materially helps us in deciding the meaning of the word "yard" as it is found in the 50th section.

That 50th section enacts: "That if any person by the act authorized to sell and convey any lands, shall be applied to, by or on behalf of the said company, to treat for, sell, dispose of, or convey any part of any house, garden, yard, warehouse, building or manufactory, in the actual occupation of one person or of several persons jointly, and shall, by notice in writing, to be left with the secretary or clerk of the said company, signify his inclination or desire to treat for, sell, dispose of and convey the whole of such house, garden, yard, warehouse, building or manufactory, and if it shall happen that

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the said company shall not think proper or be willing to purchase the whole of such house, garden, yard, warehouse, building or manufactory, then and in every such case, nothing in this act contained shall extend or be construed to extend to compel such person to treat for, sell, dispose of or convey, or to authorize the said company to take or use part only or less than the whole of such house, garden, yard, warehouse, building or manufactory." *

Now the question is, what does the word "yard" there mean? In the first place, with what words is it connected? The words "house and garden," come before it; and the words "warehouse, building or manufactory," come after it: and, in my opinion, the mere collocation of the words does show that the terms, "yard" and "garden," are to be taken in connection with a house. The Legislature must be presumed to preserve a unity of idea: but that unity of idea would be broken, if you, first of all, were to take the house, and next take a garden and yard as disconnected from a house, and then return again to the original idea with a modification of it, namely, a warehouse, a building, or a manufactory: and I cannot but think that the position of the words here, does show that the garden and the yard were intended to be taken in connection with the house.

These acts of Parliament are drawn by persons who are conversant with the law: and it is not immaterial to consider what is the notion attached, by law, to a house. Lord Coke in his 1st Institute, 5 b, says: "By the grant of a messuage or house, *messuagium*, the orchard, garden and curtilage (that is the yard) do pass; and so an acre or more may pass by the name of a house." And it is remarkable that, where Sheppard's Touchstone gives an account of the words which are used in a fine and the order in which the words so used are to be placed, it mentions the messuage, the toft, the mill, the dove house, and then comes the garden; and, if you look into [628] Wilson on Fines, you will see that, for "about one hundred pages, there are instances given of fines; and I think that there is but one (which seems to have been a fine of a very small property) in which the word "curtilage" is mentioned; although, in all of them, I believe messuages are mentioned without express mention of the curtilage. The word messuage would comprehend the house and all that belonged to it. The toft, in law, signifies the site of a messuage. Then follows the dove house, and, next, the garden; and though the garden is expressly named in a fine, yet Lord Coke tells us that, by the term "messuage," the garden will pass, without any express mention of it.

It seems to me, therefore, that, when the Legislature, in this act of Parliament, used the word "house," it intended it to be taken in its proper, legal signification; but, for the purpose of excluding any doubt upon that subject, it added the words "garden and yard." And it appears to me to be perfectly plain that the Legislature, when it so added the word "yard," did not mean that which may be, in some sense, a yard, but that which, in a precise sense,

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is a yard, namely, that which is connected with a messuage, and capable of passing under the word "messuage."

The framers of the schedule too have repeatedly introduced the word "yard." If they had meant that everything which comes within the description of a yard, should be included in the general term "yard," what was the use of annexing the words of qualification or description to which I have before adverted? It would have been quite enough to have called the yard which any particular individual might have, by the general name of a yard, without prefixing any qualifying term, or entering into the lengthened description of "feeding yard for cattle."

"My opinion is, upon looking at the whole of this act, that this extensive piece of ground which is in no way connected with a house or building, (any otherwise than as a deal shed may be called a building, which, for the present purpose, I think it cannot,) or with a warehouse, or a manufactory, cannot be said to be a yard within the meaning of the 50th section of this act of Parliament: and I therefore think that the company lawfully might take possession, under the act, of part of the yard, without being bound to take the whole of it: and, consequently, I shall refuse the motion for the injunction. [*629]

 WATERMAN v. SMITH.

1840; 28th January.—Appointment; Power.

A power given to a husband and wife, was required to be exercised by them by any deed or writing under their hands and seals, to be by them executed in the presence of and attested by two witnesses. Held that a deed which was signed as well as sealed and delivered by the husband and wife in the presence of two witnesses, was not a good exercise of the power, because the attestation clause did not extend to the signature as well as to the sealing and delivery.

By the settlement made previously to the marriage of Isaac Baugh with Charlotte his wife, and dated the 31st August, 1785, Isaac Baugh covenanted that his heirs, executors or administrators should, within three months after his death, pay to trustees the sum of 20,000*l.* in trust, in case Charlotte Baugh should survive him and there should be issue of the marriage living at his decease, to invest the 20,000*l.* on the usual securities, and to pay the interest thereof to Charlotte Baugh for her life, and, after her decease, in trust to assign, pay, apply and dispose of the sum of 6000*l.*, part of the 20,000*l.*, and the interest and proceeds thereof, to and for the use and benefit of all or any one or more of the children of the marriage, and in such proportions, parts or shares, and payable in such manner and at such respective [*630] times as I. Baugh and Charlotte his wife, by any deed or writing under their respective hands and seals, to be by them executed in the presence of and attested by two or more credible witnesses, should direct or appoint; and, for want of such joint direction or appointment, then as Charlotte

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Baugh (she surviving the said I. Baugh,) by any deed or writing under her hand and seal, to be by her executed in the presence of and attested by two or more credible witnesses, should, in like manner, direct or appoint.

There was issue of the marriage two children, Edmund and Charlotte, the latter of whom intermarried with William Hare.

I. Baugh and Charlotte his wife, by a deed poll *under their hands and seals* dated the 2d February, 1819, directed and appointed, in exercise of the powers given to them by the settlement, that, in case Edmund Baugh should die unmarried and without issue, then the trustees should stand possessed of the 6000*l.*, in trust for Mrs. Hare, her executors and administrators, in such manner however as that the interest thereof should be for her separate use during her life, and that the principal should be subject to her disposal *by will*. This instrument was attested as follows: "Sealed and delivered in the presence of H. T. Hodgson; Samuel Hodgson."

Isaac Baugh died in March, 1823; and Edmund Baugh died in April, 1838, without having been married.

By a deed poll, dated the 3d of August, 1839, under the hand and [*631] seal of Mrs. Baugh, and by her executed "in the presence of and attested by two credible witnesses,(a) she, in execution of the power given to her by the settlement, directed and appointed that, after her decease, the trustees should assign and pay the 6000*l.* and the annual income thereof, unto her daughter, Mrs. Hare, for her separate use, or unto such person or persons as Mrs. Hare, notwithstanding her coverture, by any deed or by her last will, should appoint.

By an indenture dated the 20th of August, 1839, Mrs. Hare, in the exercise of the power given to her by the deed poll of the 3d of August, 1839, appointed, and, also according to her interest under the said deeds-poll or either of them, assigned the 6000*l.* (subject to Mrs. Baugh's life interest therein) to the plaintiff, to the intent that he should, thereout, after Mrs. Baugh's decease, repay himself a sum of money which he had lent to Mrs. Hare: provided that, if the money lent should not be repaid on or before the 20th of October, then next, then it should be lawful, for the plaintiff, to sell a competent part of the 6000*l.*, and, out of the proceeds, to retain the money lent.

The plaintiff, under the power of sale, agreed to sell, to the defendant, 1500*l.*, part of the 6000*l.* The defendant refused to complete his purchase, alleging that the plaintiff could not make a good title to the 1500*l.*, on the ground that the deed poll of the 2d of February, 1819, was a valid [*632] appointment and a full "exercise of the power contained in the settlement. Upon which the bill was filed; and after charging that the deed-poll of the 2d of February, was not a valid appointment or an exercise of the power contained in the settlement, for that it was not duly attested as

(a) The brief did not state that the signing as well as the sealing and delivery of this deed, was attested; but it is presumed that that was the case.

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required by the settlement, it prayed for a specific performance of the agreement.

The defendant demurred to the bill for want of equity.

Mr. *Wigram* and Mr. *Stone*, in support of the demurrer, contended that the deed-poll of February, 1819, was a valid execution of the power of appointment given, to Mr. and Mrs. *Baugh*, by the settlement, notwithstanding the word "signed" was omitted in the attestation clause: that that deed-poll was, in fact, signed as well as sealed by Mr. and Mrs. *Baugh*, and, consequently, was an instrument under their hands and seals: that it was their execution only that was required to be attested, the words, "under their hands and seals," being used parenthetically. *Mackinley v. Sison*, (a) *Doe v. Burdett*, (b) *Stanhope v. Keir*, (c) *Macqueen v. Farquhar*, (d) *Hougham v. Sandys*, (e) The case of *Wright v. Barlow*, (f) which will be cited on the other side, was very different from the present case; for there the power was required to be exercised by a deed under the hand and seal (of the donee,) attested by the witnesses. In this case, the instrument is to be executed in the presence of and attested by the witnesses; and, therefore, it is the execution only that is required to be attested.

*Mr. *Kight Bruce* and Mr. *Willcock* appeared in support of the [*633] bill; but,

THE VICE-CHANCELLOR, without hearing them, said:—This case does not differ from *Wright v. Barlow*. There the power was to be exercised by Elizabeth Barlow, by any deeds or deed, writing or writings, under her hand and seal, attested by two or more witnesses; but the attestation did not extend to the signature. Here the words are: "by any deed or writing under their respective hands and seals, to be by them executed in the presence of and attested by two or more credible witnesses." Consequently, the deed or writing was to be signed, as well as sealed and delivered by Mr. and Mrs. *Baugh*, and their signature, as well as their sealing and delivery, was to be attested. Moreover, an instrument which is to be executed by a married woman, must be precisely in the form prescribed. The consequence is that, as the attestation clause to the deed of February, 1819, omits the word "signed," the power was not well exercised by that deed.[1]

The question in this case, is quite different from the question as to publication, which arose in some of the cases that have been cited.

Demurrer overruled.

(a) Ante, vol. 8, p. 561.

(b) 4 Adol. & Ell. 1, and 1 Perry & Dav. 670.

(c) 2 Sim. & Stu. 37. [40, n. 1.]

(d) 11 Ves. 467. (e) Ante, vol. 2, p. 95 (f) 3 M. & S. 512.

[1] Vide *Simeon v. Simeon*, 4 Sim. 555. "The decisions upon the execution of powers have gone this length, if a power is to be executed by the donee signing, that although the witnesses actually saw the party in the act of signing, yet, if the attestation clause omits to insert the word 'signed,' it has been held a bad execution of the power, and parol evidence would not be admitted to prove the fact in opposition to the evidence afforded by the attestation clause." Pennefather, B. *Ogle v. Ogle*, Saunde & Sc. 33.

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*BULLOCK v. THOMAS.

1839 : 12th April.—Will ; Construction ; Costs.

Testatrix bequeathed 10,000*l.* three per cent. stock, in trust for E. S. for her life, and, after her decease, in trust for such one or more, exclusively of the others of her residuary legatees, as E. S. should appoint ; and she empowered E. S. to appoint 150*l.* a year to be paid to J. S. out of the interest of the stock, during his life. E. S. by her will appointed 150*l.* a year, part of the interest of the 10,000*l.* stock, or of the stocks, funds and securities, into or upon which the same should be changed or secured at the time of her death, to be paid to J. S. during his life, and, after his death, she appointed so much of the 10,000*l.* stock, or of the stocks, funds or securities, into or upon which the same should be then changed or secured, from which the 150*l.* a year should have arisen, to A. B., one of the residuary legatees named in the original will : and, as to so much of the 10,000*l.* stock, or the stocks, funds or securities into or upon which the same might be changed or transferred at her death, which should not be necessary to answer the annuity of 150*l.*, she appointed the same to J. B., another of the residuary legatees. After E. S. had made her will, the trustees at her request, sold the stock and invested the proceeds, amounting to 6600*l.* on a mortgage at five per cent. After E. S.'s death, the mortgage was paid off, and the money was invested under a decree, in the purchase of 7123*l.* consols. Held, that A. B. was entitled to 5000*l.* consols, as being the capital of the 150*l.* a year, and that J. B. was entitled to the remainder only of the 7123*l.* consols.

ELIZABETH LEGH, by her will dated the 17th of May, 1806, gave to trustees, the sum of 10,000*l.* three per cent. reduced bank annuities, upon trust to continue the same in that state, or convert the same into money, and lay out and invest such money, in their or his names or name, in the purchase of parliamentary stocks or funds of Great Britain, or at interest upon government or real securities in England ; and, during the life of Elizabeth, the wife of Jean Jacques Schenck, to pay the interest and dividends to arise therefrom, to the said Elizabeth Schenck for her separate use for her life, and,

[*635] after her decease, upon trust to pay, assign and transfer such last mentioned trust moneys, stocks, funds and securities, unto such one or more, exclusively of the others, of the persons to whom the residue of the testatrix's personal estate was thereafter bequeathed, or of the issue born of any such person or persons in the lifetime of Elizabeth Schenck, to be divided between them, in such shares, and to be vested at such times, and with such limitations over, between and among them, and with such provisions for maintenance, and in such manner as Elizabeth Schenck should, notwithstanding her coverture, by her last will or any codicil thereto, appoint ; and, in default of such appointment, the testatrix directed that the trustees should stand possessed of the same trust moneys, stocks, funds and securities, upon the trusts thereafter expressed concerning the residue of her personal estate : and the testatrix thereby empowered Elizabeth Schenck, by her will or codicil, to appoint to her husband, Jean Jacques Schenck, any annual sum or sums of money, not exceeding, in the whole, the annual sum of 150*l.*, to be paid to him during his life, out of the interest of the last mentioned trust moneys, by equal half yearly payments : and the testatrix bequeathed

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the residue of her personal estate to certain persons named in her will, or each of them as should be living at her decease.

The testatrix died shortly after the date of her will: and the trustees retained and held the sum of 10,000*l.* reduced three per cents. upon the trusts declared of the same by the will. In January, 1815, the trustees, at Mrs. Schenck's request, sold out the 10,000*l.* three per cents. and invested the proceeds, which amounted to 6600*l.*, on a mortgage of a freehold estate, bearing interest at five per cent.

On the 23d of September, 1813, Mrs. Schenck, in *exercise of the [*636] power reserved to her by the will of Elizabeth Legh, made her will, and, thereby, after reciting the before mentioned bequest of the 10,000*l.* three per cents., she appointed the annual sum of 150*l.*, *part* of the interest, dividends and annual produce of the said sum of 10,000*l.* three per cent. reduced annuities, or of the stocks, funds and securities into or upon which the same should be changed or secured at the time of her decease, to her husband, Jean Jacques Schenck, to be paid to him or his assigns during his life, by equal half-yearly payments, and, after his death, she appointed so much of the said sum of 10,000*l.* three per cent. reduced annuities, or of the stocks, funds or securities into or upon which the same should be *then* changed or secured, from which the said annual sum of 150*l.* should have arisen, unto Arabella Bullock, one of the residuary legatees named in the will of Elizabeth Legh, her executors, administrators and assigns: and *as to so much and such part of the said sum of 10,000*l.* three per cent. reduced annuities, or the stocks, funds or securities into or upon which the same might be changed or transferred at the time of her decease, which should not be necessary to be set apart in pursuance of her will and the appointment therein contained for the benefit of Jean Jacques Schenck for his life*, she appointed the same to John Rowlls Brown, another of the residuary legatees named in Elizabeth Legh's will, his executors, administrators and assigns.

In January, 1835, Mrs. Schenck made a codicil to her will; and, thereby, after reciting the death of Arabella Bullock leaving several children, she, in exercise of the power reserved to her by Elizabeth Legh's will, appointed, after the decease of her husband Jean Jacques Schenck, so much and such a part of the said sum of *10,000*l.* three per cent. reduced an- [*637] nuities, or of the stocks, funds and securities into or upon which the same should be *then* changed or secured, from which the said annual sum of 150*l.* should have arisen as aforesaid, amongst such of the daughters of Arabella Bullock as should be living and unmarried at the time of her death.

Mrs. Schenck died on the 4th of August, 1836, leaving her husband her surviving.

In September, 1836, the person entitled to the equity of redemption of the hereditaments on which the 6600*l.* was secured, gave notice of his intention to pay off that sum. In June, 1837, the bill was filed, by the unmarried daughters of Arabella Bullock who were living at Mrs. Schenck's death;

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and, after stating that the plaintiffs were desirous that the 6600*l.* should be paid into the bank, in the name and with the privity of the Accountant General in trust in the cause, in order that so much of that sum as should be required for that purpose, might be invested in the purchase of 5000*l.* consols, and that the dividends of the sum so invested might be applied in payment of the annual sum of 150*l.* to Jean Jacques Schenck ; and that the plaintiffs were advised that, upon his death, they would be entitled to have the 5000*l.* consols divided amongst them, in equal shares ; but that John Rowlls Brown objected to such investment being made ; the bill prayed that it might be declared that so much of the 6600*l.* as should be required for that purpose, ought to be invested in the purchase of 5000*l.* consols, in order that the dividends thereof might be applied in payment of the annual sum of 150*l.* to the defendant, John Jacques Schenck, during his life, [638] and that the plaintiffs *would be entitled to have the 5000*l.* consols divided amongst them, in equal shares, after his death ; and that directions might be given accordingly for the purchase and investment of the 5000*l.* consols out of the 6600*l.*, and for the payment of the dividends thereof to the defendant Jean Jacques Schenck during his life, and that the residue of the 6600*l.* after payment, thereout, of the costs of the suit, might be ordered to be paid to the defendant John Rowlls Brown.

By the decree made on the hearing of the cause, liberty was given, to the person entitled to the equity of redemption of the mortgaged premises, to pay the 6600*l.* into court ; and it was ordered that that sum, when paid in, should be laid out in the purchase of bank 3*l.* per cent. annuities in the usual manner.

In pursuance of the decree, the 6600*l.* was paid into court and laid out in the purchase of consols ; but, owing to the high price of the funds, it did not purchase more than 7143*l.* of that stock. At Mrs. Schenck's death 3000*l.* was the portion of the 6600*l.* which produced the annual sum of 150*l.* ; and, on the cause coming on for further directions, the question was whether the plaintiffs were entitled to have 5000*l.* consols, the amount claimed by their bill, set apart for them out of the fund in court, or such portion only of that fund as was equivalent to 3000*l.* at the time when the 6600*l.* was laid out under the decree.

Mr. *Knight Bruce* and Mr. *Wilbraham*, for the plaintiffs, and Mr. *Nicholl* for the defendant Jean Jacques Schenck :—Mrs. Schenck, in her will, recites the power given to her by the will of Elizabeth Legh, and [639] exhibits a clear *intention to exercise it to its full extent : and, by that will, she was empowered to appoint, to her husband, the annual sum of 150*l.*, out of the income of the trust fund, whatever it might be. The only difficulty in this case, arises from her having used the word, "part," when she exercised the power : but that word must be read, "out," for that is the word used by the original testatrix in creating the power. Mrs. Schenck then directs the the 150*l.* a year to be paid, to her husband,

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during his life ; and, after his death, she appoints that part of the capital of the trust fund, whatever it might be, from which the 150*l.* should have arisen, to the mother of the plaintiffs. The consequence is that Mr. Schenck is entitled to be paid 150*l.* a year, without diminution, during his life, out of the dividends of the trust fund ; and the plaintiffs, who, by the codicil, are substituted for their mother, will be entitled, on his death, to have that portion of the capital which produces the 150*l.* a year, divided amongst them. *Trevor v. Trevor*,(a) *May v. Bennett*.(b)

Mr. *Jacob* and Mr. *Shadwell*, for John Rowlls Brown :—The power given, by the original will, to change the securities on which the trust fund was invested, ceased on the death of Mrs. Schenck. Consequently the rights of the parties are fixed as they stood at Mrs. Schenck's death ; and the sum which, at that time, produced the 150*l.* a year, is the sum which the court ought to direct to be set apart, to answer both the annuity and the legacy given to the plaintiffs.

The cases cited have no application : for, there, the questions arose between particular legatees and general "residuary legatees. [*640] Here John Rowlls Brown is as much a legatee of a specific portion of an ascertained fund, as the plaintiffs are.

The whole, or a fair proportion at least, of the costs of the suit must be paid out of that part of the fund to which the plaintiffs are entitled. *Jenour v. Jenour*.(c)

Mr. *Knight Bruce*, in reply :—The language of Mrs. Legh's will, gave, to Mrs. Schenck, power to charge the whole fund ; and it clearly appears, from Mrs. Schenck's will, that she was aware of the extent of her power and intended to exercise it fully ; and also that she was aware that she was dealing with a fund which, under the original will, was susceptible of variation ; for, after the death of her husband, she appoints, to Mrs. Bullock, so much of the 10,000*l.* reduced annuities, or of the stocks, funds or securities into or upon which the same should be then changed or secured, from which the 150*l.* a year should have arisen : and, in her codicil, she repeats those words. The consequence is that Mr. Schenck is entitled to be paid the full sum of 150*l.* a year during his life : and, at his death, the plaintiffs will be entitled to the fund which produces that sum.

THE VICE-CHANCELLOR :—The difficulty in this case has arisen in this way. Mrs. Schenck, meaning to make a division of the fund into two parts, has not used the same language in disposing of one part of it, as she has in disposing of the other part. The language of the latter gift, is not correlative to that of the former. But it is plain that she intended "that [*641] her husband should have 150*l.* a year arising from the interest of a portion of the fund, and that the sum which Mrs. Bullock was to take, should be that portion of the whole fund out of which the 150*l.* was to be payable.

(a) 5 Russ. 24.

(b) 1 Russ. 370.

(c) 10 Ves. 562.

1840.—Matter of Williams, Ex parte Bird.

Having given that, all the rest was to go to Mr. John Rowlls Brown. But, after having given a certain part of the fund, she has, by a plain blunder in language, so given the remainder as if she meant to trench on that part which she had before given. Now what would this court have done if it had not found the fund invested in 3 per cent. stock? This court would, on the death of Mrs. Schenck, have ordered the fund to be paid into court and laid out in consols. Then, out of that fund, Mr. Schenck would be entitled to receive 150*l.* a year, which would be represented, in capital, by 5000*l.* consols and only the remainder of the capital would go to Mr. Brown.

Next, with respect to the costs of the suit. As the question which has arisen in this case relates to the division of the whole fund, the costs of the suit must be paid, rateably, out of the two portions of the fund.

[*642] *IN THE MATTER OF WILLIAMS, Deceased. EX PARTE BIRD.

1840: 7th August.—Mortgagee; Construction of 11 Geo. 4 and 1 Will. 4, c. 60, s. 8.

The case of a mortgagee leaving an heir but who is not known, is within the 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, as expounded by 4 and 5 Will. 4, c. 23.

THIS case came before the court on the 26th and 27th of June, 1840.^(a) It was mentioned again on a subsequent day, when the Vice-Chancellor said that he must take time to consider the acts of Parliament which had been referred to.^(b)

On this day his Honor delivered judgment as follows:—I do not find that there is any decision which is at all at variance with the opinions expressed by Lord Langdale, M. R., in *Ex parte Whitton*;^(c) and by myself *In re Stanley*;^(d) when that case came before me the second time. The case *In re Deardon*^(e) came before the present Lord Chancellor when Master of the Rolls; and it appears that his Lordship's opinion was formed, solely, on the 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, and that no reference was made to the 4 and 5 Will. 4, c. 23. My opinion, therefore, is that this case comes within the 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, coupled with the legislative exposition of that enactment given by the 4 and 5 Will. 4, c. 23: and, therefore, you may take your order.

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*BRYDGES v. BRANFILL.

1840: 16th November.—Practice; Publication.

Before a defendant can move to enlarge publication, he must serve his co-defendants, as well as the plaintiff, with notice of the motion.

MR. KNIGHT BRUCE, for the defendant, Brooks, moved to enlarge publication.

(a) See ante, p. 426.

(d) Ante, vol. 7, p. 170.

(b) See ante, p. 494.

(e) 3 Myl. & Keen, 508.

(c) 1 Keen, 278.

 1840.—In re Christie.

Mr. *Bethell*, for the plaintiff, objected that the co-defendants had not been served with the notice of motion; and cited 1 Smith's Practice, 388.

THE VICE-CHANCELLOR said that the co-defendants might be delayed by the order sought to be obtained, and, therefore, they were interested in the application, and ought to be served with notice of it. And his Honor ordered the motion to stand over in order that the co-defendants might be served with notice of the motion.

 IN RE CHRISTIE.

1840: 20th November.—Practice; Infant; Maintenance.

Order made on petition without suit, for the allowance of 450*l.* a year for the maintenance of an infant, the income of whose property exceeded 1500*l.* a year.

PETITION for maintenance out of the income of an infant's personal estate.

The income exceeded 1500*l.* a year; and the Master's report approved of an allowance, for maintenance, of 450*l.* a year.

THE VICE-CHANCELLOR said that he thought the distinction, as to making orders on petitions without suit, between cases where the income was above or below 300*l.* per annum, was without any foundation in principle; and he made the order.[1]

Mr. *Loftus Wigram* appeared for the petitioner.

 *HULME v. HULME.

[*644]

1839: 19th April.—Will; Construction.

Testator directed his trustees and executors to apply, the income of his residuary estate, for the maintenance, &c. of all his children, and to accumulate the surplus for their benefit, until the youngest should attain twenty-one, and then to divide the capital into as many equal shares as the number of his children who should be then living should amount to, an equal share being allotted to each of them and to the issue of such of them as should be then dead, such issue taking their parents' share, the shares of such of his children as should be sons, to be paid, to them or their issue, on his youngest child attaining twenty-one, and, the shares of such of them as should be daughters, and, of the issue of such of his daughters as should be then dead, he directed to remain in the hands of his trustees, upon trust to pay the interest to each of his said children, being daughters, during their lives for their separate use; and, on the decease of each of his said daughters, or in case any of them should be dead leaving issue when his youngest child should attain twenty-one, then he directed his trustees to pay the share of each such daughter to her issue. One of the daughters who was living when the youngest child attained twenty-one, died a spinster. Held that she took an absolute interest in a share of the residue.

JONATHAN HULME made his will, dated the 26th of May, 1824, which,

[1] As to the jurisdiction of the court in allowing maintenance to an infant out of his own estate, although not a ward of court, see 2 Story's Eq. § 1354 and cases there cited. *Cudworth v. Thompson*, 3 Deau. 258. *Heyward v. Cuthbert*, 4 Deau. 445.

1839.—Hulme v. Hulme.

after containing various specific and other bequests, proceeded as follows:—
 “ I give and devise my estate and interest of and in my leasehold close of land situate in Stretford aforesaid, unto Thomas Gaskill and James Sothern, their heirs, executors and administrators, nevertheless upon trust, during the respective minorities of my children, to receive and take the rents, issues and profits of the said hereditaments and premises, and apply and dispose of the same in such a manner as the interest and proceeds of my residuary estate is hereinafter directed to be applied and disposed of, during the respective minorities of my said children; and, from and after the attainment of the youngest for the time being of my said children to the age of twenty-one years, in trust for all my children begotten on the body of my wife,
 [*645] Betty, their *respective heirs, executors and administrators: and I give and bequeath, unto each of my sons, on their respective attainment to the age of twenty-one years, the sum of 200*l.*, and, to each of my daughters begotten on the body of my said wife Betty, on their respective attainment to the age of twenty-one years, or day or days of marriage, which, shall first happen, the sum of 500*l.*: and I give and bequeath to my daughter Ann, by my first wife, the sum of 50*l.*, to be paid on the attainment of the youngest of my said children to the age of twenty-one years; but, in case my said daughter Ann, shall be then dead without leaving lawful issue, then the said legacy of 50*l.* shall be added to the residue of my estate and effects and be disposed of accordingly. And as concerning the moneys to arise from the sale of my hereditaments and premises hereinbefore directed to be made, and also as for and concerning all the residue and remainder of my estate and effects of what nature or kind soever and wheresoever situate, subject nevertheless to the payment of my debts, funeral and testamentary expenses and the several legacies by me hereinbefore bequeathed, I give and bequeath the same unto the said Thomas Gaskell and James Sothern, their executors, administrators and assigns, upon trust that they, my said trustees, shall and do place the same out at interest on real security, or invest the same in the public funds, and shall and do pay and apply the dividends, interest and proceeds thereof or so much thereof as shall be necessary, in the discharge of the said yearly sums of 100*l.* or 50*l.*, as the case may be, to my said wife, at or on the days and times and in the portions hereinbefore apportioned for payment thereof, and also in the maintenance, education and support of *all my children* begotten on the body of my said wife Betty, until the youngest for
 [*646] the time being of the said children shall attain the age *of twenty-one years: and I do hereby authorize and empower my said trustees to lay out and advance any sum or sums of money for the placing out apprentice any of my children to any trade or profession, as they in their discretion, shall judge proper, such sum or sums of money to be laid out or advanced as aforesaid to be paid out of the share or shares of my estate and effects to which such child on whose behalf the same shall have been advanced, or his, her or their issue, may become entitled under or by virtue of this my will;

1839.—Hulme v. Hulme.

and, in case of any surplus of the dividends, interests and proceeds of my said residuary estate, after satisfying the purposes aforesaid, shall and do permit the same to accumulate to and for the benefit of *all my children* begotten on the body of my said wife, until the youngest of them for the time being shall attain the age of twenty-one years: and, from and after the attainment of the youngest for the time being of my said children to the age of twenty-one years, upon trust that they, my said trustees, shall and do continue out at interest or invest, in the public funds, so much of the said principal trust moneys as shall be sufficient to produce and raise the said yearly sum of 100*l.* or 50*l.* (as the case may be) so as aforesaid given and bequeathed unto my said wife; and, subject thereto and to the payment of the several legacies aforesaid, shall, and do *divide and assign the said trust moneys* and all the dividends, interest and proceeds thereof, and all accumulations in respect of the same, and also so much of the said trust moneys as shall be reserved and continued out at interest or invested as aforesaid for producing and raising the said yearly sum of 100*l.* or 50*l.*, as the case may be, from and after the decease of my said wife, *into as many equal parts and shares as the number of my children, begotten on the body of my said wife Betty, shall amount to, an equal part or share being allotted to or in trust for each* [*647] *of my children* by my said wife Betty who shall be living on the attainment of the youngest for the time being of my said children to the age of twenty-one years, and to or in trust for the issue of such of them as shall be then dead leaving issue, such issue, nevertheless, to have and take the part and share only which his, her or their parent or parents would, if living, have been entitled to; the share or shares of such of my said children, being a son or sons, to be paid to such son or sons or his or their issue on the attainment of the youngest for the time being of my said children to the age of twenty-one years, and the share or shares of such of my said children as, being a daughter or daughters, shall be living on the attainment of the youngest for the time being of my said children to the age of twenty-one years, and of the issue or issues of such of my said daughters as shall be then dead leaving issue, I direct shall remain in the hands of my said trustees, upon trust that they, my said trustees, shall and do place the same respectively out at interest or invest the same in the public funds, and shall and do pay, the dividends, interest and proceeds of each share respectively, *unto each of my said children being daughters during her or their life or lives*, to and for her and their own separate and independent use and benefit, and not subject to the control, debts or engagements of any husband or husbands they or any of them may hereafter happen to marry; and, on the decease of each of my said daughters, or in case any of my said daughters shall be dead leaving issue at the time of the attainment of the youngest for the time being of my said children to the age of twenty-one years, upon trust that they my said trustees, shall and do pay the share of such daughter so dying or dead as aforesaid leaving issue, unto and amongst all *and every the children of such daughter* [*649]

1839.—*Hulme v. Hulme.*

so dying or dead as aforesaid who shall be then living, and to the issue of such of them as shall be then dead leaving issue, equally, share and share alike, such issue, nevertheless, to have and take the part and share only which his, her or their parent or parents would have been entitled to if living: and my will and mind is and I do hereby direct that the said Thomas Gaskell and James Sothern shall and do, from time to time, during the respective minorities of the child or children of such daughter so dying or dead as aforesaid, pay and apply, the dividends,* interest and proceeds of her or their respective share or shares, to and for the maintenance, education and support of such children, or otherwise for their benefit and advantage, or lay out and invest the same or any surplus thereof, on such and the like securities as hereinbefore mentioned, there to accumulate to and for the use and benefit of such children respectively."

The testator died some time after the date of this will, leaving Betty Hulme his widow, and seven children by her, and Ann Hulme his only child by his first wife.

Henry Hulme was the youngest child, and had, long since, attained the age of twenty-one years.

Emily Hulme, one of the testator's daughters, died a spinster, having, after she had attained the age of twenty-one years, made her will dated the 30th of September, 1837, and thereby appointed her sister, Mary Hulme, executrix thereof.

The bill, which was filed by the testator's widow and surviving children, except Mary Hulme, against Mary Hulme and James Sothern, stated [**649*] that Mary Hulme, as "the executrix of Emily Hulme, alleged that, according to the true construction of the testator's will, Emily Hulme was entitled, at the time of her death, to a share of the residuary estate of the testator; but the plaintiffs charged that, in the events that had happened, the testator died intestate as to such share, and that such share was then divisible among the next of kin of the testator, and therefore, the plaintiffs were, together with Mary Hulme, in her own right and as the representative of Emily Hulme, entitled to such share.

The bill prayed that it might be declared that, upon the death of Emily Hulme without having been married, her share of the testator's residuary personal estate became devisible among his next of kin; and that it might be also declared that the plaintiffs and the defendant, Mary Hulme, in her own right and as representative of Emily Hulme, were entitled to such share.

Mr. *Jacob* and Mr. *Koe*, for the plaintiffs:—The will does not contain any words of gift, under which the daughters could claim any interest in any part of their father's residuary estate, except for their lives. The whole of the residue except the shares given to the sons, is placed under the control of the trustees, and there is no absolute gift to the daughters.—[The Vice-Chancellor: In the first instance, there is an absolute gift to all the children who should be living at the time when the youngest should attain the age of

1839.—*Hulme v. Hulme*.

twenty-one years. The testator directs his trustees to divide and assign the trust moneys into as many equal parts and shares as the number of his children begotten on the body of his second wife, should amount to, an equal part or share being allotted to or in trust for each of his children by his said wife who should be living on the "attainment of the youngest, [*630] or the time being, to the age of twenty-one years.]—The testator did not mean, by those words, to give absolute interests; for then the subsequent direction to pay the shares, of his sons, to them on the youngest child attaining twenty-one, would be superfluous: and, moreover, there is an express direction to pay the dividends and interest, of the shares of the daughters, to them for their lives.

Mr. *Knight Bruce* and Mr. *Shadwell*, appeared for the defendants: but, THE VICE-CHANCELLOR, without hearing them, said:—By the first operative words, the testator makes an absolute gift to all his children by his second wife, who should be living when the youngest child should attain twenty-one. He then superadds a direction for settling the shares of his daughters. The absolute gift remains, except so far as the direction for settling the shares of his daughters, has taken it away: and it is not taken away in the case of a daughter dying without having children.(a)

Declare that Emily Hulme took an absolute interest in the share of the testator's residuary estate provided for her by the will.[1]

(a) See *Whittell v. Dudin*, 2 Jac. & Walk. 279; and *Billing v. Billing*, ante, vol. 5, p. 232.

[1] Vide *Cuthbert v. Parrier*, Jac. 415. *Comber v. Graham*, 1 Russ. & M. 450. *Bourn v. Gibbs*, 2 Bl. 615, and note 2, *ibid*; where among other cases, *Mayer v. Townsend*, (3 Beav. 443,) is referred to, and partially stated. A further extract from that case appears to be apposite to the present subject. Lord Langdale, M. R., there says: "The testator first directs the trustees, 'to raise the sum of 5000*l.* for his daughter Elizabeth.' If he had ended there, she would, without any question whatever, have been entitled to the legacy absolutely; he then directs, that when the trustees should have obtained the same, they should invest it, and then he imposes certain restrictions; and first the trustees are to apply the dividends unto the daughter for her separate use for life. Suppose the will had ended here, I apprehend the daughter, being unmarried at her father's death, would have been entitled to have taken the 5000*l.* absolutely, notwithstanding the gift was to her separate use. After the decease of the daughter, there is a limitation to her children; by this contingency, she might be deprived of her absolute interest, and it might go to her children; there follows a power under which she might further diminish her interest, by giving a life estate to any husband. It is said, that it could not be intended that she should take an absolute interest, because if there were no children, a husband surviving her might take the property absolutely; I apprehend there would be a great deal to say on that point; but it does not arise; the question is, whether the legacy given absolutely by the first clause, is to be subject to any other contingencies or limitations beyond those expressed.—None of these having taken effect, the absolute interest remained in the daughter." A testator bequeathed a leasehold house and premises with the furniture and plate to his son Richard, and added, "and should he die without heir or will, the profits of the said house to be equally divided between all my grand-children by the consent of his mother:" it was held that the son took an absolute interest in the house. *Wigram, V. C.*, says; "The gift to Richard is absolute in the first instance; and the general rule of law is, that an absolute interest is not to be taken away by a gift over, unless that gift over may itself take effect. Now, it has been repeatedly decided, that where a legacy is given absolutely, and a gift over is superadded in the event of the legatee dying without having disposed of his legacy, the gift over is void and the legacy is

1839.—*Lushington v. Price.*

[*651]

*LUSHINGTON v. PRICE.

1839 : 25th April.—Mortgage ; Foreclosure ; Redemption.

A decretal order in a foreclosure suit under 7 Geo. 2, c. 20, s. 2, cannot be made, unless all the defendants who are interested in the equity of redemption, join in the application and admit the plaintiff's title ; and, consequently, the order cannot be made where one of these defendants is an infant.

MOTION, by one of the defendants in a foreclosure suit who was tenant for life of the equity of redemption, for a decretal order, under 7 Geo. 2, c. 20, s. 2.(a)

The Vice-Chancellor said that the act required all the defendants who had a right to redeem the mortgaged premises, to join in the application and to admit the plaintiff's title ; but, in this case, the application was [*652] made by only one of them, and, if they had all *joined, they could not have admitted the plaintiff's title, as one of them was an infant, and, therefore, the motion must be refused.(b)[1]

absolute.—The question then, is, whether there is any difference between a gift over in the event of the legatee not disposing of the legacy, and a gift over in the event of his not disposing of it by will ; I think no such distinction can be maintained. The will of Richard is not to be the exercise of a power but an incident to property which is sufficient to place the whole at the absolute disposal of the legatee. The cases cited on behalf of the personal representatives of Richard show, that where such absolute power is given, the property is absolute. I read this part of the will, therefore, as if it had stood—'If we shall have no heir, and shall not have disposed of the property.' *Green v. Harvey*, 1 Hare, 428.

(a) This section is as follows: " And be it further enacted, by the authority aforesaid, that, from and after the said first day of Easter term, 1734, where any bill or bills, suit or suits, shall be filed, commenced, or brought in any of his Majesty's Courts of Equity, in that part of Great Britain called England, by any person or persons having or claiming any estate, right, or interest in any lands, tenements, or hereditaments, under or by virtue of any mortgage or mortgages thereof, to compel the defendant or defendants in such suit or suits (having or claiming a right to redeem the same) to pay the plaintiff or plaintiffs in such suit or suits the principal money and interest due on any such mortgage, or the principal money and interest due on such mortgage together with any sum or sums of money due on any incumbrance or specialty charged or chargeable on the equity of redemption thereof ; and, in default of payment thereof, to foreclose such defendant or defendants of his, her, or their right or equity of redeeming such mortgaged lands, tenements, or hereditaments ; such court or courts of equity wherein such suit or suits shall be depending, upon application made to such court by the defendant or defendants in such suit having a right to redeem such mortgaged lands, tenements, or hereditaments, and upon his or their admitting the right and title of the plaintiff or plaintiffs in such suit, may and shall, at any time or times before such suit or cause shall be brought to a hearing, make such order or decree therein as such court or courts might or could have made therein, in case such suit or cause had then been regularly brought to hearing before such court or courts ; and all parties to such suit or suits shall be bound by such order or decree so made, to all intents and purposes, as if such order or decree had been made by such court at or subsequent to the hearing of such cause or suit ; any usage to the contrary thereof in anywise notwithstanding."

(b) See *Garth v. Thomas*, 2 Sim. & Stu. 188. For forms of the order, see 2 Eq. Draftsman, 390, and 2 Fowl. Excheq. Pract. 399. [See *Piggin v. Chestham*, 2 Hare, 484.]

[1] That an order may be made in cases of foreclosure, under the general power of the court, so as to bind infants, see *Grane v. Mitchell*, 10 Sim. 484. Where a statute makes no saving or

1839.—Welford v. Daniell.

Mr. Knight Bruce, Mr. G. Richards, Mr. Lloyd, Mr. Dixon and Mr. Stone appeared on the application.

WELFORD v. DANIELL.

1839: 8th May.—Contempt; Process; Pro confesso.

Where the Master has reported that a defendant is unable, by reason of poverty, to employ a solicitor to put in his answer, the court will, by one and the same order, direct counsel and a solicitor to be assigned to the defendant for the purpose of putting in his answer, and that a *habeas corpus* do issue against him, and that the plaintiff's clerk in court do attend with the record, on the return of the writ, in order that the bill may be taken *pro confesso* against the defendant, unless he shall, in the meantime, put in his answer.

THE Master having reported, upon a reference made to him under 11 Geo. 4, and 1 Will. 4, c. 36, s. 15, rule 6, that the defendant was unable, by reason of poverty, to employ a solicitor to put in his answer.

Mr. Stinton, for the plaintiff, now moved, under the same rule, that the defendant might have counsel and a solicitor assigned to him, in order that he might be enabled to put in his answer; and, under rule 2, that a *habeas corpus* might issue against the defendant, returnable on the first day of the following term (which would *give him twenty-eight days between the time when he was committed to the Fleet and the return of the writ;) and that, on the return of the writ, the plaintiff's clerk in court might attend, with the record, in order that the bill might be taken *pro confesso* against the defendant, unless, in the meantime, he should put in his answer. [*653]

The Vice-Chancellor made the order, observing that it was a combination of the 2d and 6th rules.

HAWES v. BAMFORD.

1839: 8th May.—Affidavit; Injunction.

An affidavit was filed and intituled in a cause in which there were three defendants. Afterwards, the plaintiff struck out the name of one of the defendants; and then obtained the injunction on the affidavit as it was originally intituled. Held that the injunction was regularly obtained.

MOTION to discharge an order for an injunction, on the ground that the affidavit on which it was obtained, was intituled in a cause in which there were three defendants; whereas, at the time when the injunction was obtained, the names of two only of those defendants appeared upon the record.

The facts of the case were these. At the time when the affidavit was filed, there were three defendants to the suit. Afterwards, the plaintiff amended

exception, the court will make none in favor of infants. *Demarest v. Wynkoop*, 2 Johns. Ch. Rep. 592.

1839.—Winterbottom v. Ingham.

his bill by striking out the name of one of the defendants, and then moved for and obtained the injunction on the affidavit as it was originally intituled.

In support of the motion, it was contended that an indictment for perjury would not lie on the affidavit.

The Vice-Chancellor said that the perjury, if any, was committed at the moment, when the affidavit was filed ; and refused the motion with costs.

[*654]

*WINTERBOTTOM v. INGHAM.

1839 : 22d May.—Specific Performance ; Title.

An order, made *on motion*, for a reference as to title ought to contain directions for the production of deeds, &c., and for the examination of the parties on oath.

IN this suit (which was a suit for the specific performance of an agreement for the sale of an estate,) a question arose as to the form of an order made, *on motion*, for a reference, to the Master, to inquire whether a good title could be made to the estate comprised in the agreement.

The Vice-Chancellor ruled that the directions, usual in decrees, for the production of deeds, &c., and for the examination of the parties on oath, ought to be inserted in the order ; and that further directions and costs ought to be reserved.(a)

Mr. *Knight Bruce* and Mr. *Koe* were counsel in the cause.

(a) See Seton on Decrees, pp. 11 and 109.

INDEX

TO THE PRINCIPAL MATTERS.

ACCEPTANCE OF TRUST.

1. A testator resident in India, appointed A. B. and C. his executors and trustees. A. and B. were resident in India, and C. in Ireland. A. proved the will in India, and C. in England: but B did not prove at all. The assets were suffered to remain, for several years, in the hands of M. & Co., of Calcutta, the testator's bankers and agents. B. was a partner in that firm at the testator's death: but, shortly afterwards, he retired and came to England. He then entered into partnership with R. & Co. of London, then agents and correspondents of M. & Co., and paid some of the testator's legacies to persons in England; and, in order to satisfy a legacy given by the testator upon certain trusts, he invested the amount in stock in the names of A. and himself as trustees; but the payments and investment were made by the direction of A., and out of remittances sent by him to R. & Co. M. & Co. ultimately failed. Held that the above-mentioned acts were done by B. as agent to A. and not as an executor or trustee of the will, and, consequently, that he was not responsible for the loss occasioned to the estate by the failure of M. & Co. *Lovry v. Fulton*, 115
2. An executor who does not prove, but acts, is answerable only for what he actually receives. *Ibid.*

ACCOUNT.

- A committee appointed by the inhabitants of M., employed the plaintiffs, as their solicitors, to apply, to Parliament, for an act constructing a dock. The plaintiffs, in the course of their employment, paid considerable sums to engineers, witnesses, parliamentary agents, and various other persons; and a large sum became due to them for their own costs, and several liabilities were existing against them. The plaintiffs at different times received, through bankers and others, various sums on account of what was due to them, but were unable to obtain payment of the balance: upon which they filed a bill against some of the members of the committee, alleging that, of

the other members, some were out of the jurisdiction, and others were dead and their personal representatives unknown, and praying that the defendants might come to an account with them, and pay to them the balance (which was stated to be 3232*l.* 1*s.* 4*d.*.) or such balance as, on taking the account, should be found due, and also to indemnify them against the existing liabilities. A demurrer to the bill was allowed. *Allison v. Herring*, 583

ACQUIESCENCE.
See TRUSTEES.

AFFIDAVIT.

1. A. sold a fund to which his wife was entitled in reversion; and, when it fell into possession, he was resident in Africa. The wife consented to waive her equity to a settlement, and that the fund should be transferred to the purchaser. Held, that the usual affidavit that there was no settlement affecting the fund, might be made by the wife alone. *Elliot v. Remington*, 502
2. An affidavit was filed and intitled in a cause in which there were three defendants, afterwards the plaintiff struck out the name of one of the defendants, and then obtained the injunction on the affidavit as it was originally intitled. Held that the injunction was regularly obtained. *Hawes v. Bamford*, 653

AFFIDAVIT OF SERVICE OF
SUBPENA.

An affidavit of the service of a subpoena to appear, stating that the deponent served the defendant with it by leaving a true copy of it and of the indorsement thereon with A. the wife of L., the sister of defendant, at whose house the defendant lodged, is insufficient, as it does not show where the writ was served. *Bickford v. Skewes*, 428

AGREEMENT.

1. Certain persons intended to form a railway from A. to B., which was to pass over the plaintiff's estate. The plaintiff opposed the

- project: but, on the agent for the projectors agreeing, in writing, to pay him 20,000*l.* for the portion of his estate over which the railway was to pass, he consented to withdraw his opposition. At the same time, certain other persons intended to form a railway between the same *termini*, but by a different line, which also passed through the plaintiff's estate, but not through the same part of it as the former line: 14 acres of the plaintiff's land were required for the former railway, and 16 acres for the latter. The plaintiff opposed the latter railway also. The agents for the rival projectors then entered into and signed an agreement (which was approved of and signed by the plaintiff's agent), by which they agreed that the first line should be abandoned and the second adopted, and that the adopted line should take the engagements entered into, with the landowners, by the abandoned line: and, thereupon, the plaintiff withdrew his opposition to the adopted line; and the act of Parliament for making the second railway and for incorporating the projectors of it, was passed. Held that the incorporated company were bound to perform the agreement made with the plaintiff by the projectors of the first railway. *Stanley v. Chester and Birkenhead Railway Company*, 26*a*
2. By an agreement between the plaintiffs and the defendants, the former, in consideration of certain payments to be made by them to the latter, were to have the exclusive right of engraving and publishing a series of maps from drawings to be furnished to them, from time to time, by the latter. The court refused to restrain the defendants from acting in violation of the agreement, as it could not compel the defendants to furnish the drawings; and therefore, could not decree a specific performance of the agreement. *Baldwin v. The Society for the Diffusion of Useful Knowledge*, 393
3. The bill stated a parol agreement, in part performed, for a lease of a farm to be granted by the defendant to the plaintiff one term of which was that a certain arable field should be laid down in pasture. The plaintiff entered and laid down the field, and it was, afterwards, severed from the farm, and an abatement in the rent, was made in respect of it. The witness examined to prove the agreement, did not state that it contained any provision as to laying down the field; so that the agreement proved, varied from that alleged in the bill; and, on that account, the court refused to decree a specific performance. *Mundy v. Jolliffe*, 413
4. Two railways called A. and B., were projected by different parties, to run from M. towards N. The line of A. passed through the centre of the plaintiff's estate, and the line of B. through a corner of it. The projectors of A. agreed with the plaintiff for the purchase of that portion of his land which they required; and they were to have power to vacate the agreement in case the act for making their railway should not pass. Two bills were brought into Parliament for making the railways, and were referred to a committee, at whose suggestion the projects were amalgama-

ted: and an act was passed incorporating the projectors of both railways into one company, and for making a railway partly in the line of A., and partly in the line of B., the latter being the line selected with respect to the plaintiff's estate. Pending the act, the promoters of the two railways agreed with each other, that, where either company should have entered into contracts with landowners whose property might be affected by either line, though in a somewhat different mode, the contracts entered into by the company proposing the rejected line, should be adopted by the united company. A copy of this agreement was subsequently sent to the plaintiff, by the united company. The projectors of line A. afterwards vacated their agreement with the plaintiff. Held that the plaintiff could not enforce that agreement against the united company. *Greenhalgh v. The Manchester and Birmingham Railway Company*, 416

AMENDMENT.

1. Where a plaintiff wishes to amend his bill, but does not require a further answer, the order ought to contain a recital to that effect, otherwise it is irregular. *Boddington v. Woodley*, 360
2. After an injunction had been continued on merits, the plaintiff moved to amend without prejudice to the injunction. Held that, in such a case, the amendment could not prejudice the injunction, and therefore, the motion was a simple application to amend, and ought to have been made before the master. *Woodroffe v. Daniel*, 410

See **CONTENT**, 4.

ANNUITY.

1. The memorial of an annuity, after setting forth the grant, from which it appeared that the consideration for the annuity was 455*l.*, averred that the true and *bona fide* consideration for the annuity was 450*l.*, and that the said sum of 450*l.* was paid to the grantor by the grantee. The memorial stated also that the grantee's execution of the deed, was attested by three persons whose names it mentioned, but the name of only one of them was endorsed on the deed. Held that the grant of the annuity and all the securities for it, were void. *Gibbs v. Hooper*, 89
2. A testator charged his real estates with the payment of his debts, and of an annuity to his wife in lieu of dower. The real estates having been sold to pay the debts and the income of the remaining proceeds being insufficient to pay the annuity. Held that the widow was entitled to have her annuity paid out of the capital as well as the income of the remaining fund. Held also (the annuity being wholly in arrear) that the arrears were to be computed from the testator's death. *Stamper v. Pickering*, 176

APPOINTMENT.

1. Testator bequeathed a sum of stock in trust for all or such one or more exclusive of the

where of the children of his niece, as she should, by her will, appoint; and, in default of appointment, in trust for all her children living at his decease. The niece, by her will, appointed 6000*l.*, part of the stock, to her daughter, for her separate use for life; and, after her death, to such persons, &c. as the daughter should by will, appoint, and, in default of appointment, to the niece's two sons. The two sons and the daughter were the niece's only children, and they were all living at the testator's death. After the death of the niece, her two sons and daughter and the husband of the daughter executed a deed by which, after reciting that it was conceived that the testamentary power of appointment given to the daughter, was invalid, as being an excessive execution of the power given to her mother, and that it was also conceived that, if that power should be valid and should not be exercised, then and in either event the reversion of the 6000*l.* expectant on the daughter's death, belonged to her two brothers and to herself and her husband; the parties in order to obviate any doubts respecting the same and to carry their mother's intention into effect, assigned the fund to two trustees, in trust for the daughter, for her separate use for life, and, after her death, for the husband for life, and after his death, for the children of the daughter and her husband, and, if they should all die under 21, in trust for the daughter's next of kin: and the daughter alone was empowered to appoint new trustees of the deed. A few months afterwards, the daughter made a will, in exercise of the power given to her by her mother, and appointed the fund to her husband absolutely. Some time afterwards she executed a deed, by which she appointed a new trustee of the prior deed. Shortly afterwards she died, leaving her husband and four children surviving. Held that the testamentary power of appointment given to the daughter, was valid: that the first deed was not intended to operate, unless that power should be either void or not exercised: that the daughter's will was a good execution of the power, and was not revoked by the second deed. *Phipson v. Turner*, 227

2. A power given to a husband and wife, was required to be exercised by them by any deed or writing under their hands and seals, to be by them executed in the presence of and attested by two witnesses. Held that a deed which was signed as well as sealed and delivered by the husband and wife, in the presence of two witnesses, was not a good exercise of the power, because the attestation clause, did not extend to the signature, as well as to the sealing and delivery. *Waterman v. Smith*, 629

See POWER.—POWER TO APPOINT TRUSTEES.

ARBITRATION.

Where an award is made after the submission has been revoked by the plaintiff, equity will not restrain the defendants from acting on the award, unless the plaintiff had good grounds

for revoking the submission. *Pope v. Lord Duncannon*, 177

See WITNESS, 2.

ASSIGNEE OF DEBT.

The assignee of a debt cannot sue for it in a court of equity, unless the assignor refuses to allow the assignee to sue for it, at law, in his name, or has done or intends to do some act which will prevent the assignee from recovering it at law, in the assignor's name. *Hammond v. Messenger*, 327

ATTACHMENT.

See CONTEMPT, 1.

ATTORNEY GENERAL.

1. The Attorney General not having answered the bill within a reasonable time, the court ordered that he should put in his answer within a week after service of the order, or that the bill should be taken *pro confesso* against him. *Groom v. Attorney General and Others*, 325
2. Testatrix gave 6000*l.* stock to the governors of the charity for the relief of poor widows and children of clergymen, the dividends to be, from time to time, applied for the benefit of poor widows and maiden daughters of clergymen of the Church of England who should have attained the age of 30 years, in such shares and proportions as the governors of the said charity should, in their discretion, think fit. A bill, claiming the legacy, was filed, against the executors, by "The Governors of the Corporation of the Society for the Relief of Poor Widows and Children of Clergymen, commonly called The Corporation of the Sons of the Clergy." Held that the Attorney General was a necessary party to the bill, as the legacy was not given upon trusts corresponding with the trusts upon which the corporation held their general property. *Corporation of the Sons of the Clergy v. Moss*, 610

AWARD.

See ARBITRATION.

BANKRUPT.

A. demised to B. (who was alleged to be an uncertificated bankrupt) a wharf, with the use of a road, in common with the occupiers of adjoining wharfs. C. obstructed the road. B. filed a bill against him to restrain the nuisance. Held that neither A. nor the occupiers of the adjoining wharfs, nor the assignees of B. were necessary parties to the bill. *Sample v. London and Birmingham Railway Company*, 239

BISHOP.

In a suit for the specific performance of an agreement for the sale of the next presentation to a living, the court will restrain the bishop of the diocese from taking advantage of a lapse pending the suit. *Nicholson v. Knapp*, 326

BONUS.

See POLICY OF INSURANCE.

BREACH OF TRUST.

By a settlement made in India, in 1778, the trustees were directed to invest a certain sum of rupees in good public or private securities, at the highest rate of interest that could be obtained, upon certain trusts under which one of the daughters of the marriage became entitled to a moiety of the fund after the death of her father and mother. The fund was accordingly invested in notes of the Indian Government; and those notes were deposited with Palmer & Co. of Calcutta. On the daughter's marriage in 1791, her moiety of the fund was assigned to other trustees, in trust, after the deaths of her father and mother, to receive and lay out the same in such of the public stocks or parliamentary funds or other securities (private personal security only excepted), as the daughter and her husband should appoint. After the father's death, the mother filed a bill against the trustees of the two settlements, and her daughter and her husband, to have the trusts of 1778 carried into execution. By the decree in that suit made in 1809, at which time the mother was dead, certain arrears of interest on the fund were ordered to be paid to the mother's representative, and the daughter's moiety of the fund was declared to have vested in the trustees of the settlement of 1791 upon the trusts thereof, and was ordered to be paid to them accordingly. The trustees of 1778 did not comply with that decree, but allowed the notes to remain in the hands of Palmer & Co., who failed in 1830, having previously received the amount of the notes. Held that the trustees of 1778 were responsible for the loss. Held also, that, although the *cestui que trust* knew and acquiesced in the mode in which the fund had been invested and dealt with, and approved of its remaining under the management of Palmer & Co., yet, as the trustees were aware that Palmer & Co. were in pecuniary difficulties some time before they failed, but did not inform the *cestui que trusts* thereof, the acquiescence did not exempt the trustees from their liability. *Munch v. Cockerell*, 339

See PARTIES, 2.

CERTIFICATE.

See TAXATION, 1.

CHARITY.

Testatrix gave 6000*l.* stock to the governors of the charity for the relief of poor widows and children of clergymen, the dividends to be, from time to time, applied for the benefit of poor widows and maiden daughters of clergymen of the Church of England who should have attained the age of 30 years, in such shares and proportions as the governors of the said charity should, in their discretion, think fit. A bill claiming the legacy, was filed, against the executors, by "The Governors of the Corporation of the Society for the Relief

of Poor Widows and Children of Clergymen, commonly called The Corporation of the Sons of the Clergy." Held that the Attorney General was a necessary party to the suit, the legacy not being given upon trusts corresponding with the trusts upon which the corporation held their general property. *Corporation of the Sons of the Clergy v. Mose*, 610

CHOSE IN ACTION.

A married woman, being entitled to one-fifth of a residue, joined with her husband, and the four other residuary legatees, in filing a bill, to have the testator's estate administered, and the residue ascertained and distributed amongst the party entitled. Pending the suit, but before the rights of the parties had been declared, the husband and wife joined in assigning the wife's share to A., as a security for a debt due to him from the husband. The husband died; and afterwards a decree was made, directing one-fifth of the residue to be paid to the wife. A. never presented a petition in the suit, or took any other step to enforce his security, until after the decree was made. Held that, by the decree, the wife became entitled to her share free from her husband's debt. Whether an assignment by a husband and wife of the wife's *chose in action* to a particular assignee, for value, is binding on the wife surviving?—*Qu. Hutchings v. Smith*, 137

CHURCHWARDENS.

A suit in this court, by the churchwardens of a parish, to restrain a person from pulling down the churchyard wall, is maintainable. The churchwardens, notwithstanding their office has ceased, may file a supplemental bill, for the purpose of stating facts occurred since the filing of the original bill, and may join their successors as co-plaintiffs with them in the supplemental suit. *Marriott v. Terpley*, 279

COMMISSIONERS FOR EXAMINING WITNESSES.

The court will restrain commissioners for examining witnesses from bringing an action for their fees against a solicitor in the cause, and will refer it to the master to ascertain what is due to them. *Blundell v. Gladstone*, 455

CONSTRUCTION.

1. A testatrix being entitled to her son's residuary estate (the amount of which was unascertained at her death) bequeathed as follows: "If any debts due me at my decease, I request my executors will collect and pay into the hands of my children." Held that the son's residue passed by the bequest. *Bainbridge v. Bainbridge*, 16
2. Testator gave his residuary personal estate to J. J. an infant, and directed his executors to place it out at interest to accumulate, and to pay the principal to the infant on his attaining 24, and in the meantime to allow 60*l.* a year for his maintenance: and the testator

gave the residue over, on the infant's dying under 21. The court held that the residue was actually given to the infant, and that what followed the gift was merely directory as to the management of it; and, on the infant's attaining twenty-one, allowed the residue and accumulations to be transferred to him. *Joselyn v. Joselyn*, 63

1. Testator bequeathed his residuary estate to his wife for life, and after her death, to his son and daughter, share and share alike, and their respective issue, with benefit of survivorship between his said children or their issue respectively. Held that the survivorship was to take place only in the event of the issue of a child failing in the lifetime of the testator's widow. *Turner v. Capel*, 158

2. Testator directed that, after his wife's death part of his stock should be transferred to Johanna G. for her sole and entire use during her life; that she should not alienate it, but enjoy the interest during her life; and that, at her decease, she might dispose of it, as she thought fit. Held that J. G. took an interest for life, with a power to dispose of the stock by her will. *Archibald v. Wright*, 161

3. A testator concluded his will as follows; "I deem there will be found sufficient, in my banker's hands, to discharge all my debts, which I desire Mrs. E. M. to do, and keep the residue for her own use." Held, (the whole of the will being taken together) that E. M. was entitled, not only to the residue of the money in the banker's hands, but to the residue of the testator's general personal estate. *Boys v. Morgan*, 289

4. Testator bequeathed all his property, both real and personal, to his son Charles, his heirs, executors, &c. to and for his and their own use and benefit, well knowing he would discharge the trust the testator reposed in him by remembering his (the testator's) sons and daughters, William, Edmund, Martha, &c. Held that no trust was created for the sons and daughters; but that Charles took the property for his benefit absolutely. *Bardsell v. Bardsell*, 319

5. Testatrix gave legacies to A. B. and C., and declared that if any of them should be dead at her decease, or should not then be heard of to be then living, or should not respectively claim their respective legacies within twelve months after her death, then the legacies given to such of them as should be dead at her decease, or as should neglect to claim the same within the time aforesaid, should sink into her residuary estate. Three years after testatrix's death, C., who had not been heard of for upwards of 20 years, claimed her legacy. Held that she was not entitled to it, although she had been ignorant, until a short time before, that her sister was dead. *Hawkes v. Baldwin*, 355

6. Testator bequeathed a sum of stock to his wife for life, and after her decease, to his three sons, equally to be divided amongst them, if they should be all living at the decease of his wife; but if any or either of them should happen to die in the lifetime of his wife, and should leave any child or children, his will

was, that such child or children who should be living at the time of his wife's death, should be substituted in the place of such of his said sons who should so happen to die, and take his, her, or their parent's share. All the sons died in the wife's lifetime. Two of them left children who were living at the wife's death. The third died a bachelor. Held that one-third of the stock fell into the residue. *Hustler v. Tylbrook*, 368

9. Testatrix gave to her servants, Samuel Eales, and Charlotte, his wife, an annuity of 200*l.* a year each, for their lives and the life of the survivor. Held that each of the legatees was entitled to an annuity of 200*l.* during their joint lives and the life of the survivor of them. *Eales v. The Earl of Cardigan*, 384

10. Testator bequeathed one-sixth part of his residuary estate amongst the children of his late sister J. T., and directed that their shares should be paid to them at 21; and that in case any of them should die under that age leaving issue, their shares should be paid to their issue, as soon as such issue could give a legal discharge for the same, but if any of the children should die without leaving issue, their shares should be paid to the surviving children and the issue of such of them as should be then dead, such issue taking no greater share than their deceased parents would have been entitled to, if living; and he bequeathed another sixth part to his sister, M. C. for life, and, after her death, unto and amongst her issue, and to be payable at the like times and with the like benefit of survivorship, and in like manner as was thereinbefore expressed concerning the sixth part thereinbefore given to the children of J. T. M. C. had six children living at testator's death; and she had had another child, who died before the date of the will. Held, that as the latter clause of the will referred to the former, the word *issue* in it must be taken to mean children. Held also, that, under the former clause, no grandchild of J. T. could take except by way of substitution for its parent, and, therefore, under the latter clause, no grandchild of M. C. could take, except by way of substitution for its parent. *Peel v. Catlow*, 372

11. Testatrix bequeathed her residue to her second cousins, of the name of S., and the issue of such of them as were dead. She had no second cousins, but she had three first cousins once removed, of that name, two of whom were living at her death, and had children, but the third was then dead, leaving children. Held, that the two surviving first cousins once removed, and the children of the one who was dead, were entitled to the residue, to the exclusion of the children of the former, although they were in the same degree of relationship to the testatrix as her second cousins would have been, had she had any. *Slade v. Fooks*, 386

12. A marriage settlement recited that it had been agreed, on the treaty for the marriage, that the intended husband should insure his life in the Rock Insurance Office, in the names of trustees, in the sum of 3000*l.*: that the dividends of certain canal shares should be applied in keeping the policy on

- foot: that *the said sum of 3000*l.** under the policy, should be settled in manner thereafter mentioned; and that, in pursuance of the agreement, the intended husband had made an insurance on his life in the Rock office, in sum of 3000*l.* in the names of the trustees of the deed; and it was declared, that the trustees should stand possessed of *the policy*, in trust for the intended husband, until the marriage, and that, upon the solemnization thereof, they should stand possessed of *the said sum of 3000*l.** when received under the policy, upon certain trusts, for the benefit of the intended wife, and the children of the marriage. The husband became bankrupt, and afterwards died. On his death, a considerable bonus was payable on the 3000*l.* Held that the husband's assignees were not entitled to the bonus, but that the sum, as well as the 3,000*l.*, belonged to the trustees of the settlement. *Parke v. Bell*, 388
13. Testator commenced his will as follows: "All my property in the several public funds, excepting that in the three per cent. consols, is to be sold out, and, after defraying, from the produce thereof, my funeral expenses and debts, the remainder is to be placed in the three per cent. consols, in which fund I now stand possessed of 3700*l.* capital stock. The annual dividends I leave in trust to my executor and executrix, to be paid by them, as the dividends shall become due, to the persons undermentioned during their natural lives; namely, 30*l.* per annum to my niece H., and 20*l.* per annum to my niece S." The testator, in a subsequent part of his will, gave all his household furniture and all his property of every kind, *not specified above*, to his wife. Held that the capital producing the two yearly sums of 30*l.* and 20*l.* passed to the wife. *Clowes v. Clowes*, 403
14. Testator gave one-third of his residuary estate to his wife, and the other two-thirds to trustees in trust for his children at 21: and directed that, until the shares of his children should be payable to them, the income thereof should be paid to his wife, to be by her applied, or, in case of her death to be applied by the trustees, for the maintenance of the children. Held that the wife was entitled to the income of the children's shares during their minorities, she maintaining them in a proper manner. *Hadow v. Hadow*, 438
15. Testator, by his will, gave legacies to several persons, describing each of them as his cousin. By a codicil, he gave his residuary estate to all such of his cousins, both on his father's and mother's side, as should be living at his decease, and to all the children of such of his said cousins as might have theretofore died or might die in his lifetime. The testator left several first cousins and children of first and second cousins, and one first cousin once removed. Held that none of them were included in the residuary bequest, except the first cousins living at the testator's death, and the children of first cousins who died in his lifetime. *Caldecott v. Harrison*, 457
16. Testator directed his trustees to apply the rents of his freehold estates, *during the life of his wife*, for the maintenance and education of his two great nieces, and, after his wife's death, to sell the estates and apply the proceeds to the use and benefit of both his great nieces, share and share alike, but, if there should be but one of them living at his wife's death, to the use and benefit of the surviving great niece only. One of the great nieces died, an infant, in the lifetime of the wife. Held that a moiety of the rents accrued between her death and the death of the widow did not go to the surviving great niece or result to the testator's heir, but belonged to be personal representative. *Webb v. Kelly*, 463
17. Testator, by his will, gave pecuniary legacies to several persons, and directed his residue to be divided amongst his before mentioned legatees in proportion to their several legacies thereinbefore given. By a codicil, which was directed to be taken as part of his will, he gave several pecuniary legacies to persons, some of whom were legatees under his will, and declared that the several legacies mentioned in the codicil, were given, to the therein mentioned legatees, in addition to what he had given to them or any of them by his will. Held that none of the legatees under the codicil were entitled to share in the residue in respect of their legacies under the codicil. *Hall v. Severne*, 522
18. Testator gave all his estate, real and personal, to his executors, in trust to be disposed of by them as after mentioned. He then gave all his real estates, houses and lands to his wife for life: "and, after the decease of my wife I give my houses, lands and estates in B. to J. B., but, at his death, I will that the whole shall be for the use of the said J. B.'s wife and children, and which children, at the death of their mother, shall inherit the same jointly during their lives; and, if the said children shall die before they arrive at the age of 21, I will that my houses and estates in B. go to H. S." Held that J. B.'s children took the estate for their lives only; and, they having attained 21, that the inheritance was undisposed of. *Spry v. Bromfield*, 534
19. Testatrix having two sons and two daughters living, gave a legacy to each of them, and then gave the residue to Mary, one of her daughters, for life: "and, after her decease, I will that the said property be equally divided amongst such of my sons and daughters as may be living at the decease of the said Mary: and in case of the decease of any of my said sons or daughters, the surviving children of any of my sons or daughters, to have their fathers' or mothers' part." The testatrix had another son and daughter, both of whom were dead at the date of her will, leaving children. Held that their children were entitled to shares of the residue. *Jarvis v. Pond*, 548
20. A., being seized of the equity of redemption of lands in N., and also of the legal estate, as heir to his father, to whom he had mortgaged the lands in fee, devised his estates in N. and elsewhere to trustees in trust to sell. Held that the legal estate in the mortgaged property did not pass by the will. *Ex parte Marshall*, 553
21. Testator devised his estates to his son, if he

should attain the age of 23 years or should be married with the consent of his trustees, which should first happen, and to his heirs and assigns, absolutely, for ever. And in case his son should die without attaining such age, or, being married with such consent as aforesaid, should die without lawful issue, or such issue should die under the age of 21 years, then to the testator's daughters, as tenants in common, and the heirs of their bodies. The son married, under the age of 23, with the consent of the trustees, and, afterwards, attained that age. Held that the son was seized of an absolute estate in fee: or, if not, that, under the words of the gift over, "shall die without lawful issue," he was seized of an estate tail, those words not being confined by the words, "or such issue shall depart this life under the age of 21 years," to dying without issue living at his death; and, consequently, that he could make a good title to the devised estates.

Grimshaw v. Pickup, 591

22. The Master having been prevented by illness from attending at his office on the day appointed for hearing an application to enlarge publication; held that the application might be made to the court. *Boys v. Trapp*, 218

23. The case of a mortgagee leaving an heir, but who is not known, is within 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, as expounded by 4 and 5 Will. 4, c. 23. *In the matter of Williams deceased, ex parte Bird*, 642

24. Although the insolvent debtors' act (7 Geo. 4, c. 57, s. 20,) directs the assignees to sell the insolvent's real estates by auction, yet, if they have tried to sell them by auction, and failed, a sale by private contract will be good. *Mather v. Priestman*, 352

25. Testatrix bequeathed 10,000*l.* three per cent. stock, in trust for E. S. for her life, and after her decease, in trust for such one or more exclusively, of the others of her residuary legatees as E. S. should appoint; and she empowered E. S. to appoint 150*l.* a year to be paid to J. S., out of the interest of the stock, during his life. E. S., by her will, appointed 150*l.* a year, part of the interest of the 10,000*l.* stock, or of the stocks, funds and securities, into or upon which the same should be changed or secured at the time of her death, to be paid to J. S. during his life, and, after his death, she appointed so much of the 10,000*l.* stock, or of the stocks, funds or securities into or upon which the same should be then changed or secured, from which the 150*l.* a year should have arisen, to A. B., one of the residuary legatees named in the original will: And, as to so much of the 10,000*l.* stock, or the stocks, funds or securities into or upon which the same might be changed or transferred at her death, which should not be necessary to answer the annuity of 150*l.*, she appointed the same to J. B., another of the residuary legatees. After E. S. had made her will, the trustees, at her request, sold the stock and invested the proceeds, amounting to 6600*l.*, on a mortgage at five per cent.: after E. S.'s death the mortgage was paid off, and the money was invested, under a decree, in the purchase of 7143*l.* consols. Held that A. B. was entitled to 5000*l.* consols, as being

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the capital of the 150*l.* a year, and that J. B. was entitled to the remainder only of the 7143*l.* consols. *Bullock v. Thomas*, 634

26. Testator directed his trustees and executors to apply the income of his residuary estate for the maintenance, &c., of all his children, and accumulate the surplus for their benefit, until the youngest should attain twenty-one, and then to divide the capital into as many equal shares as the number of his children who should be then living should amount to, an equal share being allotted to each of them, and to the issue of such of them as should be then dead, such issue taking their parents' share, the shares of such of his children as should be sons to be paid to them or their issue on his youngest child attaining twenty-one, and the shares of such of them as should be daughters, and of the issue of such of his daughters as should be then dead, he directed to remain in the hands of his trustees, upon trust to pay the interest to each of his said children, being daughters, during their lives for their separate use; and, on the decease of each of his said daughters, or in case any of them should be dead leaving issue when his youngest child should attain twenty-one, then he directed his trustees to pay the share of such daughter to her issue. One of the daughters who was living when the youngest child attained twenty-one, died a spinster. Held that she took an absolute interest in a share of the residue. *Hulme v. Hulme*, 644

See RECEIPT CLAUSE.—SEPARATE USE.—SETTLEMENT, 1, 2.—TRUSTEES, 1-3.—VESTING.—WILL, 9-12.

CONSTRUCTION OF NEW ORDERS.

1. Under Lord Lyndhurst's 12th order, the Master may of his own authority, and whether he is attended by any one on behalf of the parties or not, allow himself further time to make his report as to scandal, impertinence or insufficiency. *Woods v. Woods*, 213
2. Where a demurrer to the whole bill is allowed, but the plaintiff has leave to amend, the costs which he is to pay to the defendant are not the whole costs of the suit, but of the demurrer only. *Hammond v. Messenger*, 338
3. Lord Brougham's 28th order, which directs that orders for paying out sums of money shall specify the amount to be paid out, applies to those cases only in which the amount to be paid out can be ascertained at the time when the order for payment is made. *Piggot v. Garraway*, 260
4. The words, "the second term then next following," in the 17th amended order, mean, not the second term following the undertaking to speed, but following the day on which the order for the commission to examine witnesses, is served. *Williams v. Macdonnell*, 400
See PRACTICE, 6.

CONSTRUCTION OF RAILWAY ACT.

By the Southampton Railway act, it was enacted that it should be lawful for the company, according to the provisions and subject to the restrictions of the act, to construct in, upon,

across, under, or over, any lands, streets, roads, rivers, &c. such bridges, arches, piers &c. as they should think proper: that, where any bridge should be erected for carrying the railway over or across any road, the span of the arch should be formed so as to leave a clear and open space, under every arch, of not less than fifteen feet: that in all cases in which any road should be found necessary to be cut through, diverted, taken or so much injured as to be impassable for passengers or carriages, the company should, before any road should be so cut through, &c., cause a sufficient carriage or horse-road, as the case might require, to be made instead thereof, as convenient for passengers and carriages as the road to be cut through, &c., or as near thereto as might be, and should cause the same to be put into good order where the former road could not be more easily restored; and, when the road cut through, &c., should be a turnpike-road, the substituted road, if temporary, should be set out and made as aforesaid, and the principal road should be restored within six months; and the railway, where it should cross such turnpike road, should be constructed and kept in repair so as to prevent, as far as practicable, any obstruction to the passage along the road. Held that the company, in carrying a bridge over a turnpike road, might erect the piers upon the road, and were not bound to leave more than a clear open space of fifteen feet under each arch, notwithstanding the original width of the road would be considerably lessened thereby. *Attorney General v. London and Southampton Railway Company*, 78

CONTEMPT.

1. A plaintiff may issue an attachment against a defendant for want of answer, although he is himself in contempt for non-payment of costs, which he has been ordered to pay to the defendant. *Wilson v. Bates*, 54
2. After the first proclamation had been made under a writ of *exigi facias*, which the defendant had issued in an action which he had brought against the plaintiff, the plaintiff served the defendant with the common injunction. The sheriff, upon receiving notice of the injunction, applied to the defendant's solicitor for instructions as to the course which he was to pursue, but the solicitor said that he had no instructions to give, upon which the sheriff proceeded to make three of the remaining proclamations. Held that the defendant had been guilty of a contempt. *Woodley v. Bodington*, 214
3. A defendant, being in contempt for want of answer, filed his answer, and the plaintiff took an office copy of it. Held that the plaintiff did not, thereby, waive the contempt. *Woodward v. Twinsaine*, 301
4. If a defendant is in contempt for want of answer, the plaintiff does not waive the contempt by obtaining an order to amend. *Livingstone v. Cooke*, 468
5. Where the Master has reported that a defendant is unable, by reason of poverty, to employ a solicitor to put in his answer, the court

will, by one and the same order, direct counsel and a solicitor to be assigned to the defendant for the purpose of putting in his answer, and that an *habeas corpus* do issue against him, and that the plaintiff's clerk in court do attend, with the record, on the return of the writ, in order that the bill may be taken *pro confesso* against the defendant, unless he shall, in the meantime, put in his answer. *Welford v. Daniell*, 652

COPYRIGHT.

The publisher of a book, filed a bill for the usual relief on an invasion of copyright; but, though he had purchased the book of the author and paid for it, it did not appear that the copyright had been assigned to him. Held that the bill was demurrable because the author was not a party to it. *Colburn v. Dunscombe*, 151

CORPORATION.

See AGREEMENT, 4.—LIABILITY OF CORPORATIONS.—MUNICIPAL CORPORATION ACT.

COSTS.

1. A cause was ordered to stand over for want of parties: and the court gave the defendants the costs of the day, although the objection was not taken by their answers. *Lovry v. Fulton*, 104
 2. Where a demurrer to the whole bill is allowed, but the plaintiff has leave to amend, the costs which he is to pay to the defendant are not the whole costs of the suit, but of the demurrer only. *Hammond v. Messenger*, 338
 3. A mortgagee is not entitled as against the devisees of the mortgaged estate, to be paid the costs of an action brought by him against the executrix of the mortgage. *Lewis v. John*, 366
 4. A plaintiff, after being served with a notice of motion to dismiss, filed a replication and informed the defendant that he had done so, but did not tender the costs of preparing and serving the notice of motion. Held that the defendant was entitled to the costs of the motion. *Attorney General v. Cooper*, 379
 5. The assignee of an insolvent mortgagor, before a bill was filed to foreclose the mortgage, had consented to join in conveying the estate to the mortgagee, and had distributed the insolvent's estate amongst the creditors, and, by his answer, he disclaimed all interest in the premises. The plaintiff was ordered to pay him his costs of the suit. *Thompson v. Kendall*, 397
 6. A trustee disclaimed by his answer, but was continued as a party until the hearing. Held, nevertheless, that he was entitled to costs, as between party and party only. *Bray v. West*, 429
 7. Motion that the plaintiff, a naval officer on half-pay, who had resided sixteen years in Barbadoes, where he held the office of captain of the port, under the appointment of the crown, might give security for costs, refused. *Evelyn v. Chippendale*, 497
- See CONSTRUCTION, 25.—DISMISSAL, 2, 3.—LIEN.—TAXATION.

COUSINS.
See WILL, 6, 13.

COVENANT.

- A. the owner of a piece of land, divided it into lots for building a row of houses, and a deed was made between him of the one part and X. and Y. (who had purchased some of the lots from him) and the several persons who should at any time execute the deed, of the other part; by which, after reciting that A. had determined and proposed and thereby expressly declared that it should be a general and indispensable condition of the sale of all or any of the lots, that the proprietors thereof for the time being should observe and abide by the several stipulations and restrictions therein-after contained; it was mutually covenanted between A., X. and Y., and the several other persons who should at any time execute the deed, and each of them, A., X. and Y., and the several persons &c., for himself, his heirs, executors and administrators, thereby covenanted with all and every the other and others of them, and with the heirs, executors, administrators or assigns of all and every the other and others of them, mutually and reciprocally, that none of the proprietors of any of the lots for the time being should at any time carry on thereon the business of an inn-keeper. A. sold and conveyed one of the lots to B., and another to C., both of whom executed the deed of covenant. The plaintiff afterwards purchased B.'s lot, and the defendant purchased C.'s lot, with notice of the deed of covenant. The defendant intending to use the house on his lot as a family hotel, an injunction was granted to restrain him from so doing. *Whatman v. Gibson*, 196
- 2 A. covenanted with B. to pay him a certain sum, by bills of exchange to be drawn by B. upon and accepted by A. A. only gave B. a bill for part of the sum; and that bill was dishonored. Held that B. was a specialty creditor of A. for the whole sum. *Copland v. Martin*, 433

DEBT.

1. Where an estate is devised to a trustee in trust to sell and pay the testator's debts, and subject thereto, in trust for A., an acknowledgment of a debt, in writing, signed by the trustee or his agent, is sufficient to preserve the creditor's right of suit for twenty years after the giving of the acknowledgment. *Lord St. John v. Boughton*, 219
See DEBTOR AND CREDITOR.—WILL, 1.

DEBTOR AND CREDITOR.

The assignee of a debt cannot sue for it in a court of equity, unless the assignor refuses to allow the assignee to sue for it, at law, in his name, or has done, or intends to do, some act which will prevent the assignee from recovering it at law, in the assignor's name. *Hammond v. Messenger*, 327
See CHOSE IN ACTION.—DEBT.

DECREE.
See SUPPLEMENTAL SUIT.

DEFENDANT.

1. A bill was filed by a person claiming to be entitled to a trust fund, against the trustees, and another party, who it alleged, claimed an interest in the fund; and it contained various allegations tending to show that he had mixed himself up with the whole transaction and had rendered the suit necessary by his personal conduct, and it prayed that that party might pay the costs of the suit. Held that, as the bill did not state, simply, that the defendant claimed an interest in the fund, it was not sufficient for the defendant to put in a mere disclaimer, but that he must answer the bill fully. *Graham v. Coape*, 93
2. Leave given to a defendant to file a supplemental answer for the purpose of correcting a mistake, in his former answer, as to the custom of a manor, which was one of the facts in issue in the cause. *Frankland v. Overend*, 365
See CONTENTS, 2, 5.—COSTS, 1, 4.—DISCLAIMER.—PLEA AND PLEADING, 7.

DEMURRER.

1. A court of equity will not assist a judgment creditor to obtain payment of his debt, unless he has sued out execution; and, if he does not state that he has done so, in his bill, the defendant may demur. *Neate v. Duke of Marlborough*, 60
2. Demurrer allowed to a bill of discovery in aid of the defence to a suit in a foreign court. *Bent v. Young*, 180
3. In computing the twelve days allowed by Lord Brougham's 10th order for filing demurrers, an intervening vacation is not to be excepted. *Boys v. Morgan*, 262
4. Pending a notice of motion for a special injunction, the defendant put in a demurrer. Held that the demurrer must be set down and argued *instantly*. — *v. The Bridgewater Canal Company*, 378
5. The pendency of a demurrer does not prevent the plaintiff from serving the defendant with a notice of motion. *Wardle v. Claxton*, 412
6. After a demurrer had been filed, two of the plaintiffs procured their names to be struck out of the bill. Held that, as that act was not done by the remaining plaintiffs, the bill must be considered, on the argument of the demurrer, as if the names of the two remained on the record. *Miles v. Thomas*, 606
See ACCOUNT.—CONSTRUCTION OF NEW ORDERS, 2.—COPYRIGHT.—JOINT STOCK COMPANY.—PARTIES, 1.—WILL, 20.

DISCLAIMER.

A bill was filed by a person claiming to be entitled to a trust fund, against the trustees, and another party, who it alleged, claimed an interest in the fund; and it contained various allegations tending to show that he had mixed himself up with the whole transaction and

had rendered the suit necessary by his personal conduct; and it prayed that that party might pay the costs of the suit. Held that, as the bill did not state, simply, that the defendant claimed an interest in the fund, it was not sufficient for the defendant to put in a mere disclaimer, but that he must answer the bill fully. *Graham v. Coape*, 93
See *Coers*, 5, 6.

DISCOVERY.

1. Demurrer allowed to a bill of discovery in aid of the defence to a suit in a foreign court. *Bent v. Young*, 180
2. Where a defendant to a bill of discovery, in aid of an action brought against him by the plaintiff, has been ordered to deposit in the hands of his clerk in court documents admitted by his answer to be in his custody, the plaintiff is entitled to have such of those documents as by reference in the body of the answer, are made part of the answer, produced and read, at the trial, as part of the answer. *Driver v. Wright*, 261
3. A bill was filed for an account of dealings and transactions between the parties, and to restrain an action brought by the defendant against the plaintiff for a breach of contract, in not accepting bills drawn on him by the defendant. Held that the plaintiff was entitled to inspect those parts only of the books mentioned in the schedule to the answer, which related to the matters in question in the suit; and that, if he wished to inspect other parts of them, with a view to his defence to the action, he must file a bill of discovery. *Rawson v. Samuel*, 442
4. A court of equity will compel a discovery and production of documents in aid of proceedings at law to try a disputed right under the tithe commutation act, notwithstanding special provisions are contained in that act for those purposes. *Morris v. The Duke of Norfolk*, 472

See PARTIES, 1.—PLEA AND PLEADING, 1, 2.

DISMISSAL.

1. A. and B. sued in respect of a joint demand, and B. sued in respect of a distinct separate demand. The joint demand failed, but the separate one succeeded. The bill was dismissed as against both plaintiffs, but without prejudice to B.'s filing a new bill. *Cowley v. Cowley*, 299
2. Where a plaintiff files a replication after being served with notice of a motion to dismiss, but before the motion is made, no order ought to be made on the motion, except for the plaintiff to pay the costs of it. *Corporation of Dartmouth v. Holdsworth*, 383
3. A plaintiff, after being served with a notice of motion to dismiss, filed a replication, and informed the defendant that he had done so, but did not tender the costs of preparing and serving the notice of motion. Held that the defendant was entitled to the costs of the motion. *Attorney General v. Cooper*, 379
4. After a decree or decretal order, not directing

inquiries merely, has been made, the bill cannot be dismissed. *Bluck v. Colanghi*, 411
See *Coers*, 4.—NEW OADGSA.

DISSOLUTION.

Three members of a company, which was unlimited as to its duration, executed a deed dissolving the company, and left a notice of it at the company's office. They then filed a bill on behalf of themselves and all the other members except the defendants, against the officers of the company, alleging that the company consisted of upwards of 400 members, and that the plaintiffs were ignorant of and had no means of learning their names and residences, and praying that the company might be declared to be dissolved. Held, that all the members ought to have been served with notice of the deed, and a demurrer to the bill, for want of equity, was allowed. *Wheeler v. Van Wart*, 193

EXCEPTION.

1. A solicitor presented a petition, complaining that the Master, in taxing his bill, had taken into consideration matters not referred to him, and praying for leave to except to the certificate. It was objected that the solicitor ought to have filed exceptions to the certificate, but the court overruled the objection. Under the common order for taxing a solicitor's bill, the Master is bound to take a general account of receipts and payments by the solicitor, as agent for the client. *Russel v. Buchanan*, 167
2. Leave given under the circumstances to except to a report, although the party had not carried in objections to it. *Wood v. Lambirth*, 195

EXECUTORS AND ADMINISTRATORS.

1. A testator resident in India directed his trustees and executors to invest his residue in government or other good securities, and then declared trusts of it for the benefit of his children and other persons, all of whom were resident either in England or Ireland, and were mentioned so to be in the will. The residue was allowed to remain in the hands of the testator's bankers and agents in India, who ultimately failed. Held that the acting executor and trustee was responsible for the loss thereby occasioned to the estate. *Lewry v. Fulton*, 115
2. An executor who does not prove but acts, is answerable only for what he actually receives. *Ib.*
3. In a marriage settlement, the ultimate trust of the wife's chattels was for the executors or administrators of the wife of her own family, and the ultimate trust of the husband's chattels, was for his executors or administrators of his own family. Held that, though, the same words were used, *mutatis mutandis*, in both limitations, yet the court was justified in holding that, with respect to the wife's chattels, they meant her next of kin at her death, and,

with respect to the husband's chattels, his executors or administrators simply. *Smith v. Dudley*, 125
See SUPPLEMENTAL SUIT.—TAUSTEE, 3.

FEME COVERTE.

A suit was instituted by husband and wife and their infant children, by their father as next friend, respecting separate property of the wife, in which the children also were interested. Pending the suit, the husband absconded. Held that the court could not appoint a next friend for the wife, and a new next friend for the children, but it ordered that a person, to be named by the wife, should be allowed to prosecute the suit on behalf of the plaintiffs. *Greenaway v. Rotherham*, 88

By a marriage settlement, a Jamaica estate was limited, to trustees for a term of years, in trust to raise 18,000*l.* to be laid out in land, in Great Britain, of the value of 600*l.* a year, and the land, when purchased, was to be settled on the husband for life, with remainder to the wife for life, with an option to her to have an annuity of 600*l.* a year out of the land, in lieu of her life estate. Before the 18,000*l.* was raised, the wife joined, with her husband (both of them being resident in this country), in mortgaging the Jamaica estate in fee: and the wife acknowledged the mortgage deed before a magistrate, which, by the laws of Jamaica, was equivalent to levying a fine. The husband afterwards died. Held that the wife had barred herself of all claim to the provision made for her by the settlement. *Forbes v. Adams*, 462

See POWER, 1, 2, 3, 4.—SEPARATE USE.

FINE.

By a marriage settlement, a Jamaica estate was limited, to trustees for a term of years, in trust to raise 18,000*l.* to be laid out in land, in Great Britain, of the value of 600*l.* a year; and the land, when purchased, was to be settled on the husband for life, with remainder to the wife for life, with an option to her to have an annuity of 600*l.* a year, out of the land, in lieu of her life estate. Before the 18,000*l.* was raised, the wife joined, with her husband (both of them being resident in this country), in mortgaging the Jamaica estate in fee: and the wife acknowledged the mortgage deed before a magistrate, which, by the laws of Jamaica, was equivalent to levying a fine. The husband afterwards died. Held that the wife had barred herself of all claim to the provision made for her by the settlement. *Forbes v. Adams*, 462

FORECLOSURE.

1. Under a decree in a foreclosure suit, the time fixed for payment of principal, interest and costs, was the 31st of July. On the 25th, the defendant obtained an order, referring it to the Master to fix a further time, on his paying the interest and costs on the first mentioned day. The defendant, however, failed to make that payment, and on the 3d of August

following, the plaintiff obtained the usual order for foreclosure absolute; but, owing to the press of business in the registrar's office, it was not drawn up. On the 16th of August, the defendant moved for a further extension of time, on the ground that a person who had agreed to lend him the amount of the principal, interest and costs, was prevented, by illness, from coming to London on the 31st of July, and his wife, whom he had deputed to bring the money, was prevented from doing so, by the coach being full on the 30th. Motion granted. *Jones v. Creswick*, 304

2. The assignee of an insolvent mortgagor, before a bill was filed to foreclose the mortgage, had consented to join in conveying the estate to the mortgagee, and had distributed the insolvent's estate amongst the creditors, and by his answer he disclaimed all interest in the premises. The plaintiff was ordered to pay him his costs of the suit. *Thompson v. Kendall*, 397

3. A decretal order in a foreclosure suit, under 7 Geo. 2, c. 20, s. 2, cannot be made, unless all the defendants who are interested in the equity of redemption join in the application, and admit the plaintiff's title; and consequently the order cannot be made where one of those defendants is an infant. *Lushington v. Price*, 651

See PLA AND PLEADING, 8.

FOREIGN COURT.

Demurrer allowed to a bill of discovery in aid of the defence to a suit in a foreign court. The case of *Crowe v. Del Rio* stated and observed upon. *Bent v. Young*, 180

FRAUD.

See JOINT STOCK COMPANY, 2.—JURISDICTION, 5.

HUSBAND AND WIFE.

1. A married woman, being entitled to one-fifth of a residue, joined with her husband and the four other residuary legatees in filing a bill to have the testator's estate administered, and the residue ascertained and distributed amongst the parties entitled. Pending the suit, but before the rights of the parties had been declared, the husband and wife joined in assigning the wife's share to A., as a security for a debt due to him from the husband. The husband died; and, afterwards, a decree was made directing one-fifth of the residue to be paid to the wife. A. never presented a petition in the suit, or took any other step to enforce his security, until after the decree was made. Held that, by the decree, the wife became entitled to her share free from her husband's debt [Whether an assignment, by a husband and wife, of the wife's chose in action, to a particular assignee for value, is binding on the wife surviving; *Qu.*] *Hutchings v. Smith*, 137

2. An attachment having issued against a married man for want of answer of himself and wife, the sheriff returned *cepi corpus*, but that the husband was insane, and, therefore, incapable of answering. Ordered, that the wife

should answer separately, and that the senior six clerk not toward the cause, should be appointed guardian to the husband to put in his answer. *Estcourt v. Ewington*, 252

3. A husband having, without sufficient cause, separated from his wife, leaving her unprovided for, three-fourths of a fund in court, arising from property bequeathed to the wife, was ordered to be settled on her and her issue, generally, and the remaining fourth to be paid to her husband. *Coster v. Coster*, 597
- See EXECUTORS AND ADMINISTRATORS, 3.—PRACTICE, 19.

IMPERTINENCE.

See CONSTRUCTION OF NEW ORDERS, 1.

INFANT.

1. Testator gave his residuary estate to an infant, and directed 60*l.* a year to be allowed for his maintenance. The residue was of a large amount; and the court, from time to time, considerably increased the maintenance. *Josselyn v. Josselyn*, 63
 2. An infant devisee in tail may be ordered to convey under Geo. 4 and 1 Will. 4, c. 47, s. 11. *Penny v. Pretor*, 135
 3. The executors of a mortgagee in fee who had died intestate, leaving an infant heir, having, in exercise of a power in the mortgage deed, agreed to sell the estate, the heir was ordered, on a petition presented by the executors, under 11 Geo. 4 and 1 Will. 4, c. 60, s. 6, to convey the estate to the purchaser. *In re Kent*, 501
 4. Order made on petition, without suit, for the allowance of 450*l.* a year for the maintenance of an infant, the income of whose property exceeded 1500*l.* a year. *In re Christie*, 643
- See NEXT FRIEND.

INJUNCTION.

1. After the first proclamation had been made under a writ of *exigi facias*, which the defendant had issued in an action which he had brought against the plaintiff, the plaintiff served the defendant with the common injunction. The sheriff, upon receiving notice of the injunction, applied to the defendant's solicitor for instructions as to the course which he was to pursue, but the solicitor said that he had no instructions to give: upon which the sheriff proceeded to make three of the remaining proclamations. Held, that the defendant had been guilty of a contempt. *Woodley v. Bodington*, 214
2. In a suit for the specific performance of an agreement for the sale of the next presentation to a living, the court will restrain the bishop of the diocese from taking advantage of a lapse pending the suit. *Nicholson v. Knapp*, 326
3. The plaintiff was lessee of a coal mine at the rent of 300*l.* a year and subject to a royalty of 10*s.* for every wey of coals raised, in each year, above 600, that being the quantity considered to be paid for by the 300*l.* a year; and the plaintiff was authorized to determine the

lease on the coal being worked out. The plaintiff worked the mine for several years; and, when it was nearly exhausted, he was prevented, by accidents and defects in it, from continuing to work it, except at a ruinous expense. The court refused to restrain the defendant from suing for the rent of 300*l.* a year, although the plaintiff offered to pay him 10*s.* per wey for all the remaining coal. *Phillips v. Jones*, 519

4. An affidavit was filed and intitled in a case in which there were three defendants. Afterwards the plaintiff struck out the name of one of the defendants; and then obtained the injunction on the affidavit as it was originally intitled. Held that the injunction was regularly obtained. *Hawes v. Bamford*, 653
- See JURISDICTION, 2, 3.—NOTICE.

INSOLVENT DEBTOR.

Although the insolvent debtors' act, (7 Geo. 4, c. 57, s. 20,) directs the assignees to sell the insolvent's real estates by auction, yet, if they have tried to sell them by auction, and failed, a sale by private contract will be good. *McAher v. Priestman*, 322

See COSTS.

INSPECTION OF DOCUMENTS.

See DISCOVERY, 3, 4.

INSUFFICIENCY.

See CONSTRUCTION OF NEW ORDERS, 1.—DITTO.

INTEREST OR POWER.

Testator directed that, after his wife's death, part of his stock should be transferred to Johanna G. for her sole and entire use during her life; that she should not alienate it, but enjoy the interest during her life; and that, at her decease, she might dispose of it as she thought fit. Held that J. G. took an interest for life, with a power to dispose of the stock by her will. *Archibald v. Wright*, 161

INTERROGATORIES.

See PRACTICE, 17.

ISSUE.

Where a decree directs an issue to be tried at the next assizes, an application to postpone the trial on account of the illness of a material witness, must be made to the court which directed the trial. *Kebell v. Philpot*, 614

JOINT STOCK COMPANY.

1. Three members of a company, which was unlimited as to its duration, executed a deed dissolving the company, and left a notice of it at the company's office. They then filed a bill on behalf of themselves and all the other members, except the defendants, against the officers of the company, alleging that the company consisted of upwards of 400 members, and that the plaintiffs were ignorant of and had no means of learning their names and residences, and praying that the company

might be declared to be dissolved. Held that all the members ought to have been served with notice of the deed, and a demurrer to the bill, for want of equity, was allowed. *Wheeler v. Van Wart*, 193

2. The directors of a joint stock company, in order to sell their shares to advantage, represented, in their reports and by their agents, that the affairs of the company were in a very prosperous state, and declared large dividends at a time when the affairs of the company were greatly embarrassed. A person who had been induced, by those means, to purchase shares of one of the directors, filed a bill against that director, praying to be repaid his purchase money, and offering to retransfer the shares: a demurrer for want of equity, and because all the other partners ought to have been made parties, was overruled. *Stainbank v. Fernley*, 556

3. Certain persons entered into an agreement, in writing, for forming themselves into a joint-stock company, to be called the Medway Commercial Shipping Company; and, by one of their rules, the affairs and concerns of the company were to be under the management of a committee; but no time was fixed for the duration of the company. Four of the members of the company took upon themselves the exclusive management of a ship belonging to the company, and, being about to send her on a voyage which some of the members disapproved of, those members filed a bill, praying that the four might be restrained from interfering with the ship, or causing her to sail on the intended voyage, and from laying in or agreeing for any cargo, or freight, otherwise than under the direction of the committee, and that they might deliver up, to the committee, all books &c. in their possession, belonging to the ship or to the company. A demurrer for want of equity was allowed. *Semble*, that the court will interfere, between co-partners, to prevent the destruction of the partnership property, although a dissolution of the partnership may not be prayed. *Miles v. Thomas*, 606

See PLEA AND PLEADING, 3.

JUDGMENT CREDITOR.

A court of equity will not assist a judgment creditor to obtain payment of his debt, unless he has sued out execution; and if he does not state that he has done so, in his bill, the defendant may demur. *Neate v. Duke of Marlborough*, 60

JURISDICTION.

1. This court still has jurisdiction to relieve against collusive alienations of corporate property, notwithstanding the remedy provided by the 97th section of the municipal corporation act: but as, by that act, corporate property is applicable to public purposes, the Attorney General must sue, in such cases, in conjunction with the corporation. *Attorney General v. Wilson*, 30

2. Although the poor law amendment act en-

acts that no order of the poor law commissioners shall be removed by *certiorari* into any court of record except the King's Bench, and that every order which shall be removed into that court, shall, nevertheless, until declared illegal, continue in force and be obeyed in the same manner as if it had not been so removed; yet the Court of Chancery has jurisdiction to restrain the commissioners and the guardians of a union from acting upon an order pending proceedings under a *certiorari* obtained by the plaintiff to try the validity of it. *Frewin v. Lewis*, 66

3. The court will restrain the commissioners for examining witnesses from bringing an action for their fees against a solicitor in the cause, and will refer it to the Master to ascertain what is due to them. *Blundell v. Gladstone*, 455

4. Courts of equity have no jurisdiction under 3 and 4 Will. 4, c. 42, to order witnesses to attend arbitrators. *Hall v. Ellis*, 530

5. After a will of personalty had been proved, *per testem*, in the Ecclesiastical Court, a bill was filed, by the next of kin, alleging that the testator's signature to the will was obtained when he was not of sound and disposing mind; that his medical attendants were not called as witnesses when the probate was obtained: and that the evidence of the testator's incompetency did not come to the knowledge of the plaintiffs until after the time allowed for appealing from the sentence of the Ecclesiastical Court had expired; and praying that the will might be declared to have been fraudulently obtained, and that the residuary legatee might be a trustee for the plaintiffs. A demurrer to the bill was allowed, a court of equity having no jurisdiction to relieve against the probate of a will, unless the consent of the next of kin to the granting of it, was fraudulently obtained. *Gingell v. Horne*, 539

See ACCOUNT.—CHURCHWARDENS.—DISCOVERY, 4.

LANDLORD AND TENANT.

The plaintiff was lessee of a coal mine, at the rent of 300*l.* a year, and subject to a royalty of 10*s.* for every wey of coals raised, in each year, above 600, that being the quantity considered to be paid for by the 300*l.* a year: and the plaintiff was authorized to determine the lease on the coal being worked out. The plaintiff worked the mine for several years; and when it was nearly exhausted, he was prevented, by accidents and defects in it, from continuing to work it, except at a ruinous expense. The court refused to restrain the defendant from suing for the rent of 300*l.* a year, although the plaintiff offered to pay him 10*s.* per wey for all the remaining coal. *Phillips v. Jones*, 519

See PARTIES, 6.

LAPSE.

See BISHOP.

LEASE OF MINES

See INJUNCTION, 3.

LEGACY.

1. Testatrix gave legacies to A., B. and C., and declared that if any of them should be dead at her decease, or should not then be heard of to be then living, or should not respectively claim their respective legacies within twelve months after her death, then the legacies given to such of them as should be dead at her decease, or as should neglect to claim the same within the time aforesaid, should sink into her residuary estate. Three years after the testatrix's death, C., who had not been heard of for upwards of twenty years, claimed her legacy. Held that she was not entitled to it, although she had been ignorant, until a short time, that her sister was dead. *Hawkes v. Baldwin*, 355
 2. Testator directed all his property to be sold by his executors, and the proceeds to be invested in government or real securities, to be disposed of as after mentioned. He then desired his executors to pay 25*l.* yearly for the maintenance and education of his natural daughter, until she attained twenty-one or married, when he required them to pay her the sum of 500*l.* The daughter died under age and unmarried. Held, nevertheless, that the 500*l.* vested in her. *Watson v. Hayes*, 500
 3. Testator gave to his wife the use of all his property, for the benefit of herself and unmarried children, that they might be comfortably provided for so long as she should live; and, after her death be disposed of it amongst all his children. The testator left four married and three unmarried children. One of the three, married after his death. Held that the widow and the three children who were unmarried at the testator's death, were entitled, equally, to the income of the property during the widow's life. *Jubber v. Jubber*, 503
 4. The 40th sect. of the statute of limitations, 3 and 4 Will. 4, c. 27, applies to legacies payable out of personal estate as well as to legacies charged on real estate. *Sheppard v. Duke*, 567
- See UNCERTAINTY.—VESTING.—WILL, 24.

LEGAL ESTATE.

See WILL, 22.

LIABILITY OF CORPORATORS INDIVIDUALLY.

1. The municipal coporation act has not destroyed the individuality of the old corporations, but has merely varied the mode in which the officers are to be chosen. *Attorney General v. Wilson*, 30
2. If some of the members of a corporation are instrumental in unlawfully dispossessing the corporation of its property, they are personally liable. 1*b.*

LIEN.

A solicitor who had been employed by an administratrix in the administration of the deceased's estate, was also employed as her solicitor in a suit subsequently instituted by a creditor of the deceased. Pending the suit, the administratrix went to reside abroad, and forbade the solicitor to proceed any further with the suit. Afterwards the creditor obtained a decree and a receiver of the estate was appointed. Papers relating to the estate had come into the solicitor's possession, not for the purposes of the suit merely, but for those and other purposes, and he claimed a lien on them for his costs of the suit, and other business. A petition, by the creditor, praying for a reference to ascertain whether the solicitor had any lien on the papers, and that he might be ordered to deliver them up to the receiver was dismissed. *Warburton v. Edge*, 508

MAINTENANCE.

1. Testator gave his residuary estate to an infant, and directed 60*l.* a year to be allowed for his maintenance. The residue was of large amount; and the court, from time to time, considerably increased the maintenance. *Josselyn v. Josselyn*, 63
 2. Order made on petition without suit for the allowance of 450*l.* a year for the maintenance of an infant, the income of whose property exceeded 1500*l.* a year. *In re Christie*, 643
- See CONSTRUCTION, 14.

MARRIAGE SETTLEMENT.

See SETTLEMENT.

MASTER.

See CONSTRUCTION OF NEW ORDERS.

MEMORIAL.

The memorial of an annuity, after setting forth the grant, from which it appeared that the consideration for the annuity was 455*l.*, averred that the true and bona fide consideration for the annuity was 450*l.*, and that the said sum of 450*l.* was paid to the grantor by the grantee. The memorial stated also that the grantee's execution of the deed, was attested by three persons whose names it mentioned, but the name of only one of them was indorsed on the deed. Held that the grant of the annuity and all the securities for it, were void. *Gibbs v. Hooper*, 69

MINES.

See INJUNCTION, 3.

MISJOINDER.

See CHURCHWARDENS.—DISMISSAL, 1.

MORTGAGE.

See FORECLOSURE.—REDEMPTION.

MORTGAGED ESTATE.

See WILL, 22.

MORTGAGOR AND MORTGAGEE.

- Under a decree in a foreclosure suit, the time fixed for payment of principal, interest, and costs, was the 31st of July. On the 25th, the defendant obtained an order, referring it to the Master to fix a further time, on his paying the interest and costs on the first-mentioned day. The defendant, however, failed to make that payment, and on the 3d of August following, the plaintiff obtained the usual order for foreclosure absolute; but owing to the press of business in the registrar's office, it was not drawn up. On the 16th of August, the defendant moved for a further extension of time, on the ground that a person who had agreed to lend him the amount of the principal, interest and costs, was prevented, by illness, from coming to London on the 31st of July, and his wife, whom he had deputed to bring the money, was prevented from doing so, by the coach being full on the 30th. Motion granted. *Jones v. Creswicke*, 304
- 2 A mortgagee is not entitled, as against the devisees of the mortgaged estate, to be paid the costs of the action brought by him against the executrix of the mortgagor. *Lewis v. John*, 366
- 3 The executors of a mortgagee in fee who had died intestate leaving an infant heir, having, in exercise of a power in the mortgage deed, agreed to sell the estate, the heir was ordered on a petition presented by the executors under 11 Geo. 4, and 1 Will. 4, c. 60, s. 6, to convey the estate to the purchaser. *In re Kent*, 501
- 4 The case of a mortgagee leaving an heir, but who is not known, is within the 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, as expounded by 4 and 5 Will. 4, c. 23. *In re Williams*, 642
See COSTS, 5.—FORECLOSURE.

MOTION.

The pendency of a demurrer does not prevent the plaintiff from serving the defendant with a notice of motion. *Wardle v. Claxton*, 412
See DISMISSAL, 2.

MUNICIPAL CORPORATION ACT.

1. This court still has jurisdiction to relieve against collusive alienations of corporate property, notwithstanding the remedy provided by the 97th section of the municipal corporation act: but, as, by that act, corporate property is applicable to public purposes, the Attorney General must sue, in such cases, in conjunction with the corporation. *Attorney General v. Wilson*, 30
- 2 The municipal corporation act has not destroyed the individuality of the old corporations, but has merely varied the mode in which the officers are to be chosen. *Ib.*
3. If some of the members of a corporation are instrumental in unlawfully dispossessing the corporation of its property, they are personally liable. *Ib.*

MUTUALITY.
See AGREEMENT, 2.

NEW ORDERS.

1. The last order upon merits previous to the orders of 1837 coming into operation, had been made at the Rolls, against one of the defendants alone. The other defendant afterwards moved to dismiss, before the Vice-Chancellor. The motion was refused with costs, as the defendant was bound to see that the application was made in the proper court. *Tench v. Cheese*, 150
2. The words, "the second term then next following," in the 17th amended order, mean, not the second term following the undertaking to speed, but following the day on which the order for the commission to examine witnesses, is served. *Williams v. Macdonnell*, 400
See CONSTRUCTION OF NEW ORDERS.

NEXT FRIEND.

A suit was instituted by husband and wife and their infant children, by their father as next friend, respecting separate property of the wife in which the children also were interested. Pending the suit, the husband absconded. Held that the court could not appoint a next friend for the wife and a new next friend for the children, but it ordered that a person to be named by the wife, should be allowed to prosecute the suit on behalf of the plaintiffs. *Greenaway v. Rotherham*, 88

NOTICE.

A., the owner of a piece of land, divided it into lots for building a row of houses, and a deed was made between him of the one part and X. and Y. (who had purchased some of the lots from him) and the several persons who should at any time execute the deed, of the other part; by which after reciting that A. had determined and proposed, and thereby expressly declared that it should be a general and indispensable condition of the sale of all or any of the lots, that the proprietors thereof for the time being should observe and abide by the several stipulations and restrictions therein after contained; it was mutually covenanted between A., X., and Y., and the several other persons who should at any time execute the deed, and each of them A., X., and Y., and the several persons, &c., for himself, his heirs, executors and administrators, thereby covenanted with all and every the other and others of them, and with the heirs, executors, administrators or assigns of all and every the other and others of them, mutually and reciprocally, that none of the proprietors of any of the lots for the time being should at any time carry on thereon the business of an inn-keeper. A. sold and conveyed one of the lots to B., and another to C., both of whom executed the deed of covenant. The plaintiff afterwards purchased B.'s lot, and the defendant purchased C.'s lot, with notice of the deed of covenant. The defendant intending to use the house on his lot as a family hotel; an injunction was granted to restrain him from so doing. *Whatman v. Gibson*, 196

NUISANCE.
See PARTIES, 6.

OPENING BUILDINGS.

Four lots were sold for 610*l.*, 60*l.*, 20*l.*, and 20*l.*, severally to the same person. The court opened the biddings on an advance of 160*l.*, on 710*l.*, the whole amount of the sales, but would not order the lots to be resold in one lot. *Ward v. Cooke*, 87

ORDER TO AMEND.

If a defendant is in contempt for want of answer, the plaintiff does not waive the contempt by obtaining an order to amend. *Livingstone v. Cooke*, 468

ORDER FOR PAYMENT OF MONEY.

See CONSTRUCTION OF NEW ORDERS, 3.

OUTLAWRY.
See CONTEMPT, 2.

PARTIES.

1. If a person who is not a party to an action is made a party to a bill of discovery in aid of the defence to the action, he may demur, notwithstanding the bill charges that he is interested in the subject of the action. The cases of *The Bishop of London v. Fytche*, 1 Bro. C. C. 96, and *Fenton v. Hughes*, 7 Ves. 287, observed upon, and the reports of those cases corrected. *Irving v. Thompson*, 17
2. A testator in India, bequeathed his residuary estate to A., B., and C., in trust for his children L., M., and N., and appointed A., B., and C. his executors. A. proved in India and C. in England. B. died without proving; but he was alleged to have acted and committed a breach of trust in conjunction with A. L. died, and C. proved his will in Ireland. M. and N. filed a bill against B.'s executrix and A. and C. (alleging that the two last were out of the jurisdiction, and praying process against them accordingly), for a general administration of the testator's estate, and seeking to make A. and B.'s estate responsible for the breach of trust, and to have A. and C. removed from being trustees. Held that the cause could not proceed, because no personal representative of the testator, or of L. was before the court. *Lowry v. Fulton*, 104
3. A cause was ordered to stand over for want of parties: and the court gave the defendants the costs of the day, although the objection was not taken by their answers. *Ib.*
4. The publisher of a book, filed a bill for the usual relief on an invasion of copyright; but, though he had purchased the book of the author and paid for it, it did not appear that the copyright had been assigned to him. Held that the bill was demurrable because the author was not a party to it. *Colburn v. Duncombe*, 151
5. A. and B., the executors of C., employed D. to act as their agent in the business of the executors. A. died, and afterwards B.

filed a bill against D. for an account of his dealings and transactions as such agent as aforesaid. Held that A.'s personal representatives were not necessary parties to the suit. *Slater v. Wheeler*, 150

6. A. demised to B. (who was alleged to be an uncertificated bankrupt) a wharf, with the use of a road, in common with the occupiers of adjoining wharfs. C. obstructed the road. B. filed a bill against him to restrain the nuisance. Held that neither A. nor the occupiers of the adjoining wharfs, nor the assignees of B. were necessary parties to the bill. *Semple v. London and Birmingham Railway Company*, 269
7. The directors of a joint stock company, in order to sell their shares to advantage, represented, in their reports and by their agents, that the affairs of the company were in a very prosperous state, and declared large dividends at a time when the affairs of the company were greatly embarrassed. A person who had been induced, by those means, to purchase shares of one of the directors, filed a bill against that director, praying to be repaid his purchase money, and offering to re-transfer the shares: a demurrer for want of equity, and because all the other partners ought to have been made parties, was overruled. *Stainbank v. Fernley*, 556
See CHARITY.—DISMISSAL, 1.

PARTNERSHIP.

Certain persons entered into an agreement, in writing, for forming themselves into a joint stock company, to be called the Medway Commercial Shipping Company; and by one of their rules, the affairs and concerns of the company, were to be under the management of a committee; but no time was fixed for the duration of the company. Four of the members of the company took upon themselves the exclusive management of a ship belonging to the company, and, being about to send her on a voyage which some of the members disapproved of, those members filed a bill, praying that the four might be restrained from interfering with the ship, or causing her to sail on the intended voyage, and from laying in or agreeing for any cargo or freight, otherwise than under the direction of the committee, and that they might deliver up, to the committee, all books, &c. in their possession, belonging to the ship or to the company. A demurrer for want of equity was allowed. *Semble*, that the court will interfere, between copartners, to prevent the destruction of the partnership property, although a dissolution of the partnership may not be prayed. *Miles v. Thomas*, 606

See DISSOLUTION.—JOINT STOCK COMPANY.

PAYMENT OF MONEY OUT OF COURT.

Lord Brougham's 28th order, which directs that orders for paying out sums of money shall specify the amount to be paid out, applies to those cases only in which the amount to be paid out can be ascertained at the time when

the order for payment is made. *Pigget v. Garraway*, 260
See FIDUCIARY, 1.

PEER.

Where a peer is a defendant to a supplemental bill, which prays that he may answer that bill, and also the original bill, he ought to be served with office copies of both bills. *Vigers v. Lord Audley*, 408

PERSONAL REPRESENTATIVE.

See PLEA AND PLEADING, 4, 5, 7.

PLAINTIFF.

A bill was filed for an account of dealings and transactions between the parties, and to restrain an action brought by the defendant against the plaintiff for a breach of contract, on not accepting bills drawn on him by the defendant. Held that the plaintiff was entitled to inspect those parts only of the books mentioned in the schedule to the answer, which related to the matters in question in the suit; and that, if he wished to inspect other parts of them, with a view to his defence to the action, he must file a bill of discovery. *Ransom v. Samuel*, 442
See COMPROMISE, 1, 3, 4.—COSTS, 7.—DISCOVERY, 2.—DISMISSAL, 1.—PRACTICE, 12.

PLEA AND PLEADING.

- 1 If a person who is not a party to an action is made a party to a bill of discovery in aid of the defence to the action, he may demur, notwithstanding the bill charges that he is interested in the subject of the action. The cases of *The Bishop of London v. Fytche*, 1 Bro. C.C. 96, and *Fenton v. Hughes*, 7 Ves. 287, observed upon, and the reports of those cases corrected. *Irvine v. Thompson*, 17
- 2 If a plea purports to be a plea to the relief only, the defendant ought to give the discovery, otherwise the plea is bad. *King v. Heming*, 59
- 3 Two members of a company filed a bill against the directors, and afterwards obtained an injunction against them. A new director was afterwards elected; and, on his doing an act in conjunction with one of the original directors, which was prohibited by the injunction, the plaintiffs filed a supplemental bill against him, stating that fact, but omitting the allegations in the original bill. Held that the plaintiffs had stated sufficient to maintain their supplemental bill. *Vigers v. Lord Audley*, 72
- 4 A testator in India, bequeathed his residuary estate to A., B. and C., in trust for his children, L., M. and N., and appointed A., B. and C. his executors. A. proved in India, and C. in England. B. died without proving; but he was alleged to have acted and committed a breach of trust in conjunction with A. L. died, and C. proved his will in Ireland. M. and N. filed a bill against B.'s executrix and A. and C. (alleging that the two last were out

of the jurisdiction, and praying process against them accordingly), for a general administration of the testator's estate, and seeking to make A. and B.'s estate responsible for the breach of trust, and to have A. and C. removed from being trustees. Held that the cause could not proceed, because no personal representative of the testator, or of L. was before the court. *Lewry v. Fulton*, 104

- 5 A. and B., the executors of C., employed D. to act as their agent in the business of the executors. A. died, and afterwards B. filed a bill against D. for an account of his dealings and transactions as such agent as aforesaid. Held that A.'s personal representatives were not necessary parties to the suit. *Slater v. Wheeler*, 156
- 6 A suit, in this court, by the churchwardens of a parish, to restrain a person from pulling down the churchyard wall, is maintainable: and the churchwardens, notwithstanding their office has ceased, may file a supplemental bill for the purpose of stating facts occurred since the filing of the original bill, and may join their successors as co-plaintiffs with them in the supplemental suit. *Marriott v. Turpley*, 279
- 7 Where a person named as a defendant dies before appearance, an original bill, and not a bill of revivor ought to be filed against his personal representative. *Crowfoot v. Mander*, 396
- 8 The statute of limitations (3 and 4 Will. 4, c. 27, s. 40,) may be pleaded to a bill of foreclosure. A foreclosure suit being, in fact, a suit for the recovery of the money secured by the mortgage. *Dearman v. Wyche*, 570
- 9 A plea of the statute of limitations (3 and 4 Will. 4, c. 27,) ought not to deny, by answer, statements in the bill which are in direct contradiction to the averments necessary to support the plea; but an answer in support of the plea, ought to be confined to those statements in the bill which allege facts ancillary to or as affording evidence of statements which are directly negated by the requisite averments in the plea. *Ib.*
See DISMISSAL, 1.—JURISDICTION, 1.—PARTIES, 4, 6.

POLICY OF INSURANCE.

A marriage settlement recited that it had been agreed, on the treaty for the marriage, that the intended husband should insure his life in the Rock Insurance Office, in the names of trustees, in the sum of 3000l.: that the dividends of certain canal shares should be applied in keeping the policy on foot: that the said sum of 3000l. under the policy, should be settled in manner thereafter mentioned: and that, in pursuance of the agreement, the intended husband had made an insurance on his life in the Rock office, in the sum of 3000l. in the names of the trustees of the deed: and it was declared that the trustees should stand possessed of the policy, in trust for the intended husband, until the marriage, and that, upon the solemnization thereof, they should stand possessed of the said sum of 3000l., when received under the policy, upon certain trusts for

the benefit of the intended wife and the children of the marriage. The husband became bankrupt and afterwards died. On his death, a considerable bonus was payable on the 3000*l.* Held that the husband's assignees were not entitled to the bonus, but that that sum, as well as the 3000*l.*, belonged to the trustees of the settlement. *Parkes v. Bott*, 388

POOR LAW AMENDMENT ACT.

Although the poor law amendment act enacts that no order of the poor law commissioners shall be removed by *certiorari* into any court of record except the King's Bench, and that every order which shall be removed into that court, shall, nevertheless, until declared illegal, continue in force and be obeyed in the same manner as if it had not been so removed; yet the Court of Chancery has jurisdiction to restrain the commissioners and the guardians of a union, from acting upon an order pending proceedings under a *certiorari* obtained by the plaintiff to try the validity of it. *Frewin v. Lewis*, 66

PORCTIONS.

By a marriage settlement, stock was settled, subject to life interests in the husband and wife, in trust for their children, share and share alike, the shares to be paid to them at twenty-one or marriage, and the shares of children dying, leaving issue, before their shares had become payable, were to be in trust for their issue: but in case any of their children should die before their shares should become payable, without leaving any issue, then their shares were to be in trust for the surviving children. There were six children of the marriage, who all attained twenty-one: two of them died in the lifetime of their surviving parent. Held that the word "payable" must be held to mean "vested," and, consequently, that the representatives of the deceased children were entitled to shares of the stock. *Mocatta v. Lindo*, 56

POWER.

1. By a marriage settlement, freehold lands were conveyed to trustees during the joint lives of the husband and wife, in trust to pay one moiety of the rents to the wife, for her separate use, and the other moiety to the husband; and, after the decease of one of them, to the use of the survivor, with remainder to the use of the children of the marriage, with remainder, in default of such issue, if the wife should survive the husband, to the use of her in fee, but if not, then to such uses, &c. as she, notwithstanding her coverture, by her will, by her signed and published in the presence of, and attested by three or more credible witnesses, should appoint, and, in default of appointment, to the use of her in fee. The wife died in her husband's lifetime, having made a will, which purported to be signed, sealed, and delivered by her, and by which, without referring to any power, she gave all the property of which she was possessed, whether real or personal, and

also her reversionary interest or interests in any property or properties whatsoever, to her husband. Held that the will was a due execution of the power given to the wife by the settlement. *Curteis v. Kenrick*, 43

2. A married woman, having freehold estates, which were settled, on her marriage, to her separate use, with a testamentary power of appointment over them, made a will, by which, without referring to the power, she disposed of certain of the estates, *nominatim*, and then gave all the rest of her goods, chattels, estate and estates to R. C. Held that the residuary clause was a good execution of the power, as to all the estates, not previously mentioned. *Churchill v. Dibbens*, 47
3. If a married woman, having a testamentary power of appointment makes a will, it must be intended to be an exercise of the power, although it contains no reference to it. *Id.*
4. A married woman, having real property settled to her separate use, with a testamentary power over it, may dispose of leaseholds and other chattels purchased with the produce of it, but not of real estate so purchased. *Id.*
5. A power, given to a husband and wife, was required to be exercised by them by any deed or writing under their hands and seals, to be by them executed in the presence of and attested by two witnesses. Held that a deed which was signed as well as sealed and delivered by the husband and wife in the presence of two witnesses, was not a good exercise of the power, because the attestation clause did not extend to the signature, as well as to the sealing and delivery. *Waterman v. Smith*, 69

See APPOINTMENT.—CONSTRUCTION, 4.

POWER TO APPOINT TRUSTEES.

A lady, being entitled to 2000*l.* charged on her father's estates, and payable after the decease of her surviving parent, it was agreed, by her marriage articles, that, in the settlement to be made in pursuance thereof, there should be contained a power, enabling her father, in his lifetime, or his executors, within six months after the 2000*l.* should become payable, to invest that sum, in the usual securities, in the names of trustees to be for that purpose appointed, and for the trustees or the survivor of them, from time to time, with the consent of the husband and wife or the survivor, or of their own proper authority, as the case should happen, to change the securities, and to pay the interest to the husband for life, to the wife, for life, for her separate use, and to pay the principal to their children, and, in default of children, to the wife's next of kin or personal representatives. The husband died, leaving his wife and four infant children surviving. No trustees of the 2000*l.* having been appointed, the wife, after the husband's death, appointed two persons to be such trustees. Held that the appointment ought to have been made by the husband and wife jointly, and that the appointment made by the wife, was invalid. *Brasier v. Hudson*, 11

PRACTICE.

- A plaintiff may issue an attachment against a defendant for want of answer, although he is himself in contempt for non-payment of costs, which he has been ordered to pay to the defendant. *Wilson v. Bates*, 54
- Receiver granted against a defendant who was out of the jurisdiction. *Gibbins v. Mainwaring*, 77
- Leave given under the circumstances to expect to a report, although the party had not carried in objections to it. *Wood v. Lambirth*, 195
- Under Lord Lyndhurst's 12th order, the Master may, of his own authority, and whether he is attended by any one on behalf of the parties, or not, allow himself further time to make his report as to scandal, impertinence or insufficiency. *Woods v. Woods*, 213
- An attachment having issued against a married man for want of answer of himself and wife, the sheriff returned *cepsi corpus*, but that the husband was insane, and, therefore, incapable of answering. Ordered that the wife should answer separately, and that the senior six clerk not toward the cause, should be appointed guardian to the husband to put in his answer. *Estcourt v. Ewington*, 252
- In computing the twelve days allowed by Lord Brougham's 10th order for filing demurrers, an intervening vacation is not to be excepted. *Boys v. Morgan*, 262
- A and B. sued in respect of a joint demand, and B. sued in respect of a distinct separate demand. The joint demand failed, but the separate one succeeded. The bill was dismissed as against both plaintiffs, but without prejudice to B.'s filing a new bill. *Cowley v. Cowley*, 299
- A defendant, being in contempt for want of answer, filed his answer and the plaintiff took an office copy of it. Held that the plaintiff did not, thereby, waive the contempt. *Woodward v. Twissine*, 301
- The Attorney General not having answered the bill within a reasonable time, the court ordered that he should put in his answer within a week after service of the order, or that the bill should be taken *pro confesso* against him. *Green v. Attorney General and Others*, 325
- A defendant may put in a further answer pending exceptions to his first answer, although he thereby deprives the plaintiff of the benefit of obtaining the common injunction on the Master's reporting the first answer to be insufficient. The case of *Russell v. Dight*, ante, vol. 6, p. 430, explained. *Ingham v. Ingham*, 363
- Where a plaintiff wishes to amend his bill, but does not require a further answer, the order ought to contain a recital to that effect, otherwise it is irregular. *Beddington v. Woodley*, 380
- Where a plaintiff files a replication after being served with notice of a motion to dismiss, but before the motion is made, no order ought to be made on the motion except for the plaintiff to pay the costs of it. *Corporation of Dartmouth v. Holdsworth*, 383
- Pending a notice of motion for a special injunction, the defendant put in a demurrer. Held that the demurrer must be set down and argued *instanter*. — *v. The Bridgewater Canal Company*, 378
- Where a peer is a defendant to a supplemental bill, which prays that he may answer that bill and also the original bill, he ought to be served with office copies of both bills. *Vigers v. Lord Audley*, 408
- After an injunction had been continued on merits, the plaintiff moved to amend without prejudice to the injunction. Held that, in such a case, the amendment could not prejudice the injunction, and therefore, the motion was a simple application to amend, and ought to have been made before the Master. *Woodroffe v. Daniel*, 410
- After a decree or decretal order, not directing inquiries merely, has been made, the bill cannot be dismissed. *Bluck v. Colaughy*, 411
- If liberty is given to a party to exhibit further interrogatories for the examination of witnesses, he may re-examine a witness whom he has examined before, but not to the same matter. *Turner v. Trelawny*, 453
- Motion that the plaintiff, a naval officer on half-pay, who had resided sixteen years in Barbadoes, where he held the office of captain of the port, under the appointment of the Crown, might give security for costs, refused. *Eselyn v. Chippendale*, 437
- A. sold a fund to which his wife was entitled in reversion; and, when it fell into possession, he was resident in Africa. The wife consented to waive her equity to a settlement and that the fund should be transferred to the purchaser. Held that the usual affidavit that there was no settlement affecting the fund, might be made by the wife alone. *Elliot v. Remington*, 502
- An affidavit that the deponent had used all due diligence to discover where the defendant resided, or where her last place of residence was, but without success, save that he had been informed and believed that she had assumed male attire in order to disguise herself, and that she was occasionally seen in the neighborhood of a certain place, is sufficient to warrant the court in making an order under 11 Geo. 4 and 1 Will. 4, c. 36, s. 3, with a view to taking the bill *pro confesso*. *Graver v. Temple*, 523
- Before a defendant can move to enlarge publication he must serve his co-defendants as well as the plaintiff with notice of the motion. *Brydges v. Branfill*, 643
- Order made on petition without suit for allowance of 450*l.* a year for the maintenance of an infant, the income of whose property exceeded 1500*l.* a year. *In re Christie*, 643
- See COSTS—DEMURRER, 5.—DISCOVERY, 2.—DISMISSAL.—INFANT, 4.—PUBLICATION.—SUBPENA.—TAXATION.

PRESENTATION.

See BISHOP.

PROBATE.

See WILL, 20.

PROBATE DUTY.

The testator, who was domiciled in England, had, in the hands of his agents in India, certain securities of the Indian government, the principal and interest of which was payable in India, either in cash or by bills on the India Company, at the option of the creditor. Shortly before his death, he accepted an offer made, by the Company, to him and other creditors, to have his notes converted into stock, to be registered in England, and to be saleable and transferable there. The conversion was not completed at the testator's death nor till after his will had been proved in England; but, ultimately, the stock was transferred to his executors. Held that no probate duty was payable in respect either of the notes or the stock. *Pearce v. Pearce*, 480

PROCESS.

See CONTEMPT.—PEER.

PRO CONFESSO.

1. An affidavit that the deponent had used all due diligence to discover where the defendant resided or where her last place of residence was, but without success, save that he had been informed and believed that she had assumed male attire in order to disguise herself, and that she was occasionally seen in the neighborhood of a certain place, is sufficient to warrant the court in making an order under 11 Geo. 4, and 1 Will. 4, c. 36, s. 3, with a view to taking the bill *pro confesso*. *Grever v. Temple*, 523
2. Where the Master has reported that a defendant is unable, by reason of poverty, to employ a solicitor to put in his answer, the court will, by one and the same order, direct counsel and a solicitor to be assigned to the defendant for the purpose of putting in his answer, and that a *habeas corpus* do issue against him, and that the plaintiff's clerk in court do attend, with the record, on the return of the writ, in order that the bill may be taken *pro confesso* against the defendant, unless he shall, in the meantime, put in his answer. *Welford v. Daniell*, 652

See PRACTICE, 9.

PRODUCTION OF DOCUMENTS.

Where a defendant to a bill of discovery in aid of an action brought against him by the plaintiff, has been ordered to deposit, in the hands of his clerk in court, documents admitted, in his answer, to be in his custody, the plaintiff is entitled to have such of those documents as, by reference in the body of the answer, are made part of the answer, produced and read, at the trial, as part of the answer. *Driver v. Wright*, 261

See DISCOVERY, 3, 4.—LIEN.—TITLE, 1.

PUBLICATION.

1. The Master having been prevented by illness from attending at his office on the day appointed for hearing an application to enlarge publi-

cation; held that the application might be made to the court. *Boys v. Trepp*, 318

2. Before a defendant can move to enlarge publication he must serve his co-defendants as well as the plaintiff with notice of the motion. *Brydges v. Branfill*, 643

RAILWAY COMPANY.

1. Certain persons intended to form a railway from A. to B., which was to pass over the plaintiff's estate. The plaintiff opposed the project, but, on the agent for the projectors agreeing, in writing, to pay him 20,000*l.* for the portion of his estate over which the railway was to pass, he consented to withdraw his opposition. At the same time, certain other persons intended to form a railway between the same termini, but by a different line, which also passed through the plaintiff's estate, but not through the same part of it as the former line: 14 acres of the plaintiff's land were required for the former railway, and 16 acres for the latter. The plaintiff opposed the latter railway also. The agents for the rival projectors then entered into and signed an agreement (which was approved of and signed by the plaintiff's agent) by which they agreed that the first line should be abandoned and the second adopted, and that the adopted line should take the engagements entered into, with the land owners, by the abandoned line; and, thereupon, the plaintiff withdrew his opposition to the adopted line, and the act of Parliament for making the second railway and for incorporating the projectors of it, was passed. Held that the incorporated company were bound to perform the agreement made with the plaintiff by the projectors of the first railway. *Stanley v. Chester and Birkenhead Railway Company*, 264
2. Two railways, called A. and B., were projected, by different parties, to run from M. towards N. The line of A. passed through the centre of the plaintiff's estate, and the line of B. through a corner of it. The projectors of A. agreed with the plaintiff for the purchase of that portion of his land which they required; and they were to have power to vacate the agreement in case the act for making their railway should not pass. Two bills were brought into Parliament for forming the railways, and were referred to a committee at whose suggestion the two projects were amalgamated; and an act was passed incorporating the projectors of both railways into one company and for making a railway partly in the line of A. and partly in the line of B., the latter being the line selected with respect to the plaintiff's estate. Pending the act, the promoters of the two railways agreed with each other that, where either company should have entered into contracts with landowners whose property might be affected by either line, though in a somewhat different mode, the contracts entered into by the company proposing the rejected line, should be adopted by the united company. A copy of this agreement was subsequently sent to the plaintiff, by the united company. The projectors of line A. afterwards vacated their agreement with the plain-

PRACTICE.

- A plaintiff may issue an attachment against a defendant for want of answer, although he is himself in contempt for non-payment of costs, which he has been ordered to pay to the defendant. *Wilson v. Bates*, 54
1. Receiver granted against a defendant who was out of the jurisdiction. *Gibbins v. Mainwaring*, 77
1. Leave given under the circumstances to except to a report, although the party had not carried in objections to it. *Wood v. Lambirth*, 195
1. Under Lord Lyndhurst's 12th order, the Master may, of his own authority, and whether he is attended by any one on behalf of the parties, or not, allow himself further time to make his report as to scandal, impertinence or insufficiency. *Woods v. Woods*, 213
5. An attachment having issued against a married man for want of answer of himself and wife, the sheriff returned *cepi corpus*, but that the husband was insane, and, therefore, incapable of answering. Ordered that the wife should answer separately, and that the senior six clerk not toward the cause, should be appointed guardian to the husband to put in his answer. *Katcourt v. Ewington*, 252
6. In computing the twelve days allowed by Lord Brougham's 10th order for filing demurrers, an intervening vacation is not to be excepted. *Boys v. Morgan*, 262
7. A and B. sued in respect of a joint demand, and B. sued in respect of a distinct separate demand. The joint demand failed, but the separate one succeeded. The bill was dismissed as against both plaintiffs, but without prejudice to B.'s filing a new bill. *Cowley v. Cowley*, 299
8. A defendant, being in contempt for want of answer, filed his answer and the plaintiff took an office copy of it. Held that the plaintiff did not, thereby, waive the contempt. *Woodward v. Twissine*, 301
9. The Attorney General not having answered the bill within a reasonable time, the court ordered that he should put in his answer within a week after service of the order, or that the bill should be taken *pro confesso* against him. *Green v. Attorney General and Others*, 325
10. A defendant may put in a further answer pending exceptions to his first answer, although he thereby deprives the plaintiff of the benefit of obtaining the common injunction on the Master's reporting the first answer to be insufficient. The case of *Russell v. Dight*, ante, vol. 6, p. 430, explained. *Ingham v. Ingham*, 363
11. Where a plaintiff wishes to amend his bill, but does not require a further answer, the order ought to contain a recital to that effect, otherwise it is irregular. *Boddington v. Woodley*, 380
12. Where a plaintiff files a replication after being served with notice of a motion to dismiss, but before the motion is made, no order ought to be made on the motion except for the plaintiff to pay the costs of it. *Corporation of Dartmouth v. Holdsworth*, 383
13. Pending a notice of motion for a special injunction, the defendant put in a demurrer. Held that the demurrer must be set down and argued *instantly*. — *v. The Bridgewater Canal Company*, 378
14. Where a peer is a defendant to a supplemental bill, which prays that he may answer that bill and also the original bill, he ought to be served with office copies of both bills. *Vigers v. Lord Audley*, 408
15. After an injunction had been continued on merits, the plaintiff moved to amend without prejudice to the injunction. Held that, in such a case, the amendment could not prejudice the injunction, and therefore, the motion was a simple application to amend, and ought to have been made before the Master. *Woodroffe v. Daniel*, 410
16. After a decree or decretal order, not directing inquiries merely, has been made, the bill cannot be dismissed. *Bluck v. Colnaghi*, 411
17. If liberty is given to a party to exhibit further interrogatories for the examination of witnesses, he may re-examine a witness whom he has examined before, but not to the same matter. *Turner v. Trelawny*, 453
18. Motion that the plaintiff, a naval officer on half-pay, who had resided sixteen years in Barbadoes, where he held the office of captain of the port, under the appointment of the Crown, might give security for costs, refused. *Evelyn v. Chippendale*, 497
19. A. sold a fund to which his wife was entitled in reversion; and, when it fell into possession, he was resident in Africa. The wife consented to waive her equity to a settlement and that the fund should be transferred to the purchaser. Held that the usual affidavit that there was no settlement affecting the fund, might be made by the wife alone. *Elliot v. Remington*, 502
20. An affidavit that the deponent had used all due diligence to discover where the defendant resided, or where her last place of residence was, but without success, save that he had been informed and believed that she had assumed male attire in order to disguise herself, and that she was occasionally seen in the neighborhood of a certain place, is sufficient to warrant the court in making an order under 11 Geo. 4 and 1 Will. 4, c. 36, s. 3, with a view to taking the bill *pro confesso*. *Graver v. Temple*, 523
21. Before a defendant can move to enlarge publication he must serve his co-defendants as well as the plaintiff with notice of the motion. *Brydges v. Branfill*, 643
22. Order made on petition without suit for allowance of 450*l.* a year for the maintenance of an infant, the income of whose property exceeded 1500*l.* a year. *In re Christie*, 643
- See COSTS—DEMURRER, 5.—DISCOVERY, 2.—DISMISSAL—INFANT, 4.—PUBLICATION.—SUBPOENA.—TAXATION.

PRESENTATION.

See BISHOP.

PROBATE.

See WILL, 20.

SECURITY FOR COSTS.

A solicitor being indebted to A. and being pressed by A. to give him a security for the debt, prevailed on one of his clients (against whom he had a demand for costs which had not been taxed) to execute to A. a bond of 3000*l.* as a part satisfaction of the costs due from the client to the solicitor; and the solicitor, afterwards, delivered the bond to A. A. knew that the sum secured by the bond, was claimed, by the solicitor, to be due to him for costs, but had no notice that those costs had not been taxed; and a bill filed by the client against A. and the solicitor, praying that the costs might be taxed, and that the bond might stand as a security for so much only as should be found due from the client, on the taxation, was dismissed, as against A., with costs. *Harrison v. Wiltshire*, 255

See PRACTICE, 18.

SEPARATE USE.

Testator bequeathed his residuary estate to trustees, in trust to pay the income to his wife, for life, to be by her applied for her maintenance of herself and such children as he might leave at his death. Held not to be a trust for the separate use of the wife. *Wardle v. Claxton*, 524

SETTLEMENT.

1. By a marriage settlement, stock was settled, subject to life interests in the husband and wife, in trust for their children, share and share alike, the shares to be paid to them at twenty-one or marriage, and the shares of children dying leaving issue before their shares had become payable, were to be in trust for their issue, but in case any of the children should die before their shares should become payable without leaving any issue, then their shares were to be in trust for the surviving children. There were six children of the marriage, who all attained twenty-one: two of them died in the lifetime of their surviving parent. Held that the word "payable" must be held to mean "vested" and, consequently, that the representatives of the deceased children were entitled to shares of the stock. *Mocatta v. Lindo*, 56

2. In a marriage settlement, the ultimate trust of the wife's chattels was for the executors or administrators of the wife of her own family, and the ultimate trust of the husband's chattels, was for his executors or administrators of his own family. Held that, though the same words were used, *mutatis mutandis*, in both limitations, yet the court was justified in holding that, with respect to the wife's chattels, they meant her next of kin at her death, and, with respect to the husband's chattels, his executors or administrators simply. *Smith v. Dudley*, 125

See FEME COVERTE.—POLICY OF INSURANCE—POWER.

SOLICITOR.

A solicitor who had been employed by an administratrix in the administration of the deceased's estate, was also employed as her solicitor in a suit subsequently instituted by a creditor of the deceased. Pending the suit, the administratrix went to reside abroad, and forbade the solicitor to proceed any further with the suit. Afterwards the creditor obtained a decree and a receiver of the estate was appointed. Papers relating to the estate had come into the solicitor's possession, not for the purposes of the suit merely, but for those and other purposes, and he claimed a lien on them for his costs of the suit, and other business. A petition, by the creditor, praying for a reference to ascertain whether the solicitor had any lien on the papers, and that he might be ordered to deliver them up to the receiver, was dismissed. *Worburton v. Edge*, 508

See EXCEPTION, 1.—SECURITY FOR COSTS.

SOLICITOR AND CLIENT.

A committee appointed by the inhabitants of M., employed the plaintiffs, as their solicitors, to apply to Parliament, for an act for constructing a dock. The plaintiffs, in the course of their employment, paid considerable sums to engineers, witnesses, parliamentary agents, and various other persons; and a large sum became due to them for their own costs, and several liabilities were existing against them. The plaintiffs at different times received through bankers and others, various sums on account of what was due to them, but were unable to obtain payment of the balance, upon which they filed a bill against some of the members of the committee, alleging that, of the other members, some were out of the jurisdiction, and others were dead, and their personal representatives unknown, and praying that the defendants might come to an account with them, and pay to them the balance (which was stated to be 3232*l.* 1*s.* 4*d.*), or such balance as, on taking the account, should be found due, and also to indemnify them against the existing liabilities. A demurrer to the bill was allowed. *Allison v. Herring*, 583

See LIEN --SECURITY FOR COSTS.—TAXATION, 1, 2.

SPECIAL INJUNCTION.

See PRACTICE, 13.

SPECIALTY DEBT.

A. covenanted, with B., to pay him a certain sum, by bills of exchange to be drawn by B. upon and accepted by A. A. only gave B. a bill for part of the sum; and that bill was dishonored. Held that B. was a specialty creditor of A. for the whole sum. *Cepland v. Martin*, 433

SPECIFIC PERFORMANCE.

1. By an agreement between the plaintiffs and the defendants, the former, in consideration of certain payments to be made by them to the

latter, were to have the exclusive right of engraving and publishing a series of maps from drawings to be furnished to them, from time to time, by the latter. The court refused to restrain the defendants from acting in violation of the agreement, as it could not compel the defendants to furnish the drawings; and, therefore, could not decree a specific performance of the agreement. *Baldwin v. The Society for the Diffusion of Useful Knowledge*, 393

1 The bill stated a parol agreement in part performed, for a lease of a farm to be granted by the defendant to the plaintiff, one term of which was that a certain arable field should be laid down in pasture. The plaintiff entered and laid down the field, and it was, afterwards, severed from the farm, and an abatement in the rent, was made in respect of it. The witness examined to prove the agreement, did not state that it contained any provisions as to laying down the field; so that the agreement proved, varied from that alleged in the bill; and, on that account, the court refused to decree a specific performance. *Mundy v. Jolliffe*, 413

1 An order for a reference as to title ought to contain directions for the production of deeds, &c., and for the examination of the parties on oath. *Winterbottom v. Ingham*, 654
See BEMOR.

STATUTES.

7 Geo. 2, c. 57.—See FORECLOSURE, 3.

7 Geo. 4, c. 57.—See INSOLVENT DEBTOR.

11 Geo. 4 and 1 Will. 4, c. 36.—See PRACTICE, 90.

11 Geo. 4 and 1 Will. 4, c. 60.—See CONSTRUCTION, 23.

3 and 4 Will. 4, c. 27.—See PLEA AND PLEADING, 8, 9.—STATUTE OF LIMITATIONS.

3 and 4 Will. 4, c. 42.—See JURISDICTION, 4.—LEGACY, 4.

3 and 4 Will. 4, c. 94.—See CONSTRUCTION, 22.

4 and 5 Will. 2, c. 23.—See MORTGAGOR AND MORTGAGEE, 4.

STATUTE OF LIMITATIONS.

3 and 4 Will. 4, c. 27.

1 Where an estate is devised to a trustee in trust to sell and pay the testator's debts, and, subject thereto, in trust for A., an acknowledgment of a debt in writing, signed by the trustee or his agent, is sufficient to preserve the creditor's right of suit for twenty years after the giving of the acknowledgment. *Lord St. John v. Boughton*, 219

2 The 40th sect. of the Statute of Limitations, 3 and 4 Will. 4, c. 27, applies to legacies payable out of personal estate as well as to legacies charged on real estate. *Sheppard v. Duke*, 567

3 The statute of limitations (3 and 4 Will. 4, c. 27, s. 40) may be pleaded to a bill of foreclosure. A foreclosure suit being, in fact, a suit for the recovery of the money secured by the mortgage. *Dearman v. Wyche*, 570

4 A plea of the statute of limitations (3 and 4 Will. 4, c. 27) ought not to deny, by answer, statements in the bill which are in direct con-

tradiction to the averments necessary to support the plea; but an answer in support of the plea, ought to be confined to those statements in the bill which allege facts ancillary to or as affording evidence of statements which are directly negated by the requisite averments in the plea. Ib.

SUBPENA.

An affidavit of the service of a subpoena to appear, stating that the deponent served the defendant with it by leaving a true copy of it, and of the endorsement thereon, with A. the wife of L., the sister of defendant, at whose house the defendant lodged, is insufficient, as it does not show where the writ was served. *Bickford v. Skewes*, 428

SUBPENA DUCES TECUM.

A witness, a partner in a bank, was required, by a subpoena duces tecum, to produce all books and accounts, in his custody or power, containing any entries relating to 6500*l.* consols, or to the dividends thereof, or the application or disposition thereof, or relating to the matters in question in the suit. Held that the witness was not compellable to produce any books, &c. because the language of the subpoena was too general, and because the books, &c., relating to the stock, were partnership property, and his co-partners would not consent to his producing them. *Attorney General v. Wilson*, 526

SUPPLEMENTAL ANSWER.

Leave given to a defendant to file a supplemental answer for the purpose of correcting a mistake, in his former answer, as to the custom of the manor, which was one of the facts in issue in the cause. *Frankland v. Overend*, 365

SUPPLEMENTAL BILL.

Two members of a company filed a bill against the directors, and afterwards obtained an injunction against them. A new director was afterwards elected; and, on his doing an act in conjunction with one of the original directors, which was prohibited by the injunction, the plaintiffs filed a supplemental bill against him, stating that fact, but omitting the allegations in the original bill. Held that the plaintiffs had stated sufficient to maintain their supplemental bill. *Vigers v. Lord Audley*, 72
See PLEA AND PLEADING, 6.

SUPPLEMENTAL SUIT.

An executor died insolvent, after a sum had been reported due from him to his testator's estate in a suit instituted by the residuary legatees. A supplemental suit was then instituted against his personal representative. Held, that the decree in that suit, ought not to be confined to the payment of the sum reported due, but ought to embrace the general administration of the executor's estate. *Cockburn v. Robinson*, 377

SURVIVORSHIP.

Testator bequeathed his residuary estate to his wife for life, and, after her death, to his son and daughter, share and share alike, and their respective issue, with benefit of survivorship between his said children or their issue respectively. Held that the survivorship was to take place only in the event of the issue of a child failing in the lifetime of the testator's widow. *Turner v. Copel*, 158

TAXATION.

1. A solicitor presented a petition, complaining that the Master, in taxing his bill, had taken into consideration matters not referred to him, and praying for leave to except to the certificate. It was objected that the solicitor ought to have filed exceptions to the certificate, but the court overruled the objection. *Russell v. Buchanan*, 167
2. Under the common order for taxing a solicitor's bill, the Master is bound to take a general account of receipts and payments by the solicitor as agent to the client. *Russell v. Buchanan*, 167
3. A solicitor being indebted to A. and being pressed by A. to give him a security for the debt, prevailed on one of his clients (against whom he had a demand for costs, which had not been taxed) to execute to A. a bond for 3000*l.* as a part satisfaction of the costs due from the client to the solicitor: and the solicitor, afterwards, delivered the bond to A. A. knew that the sum secured by the bond, was claimed, by the solicitor, to be due to him for costs, but had no notice that those costs had not been taxed; and a bill filed by the client against A. and the solicitor, praying that the costs might be taxed, and that the bond might stand as a security for so much only as should be found due from the client, on the taxation, was dismissed, as against A., with costs. *Harrison v. Wiltshire*, 255

TITHE COMMUTATION ACT.

A court of equity will compel a discovery and production of documents in aid of proceedings at law to try a disputed right under the tithe commutation act, notwithstanding special provisions are contained in that act for those purposes. *Morris v. The Duke of Norfolk*, 472

TITLE.

An order for a reference as to title ought to contain directions for the production of deeds, &c., and for the examination of the parties on oath. *Winterbottom v. Ingham*, 654

TRIAL.

Where a decree directs an issue to be tried at the next assizes, an application to postpone the trial on account of the illness of a material witness, must be made to the court which directed the trial. *Kebell v. Philpot*, 614

TRUST.

Testator bequeathed all his property, both real and personal, to his son Charles, his heirs, executors, &c., to and for his and their own use and benefit, well knowing he would discharge the trust the testator reposed in him by remembering his (the testator's) sons and daughters, William, Edmund, Martha, &c. Held that no trust was created for the sons and daughters; but that Charles took the property for his own benefit absolutely. *Bardsell v. Bardsell*, 319

TRUSTEES.

1. A lady being entitled to 3000*l.* charged on her father's estates and payable after the decease of her surviving parent, it was agreed, by her marriage articles, that, in the settlement to be made in pursuance thereof, there should be contained a power enabling her father, in his lifetime, or his executors, within six months after the 3000*l.* should become payable, to invest that sum, in the usual securities, in the names of trustees to be for that purpose appointed, and for the trustees or the survivor of them, from time to time, with the consent of the husband and wife or the survivor, or of their own proper authority, as the case should happen, to change the securities, and to pay the interest to the husband for life, to the wife for life, for her separate use, and to pay the principal to their children, and, in default of children, to the wife's next of kin or personal representatives. The husband died leaving his wife and four infant children surviving. No trustees of the 3000*l.* having been appointed, the wife, after her husband's death, appointed two persons to be such trustees. Held that the appointment ought to have been made by the husband and wife jointly, and that the appointment made by the wife, was invalid. *Brasier v. Hudson*, 11
2. A testator resident in India, directed his trustees and executors to invest his residue in government or other good securities, and then declared trusts of it for the benefit of his children and other persons, all of whom were resident either in England or Ireland, and were mentioned so to be in the will. The residue was allowed to remain in the hands of the testator's bankers and agents in India, who ultimately failed. Held that the acting executor and trustee was responsible for the loss thereby occasioned to the estate. *Lowry v. Fulton*, 115
3. A testator resident in India appointed A. B. and C. his executors and trustees. A. and B. were resident in India, and C. in Ireland. A. proved the will in India, and C. in England: but B. did not prove at all. The assets were suffered to remain for several years, in the hands of M. & Co. of Calcutta, the testator's bankers and agents. B. was a partner in that firm at the testator's death: but, shortly afterwards, he retired and came to England. He then entered into partnership with R. & Co. of London, the agents and correspondents of M. & Co., and paid some of the testator's legacies to persons in England; and, in order to satisfy

a legacy given by the testator upon certain trusts, he invested the amount, in stock, in the names of A. and himself as trustees; but payments and the investment were made by the direction of A., and out of remittances sent by him to R. & Co. M. & Co. ultimately failed. Held that the above mentioned acts were done by R. as agent to A. and not as an executor or trustee of the will, and, consequently, that he was not responsible for the loss occasioned to the estate by the failure of M. & Co. *Lowry v. Fulton*, 115

4. By a settlement made in India, in 1778, the trustees were directed to invest a certain sum of rupees in good public or private securities, at the highest rate of interest that could be obtained, upon certain trusts under which one of the daughters of the marriage became entitled to a moiety of the fund after the death of her father and mother. The fund was accordingly invested in notes of the Indian government; and those notes were deposited with Palmer & Co. of Calcutta. On the daughter's marriage in 1791, her moiety of the fund was assigned to other trustees, in trust, after the deaths of her father and mother, to receive and lay out the same in such of the public stocks or parliamentary funds, or other securities (private personal security only excepted) as the daughter and her husband should appoint. After the father's death, the mother filed a bill against the trustees of the two settlements, and her daughter and her husband, to have the trusts of 1778 carried into execution. By the decree in that suit made in 1809, at which time the mother was dead, certain arrears of interest on the fund were ordered to be paid to the mother's representative, and the daughter's moiety of the fund was declared to have vested in the trustees of the settlement of 1791 upon the trusts thereof, and was ordered to be paid to them accordingly. The trustees of 1778 did not comply with that decree, but allowed the notes to remain in the hands of Palmer & Co., who failed in 1830, having previously received the amount of the notes. Held that the trustees of 1778 were responsible for the loss. Held also that, although the *cestui que trust* knew and acquiesced in the mode in which the fund had been invested and dealt with and approved of its remaining under the management of Palmer & Co., yet, as the trustees were aware that Palmer & Co. were in pecuniary difficulties some time before they failed, but did not inform the *cestui que trust* thereof, the acquiescence did not exempt the trustees from their liability. *Munch v. Cockerell*, 339

5. A trustee disclaimed by his answer, but was continued as a party until the hearing. Held nevertheless that he was entitled to costs, as between party and party only. *Bry v. West*, 429

See CONSTRUCTION, 20.

UNCERTAINTY.

A request, by a testator, that a handsome gratuity should be given to each of his executors, is void for uncertainty. *Jubber v. Jubber*, 503

VARIANCE.

See AGREEMENT, 3.

VENDOR AND PURCHASER.

1. A. being entitled to 4500*l.* secured on his father's estate, and payable after his father's death, borrowed 1500*l.* of B. and assigned to him the 4500*l.* with power to sell the same and to give an effectual discharge to the purchaser. A. afterwards borrowed money of other persons, and gave similar securities to them. The estate was subsequently sold under the father's will. Held that the purchaser of the estate could not safely pay the whole 4500*l.* to B. on his sole receipt; but that all the other persons who had charges on that sum, must be made parties to the conveyance and give receipts for the portions of it to which they were respectively entitled. *Brasier v. Hudson*, 1

2. A. being entitled to a sum of money payable at a future time, assigned it to B. and C. (who were bankers and co-partners) to secure moneys to be advanced, by them or either of them, to A. C. survived B. Held that, as the security was made to B. and C. jointly, C. alone could give a sufficient discharge for the whole amount due to the security. *Ib.*

See COVENANT, 1.

VESTING.

Testator directed all his property to be sold by his executors, and the proceeds to be invested in government or real securities, to be disposed of as after mentioned. He then desired his executors to pay 25*l.* yearly, for the maintenance and education of his natural daughter, until she attained twenty-one or married, when he required them to pay her the sum of 500*l.* The daughter died under age and unmarried. Held, nevertheless, that the 500*l.* vested in her. *Watson v. Hayes*, 500

WAIVER.

See PRACTICE, 8.

WILL.

1. A testatrix being entitled to her son's residuary estate (the amount of which was unascertained at her death) bequeathed as follows: "If any debts due me at my decease, I request my executors will collect and pay into the hands of my children." Held that the son's residue passed by the bequest. *Bainbridge v. Bainbridge*, 16

2. Testator gave his residuary personal estate to J. J. an infant, and directed his executors to place it out at interest to accumulate, and to pay the principal to the infant on his attaining twenty-four, and in the meantime to allow 60*l.* a year for his maintenance; and the testator gave the residue over, on the infant's dying under twenty-one. The court held that the residue was actually given to the infant, and that what followed the gift was merely directory as to the management of it: and, on the infant's attaining twenty one, allowed the re-

- residue and accumulations to be transferred to him. *Josselyn v. Josselyn*, 63
3. Testator bequeathed a sum of stock to his wife for life, and, after her decease, to his three sons, equally to be divided amongst them, if they should be all living at the decease of his wife; but, if any or either of them should happen to die in the lifetime of his wife, and should leave any child or children, his will was, that such child or children who should be living at the time of his wife's death, should be substituted in the place of such of his said sons who should so happen to die, and take his, her, or their parent's share. All the sons died in the wife's lifetime. Two of them left children, who were living at the wife's death. The third son died a bachelor. Held, that one-third of the stock fell into the residue. *Hustler v. Tillbrook*, 368
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10. If a married woman having a testamentary power of appointment, makes a will, it must be intended to be an exercise of the power, although it contains no reference to it. *Ib.*
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- children of first cousin who died in his lifetime. *Caldesett v. Harrison*, 457
14. Testator directed his trustee to apply the rents of his freehold estates, during the life of his wife, for the maintenance and education of his two great nieces, and after his wife's death to sell the estates, and apply the proceeds to the use and benefit of both his great nieces, share and share alike, but, if there should be but one of them living at the wife's death, to the use and benefit of the surviving great niece only. One of the great nieces died an infant, in the lifetime of the wife. Held that a moiety of the rents accrued between her death and the death of the widow, did not go to the surviving great niece, or result to the testator's heir, but belonged to her personal representative. *Webb v. Kelly*, 469
15. Testator gave to his wife the use of all his property, for the benefit of herself and unmarried children, that they might be comfortably provided for so long as she should live; and, after her death, he disposed of it amongst all his children. The testator left four married and three unmarried children. One of the three, married after his death. Held that the widow and the three children who were unmarried at the testator's death, were entitled, equally, to the income of the property during the widow's life. *Jubber v. Jubber*, 503
16. A bequest, by a testator, that a handsome gratuity should be given to each of his executors, is void for uncertainty. *Ib.*
17. Testator bequeathed his residuary estate to trustees, in trust to pay the income to his wife, for life, to be by her applied for the maintenance of herself and such children as he might leave at his death. Held not to be a trust for the separate use of the wife. *Wardle v. Claxton*, 524
18. Testator, by his will, gave pecuniary legacies to several persons, and directed his residue to be divided amongst his before mentioned legatees, in proportion to their several legacies therebefore given. By a codicil, which he directed to be taken as part of his will, he gave several pecuniary legacies to persons some of whom were legatees under his will, and declared that the several legacies mentioned in the codicil were given, to the therein mentioned legatees, in addition to what he had given to them or any of them by his will. Held that none of the legatees under the codicil were entitled to share in the residue in respect of their legacies under the codicil. *Hall v. Severne*, 515
19. Testator gave all his estates, real and personal, to his executors, in trust to be disposed by them as after mentioned; he then gave all his real estates, houses, and lands to his wife for life: "and, after the decease of my wife, I give my houses, lands, and estates in B. to J. B., but, at his death, I will that the whole shall be for the use of the said J. B.'s wife and children, and which children at the death of their mother, shall inherit the same jointly during their lives; and, if the said children shall die before they arrive at the age of twenty-one, I will that my houses and estates in B. go to H. S." Held that J. B.'s children took the B. estate for their lives only; and, they having attained twenty-one, that the inheritance was undisposed of. *Spry v. Bromfield*, 534
20. After a will of personality had been proved, *per testes*, in the Ecclesiastical Court, a bill was filed, by the next of kin, alleging that the testator's signature to the will was obtained when he was not of sound and disposing mind; that his medical attendants were not called as witnesses when the probate was obtained; and that the evidence of the testator's incompetency did not come to the knowledge of the plaintiffs until after the time allowed for appealing from the sentence of the Ecclesiastical Court had expired; and praying that the will might be declared to have been fraudulently obtained, and that the residuary legatee might be a trustee for the plaintiffs. A demurrer to the bill was allowed, a court of equity having no jurisdiction to relieve against the probate of a will, unless the consent of the next of kin to the granting of it was fraudulently obtained. *Ginnell v. Horne*, 539
21. Testatrix having two sons and two daughters living, gave a legacy to each of them, and then gave the residue to Mary, one of her daughters for life: "and, after her decease, I will that the said property be equally divided amongst such of my sons and daughters as may be living at the decease of the said Mary: and in case of the decease of any of my said sons or daughters, the surviving children of any of my sons or daughters, to have their fathers' or mothers' part." The testatrix had had another son and daughter, both of whom were dead at the date of her will, leaving children. Held that their children were entitled to shares of the residue. *Jarvis v. Pond*, 549
22. A. being seized of the equity of redemption of lands in N., and also of the legal estate as heir to his father, to whom he had mortgaged the lands in fee, devised his estates in N. and elsewhere, to trustees in trust to sell. Held that the legal estate in the mortgaged property did not pass by the will. *Ex parte Marshall*, 555
23. Testator devised his estates to his son, if he should attain the age of twenty-three years or should be married with the consent of his trustees, which should first happen, and to his heirs and assigns, absolutely for ever. And in case his son should die without attaining such age, or, being married with such consent as aforesaid, should die without lawful issue, or such issue should die under the age of twenty-one years, then to the testator's daughters, as tenants in common, and the heirs of their bodies. The son married, under the age of twenty-three with the consent of the trustees, and, afterwards, attained that age. Held that the son was seized of an absolute estate in fee: or, if not, that, under the words of the gift over, "shall die without lawful issue," he was seized of an estate tail, those words not being confined by the words, "or such issue shall depart this life under the age of twenty-one years," to dying without issue living at his death; and, consequently, that he could make a good title to the devised estates. *Grimshawe v. Pickup*, 591
24. Testator gave 2000*l.* to trustees, in trust to invest the same in government securities, and

- aidue and accumulations to be transferred to him. *Josselyn v. Josselyn*, 63
3. Testator bequeathed a sum of stock to his wife for life, and, after her decease, to his three sons, equally to be divided amongst them, if they should be all living at the decease of his wife; but, if any or either of them should happen to die in the lifetime of his wife, and should leave any child or children, his will was, that such child or children who should be living at the time of his wife's death, should be substituted in the place of such of his said sons who should so happen to die, and take his, her, or their parent's share. All the sons died in the wife's lifetime. Two of them left children, who were living at the wife's death. The third son died a bachelor. Held, that one-third of the stock fell into the residue. *Hustler v. Tillbrook*, 368
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- to empower Lady C. the widow of Sir N. C., to receive the dividends so long as she should continue single and unmarried; but, in case she should sell, assign, dispose of or anticipate such dividends, the testator revoked the bequest, and directed that the 2000*l.* should become part of the residue of his estate, which he gave to J. C. At the date of the will, and at the testator's death, Lady C. was married to one R.; but he had deserted her and gone abroad; and she always called herself Lady C., and represented herself to be a single woman and the widow of Sir N. C.; and the testator and others always considered her so to be. Held that she and her husband R., in her right, were absolutely entitled to the 2000*l.* *Rickton v. Cobb*, 615
25. Testatrix bequeathed 10,000*l.* three per cent stock, in trust for E. S. for her life, and, after her decease, in trust for such one or more, exclusively of the others of her residuary legatees, as E. S. should appoint; and she empowered E. S. to appoint 150*l.* a year to be paid to J. S., out of the interest of the stock, during his life. E. S. by her will, appointed 150*l.* a year, part of the interest of the 10,000*l.* stock or of the stocks, funds, and securities, into or upon which the same should be changed or secured at the time of her death, to be paid to J. S. during his life, and after his death, she appointed so much of the 10,000*l.* stock or of the stocks, funds, or securities into or upon which the same should be then changed or secured, from which the 150*l.* a year should have arisen, to A. B., one of the residuary legatees named in the original will: and, as to so much of the 10,000*l.* stock, or the stocks, funds or securities into or upon which the same might be changed or transferred at her death, which should not be necessary to answer the annuity of 150*l.*, she appointed the same to J. B., another of the residuary legatees. After E. S. had made her will, the trustees, at her request, sold the stock and invested the proceeds, amounting to 6600*l.*, on a mortgage at five per cent. After E. S.'s death, the mortgage was paid off, and the money was invested, under a decree, in the purchase of 7143*l.* consols. Held that A. B. was entitled to 5000*l.* consols, as being the capital of the 150*l.* a year, and that J. B. was entitled to the remainder only of the 7143*l.* consols. *Bullock v. Thomas*, 634
26. Testator directed his trustees and executors to apply, the income of his residuary estate, for the maintenance, &c. of all his children, and to accumulate the surplus for their benefit until the youngest should attain twenty-one, and then to divide the capital into as many equal shares as the number of his children who should be then living should amount to, an equal share being allotted to each of them and to the issue

of such of them as should be then dead, such issue taking their parents' share, the shares of such of his children as should be sons, to be paid, to them or their issue, on his youngest child attaining twenty-one, and the shares of such of them as should be daughters, and of the issue of such of his daughters as should be then dead, he directed to remain in the hands of his trustees, upon trust to pay the interest to each of his said children being daughters, during their lives for their separate use; and, on the decease of each of his said daughters, or in case any of them should be dead leaving issue when his youngest child should attain twenty-one, then he directed his trustees to pay the share of each such daughter to her issue. One of the daughters who was living when the youngest child attained twenty-one, died a spinster. Held that she took an absolute interest in a share of the residue. *Hulme v. Hulme*, 644

See APPOINTMENT.—CONSTRUCTION.—LEGACY.—POWER.—REVOCATION.

WITNESS.

1. A witness, a partner in a bank, was required by a *subpoena duces tecum*, to produce all books and accounts in his custody or power, containing any entries relating to 6500*l.* consols or to the dividends thereof, or the application or disposition thereof, or relating to the matters in question in the suit. Held that the witness was not compellable to produce any books, &c., because the language of the subpoena was too general, and because the books, &c., relating to the stock, were partnership property and his co-partners would not consent to his producing them. *Attorney General v. Wilson*, 526
2. Courts of equity have no jurisdiction under 3 and 4 Will. 4, c. 42, to order witnesses to attend arbitrators. *Hall v. Ellis*, 530
See PRACTICE, 17.

YARD.

By a railway act it was enacted that, if the railway company should be desirous of purchasing part of any house, garden, yard, warehouse, building, or manufactory, and the owner should signify his inclination to sell the whole of such house, garden, yard, &c., he should not be compelled to sell to the company, part only or less than the whole of such house, garden, yard, &c. Held that a yard for bonding foreign timber, in which there were a deal shed and two buildings containing saw-pits, was not a yard within the meaning of the enactment. *Stons v. Commercial Railway Company*, 621

REPORTS
OF
CASES
DECIDED IN THE
HIGH COURT OF CHANCERY,

BY
THE RIGHT HON. SIR LANCELOT SHADWELL,
VICE-CHANCELLOR OF ENGLAND.

BY NICHOLAS SIMONS,
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

WITH NOTES AND REFERENCES,
TO BOTH ENGLISH AND AMERICAN DECISIONS.

BY JOHN A DUNLAP,
COUNSELLOR AT LAW.

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SIR JOHN CAMPBELL, ATTORNEY GENERAL.

SIR THOMAS WILDE, SOLICITOR GENERAL.

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CASES IN CHANCERY

BEFORE

THE VICE-CHANCELLOR.

POPE v. POPE.

1839; 24th May.—Will; Construction; Trust by Implication.

Testator gave whatsoever property or effects he might die possessed of, after his debts were paid, or might become entitled to, to his wife, and appointed her sole executrix of his will: "And my reason for so doing, is the constant abuse of trustees which I daily witness among men; at the same time trusting she will, from the love she bears to me and our dear children, so husband and take care of what property there may be, for their good; and should she marry again, then I wish she may convey, to trustees, in the most secure manner possible, what property she may then possess, for the benefit of the children as they may severally need or deserve, taking justice and affection for her guide;" and, at the conclusion of his will, he gave the capital of his business to his wife, trusting that she would deal justly and properly to and by all their children. Held that no trust was created for the children.

SAMUEL POPE, a coal merchant, made his will, in the following words:

"Whatsoever property or effects I may die possessed of after my debts are paid, or become entitled to at or after my decease, whether of houses, lands, money, stock in trade, furniture, shares in business, of whatever kind and to whatsoever amount, I do give and bequeath the whole and every [*2] of them (excepting only such sum or sums as shall be hereinafter distinctly named and otherwise disposed of) to my dear and beloved wife, Angelina Pope; and I do hereby nominate, constitute and appoint her my sole executrix of this my last will and testament; *and my reason for so doing is the constant abuse of trustees which I daily witness among men: at the same time trusting she will, from the love she bears to me and our dear children, so husband and take care of what property there may be for their good: and, should she marry again, and, but for the welfare of the dear children, I have not an objection, then I wish she may convey to trustees, in the most secure manner possible, what property she may then possess, for the benefit of the children as they may severally need or deserve, taking justice and affection for her guide.* My will further is that each child shall receive, within six months after my decease, as a token of my affection, if above twenty years of age, 50*l.* clear of every deduction whatsoever: and my will further is that, as the articles of partnership now subsisting between me and my brothers, has a clause stating that, at the death of either, the

1839.—Pope v. Pope.

widow shall retain the husband's share, on her appointing a proper person to manage on her behalf; it is my wish that she may consult with them, my brothers, as to whom that management shall be consigned, that care may be taken the business be not injured; that, on my dear son Samuel Richard attaining his twenty-first year of age, he may take his father's place in the management of the said business, and a moiety of the said profits shall be his own property from that time, and the other moiety to be his mother's. The whole of the profits, from my decease to his twenty-first year, to be his mother's entirely, and the capital also, *trusting that she will act justly and properly to and by all our children.*"

[*3] "The testator left his widow and several children, all of whom were infants, him surviving. The bill, which was filed by the children against their mother, alleged that the defendant insisted that she was absolutely entitled to the whole of the testator's personal estate, except the moiety of the business bequeathed to the plaintiff, Samuel Richard Pope, upon his attaining the age of twenty-one years, or that she was, at all events, entitled to a life interest in the whole of the personal estate, with such exception as aforesaid: but the plaintiffs submitted that the defendant was only entitled to a beneficial interest in the testator's share in the business until the plaintiff, S. R. Pope, should attain the age of twenty-one years, and that, after that event, she was only entitled, under the terms of the will, to a life interest in one moiety of the profits of the business, and that, as to the residue of the testator's personal estate, she was a trustee for the plaintiffs in equal shares, and that they were entitled to have the interest and profits thereof applied in and towards their respective maintenance and education.]

The bill prayed that the rights and interests, of the plaintiffs and of the defendant, in the testator's personal estate under his will, might be ascertained and declared; and that the usual accounts might be taken of the testator's personal estate, funeral expenses and debts; and that the personal estate might be applied in a due course of administration, and that the residue thereof might be ascertained and secured for the benefit of the plaintiffs and of the defendant, according to their respective rights and interests therein; and that maintenance might be allowed and a guardian be appointed for the plaintiffs.

[*4] Mr. G. Richards and Mr. Abraham, for the plaintiffs, said that the testator clearly intended that his wife should be a trustee, of the residue of his personal estate, for his children: that the subject and objects of the trust were plainly pointed out; the subject being whatever property the testator might be possessed of at his death, after his debts should be paid, or which might accrue, to his estate, after his death: that the objection, which the testator stated, to trustees, was to *men* being trustees: that, in a subsequent part of his will, he expressed a wish that, if his wife should marry again, she would convey, *to trustees*, what property she might then possess, meaning, thereby, the property which should constitute his estate after payment of his

1839.—*Pope v. Pope.*

debts and legacies, including the eldest son's share of the profits of the business.

Mr. *Jacob* and Mr. *Romilly*, for the defendant, said that the testator, throughout his will, showed an intention not to create a trust, but to leave his wife to deal with his property according to her discretion: that, by the word, "men" the testator mean "mankind," and intended to express his dislike to trustees generally: that he thought he could confide in his wife's good feeling, and meant to leave the disposition of his property to her uncontrolled discretion: that the words: "what property there may be," were not confined to the property which the testator might leave; and the direction to husband and take care of it for the good of the children, implied a future, undefined period; not that, immediately on the testator's death his property should be held in trust for his children; and the expression: "what property she may then possess," referred to any property that the wife might then have, from whatever source: besides, in what manner would the court per- [*5] form a trust which could be exercised only by a parent; how could it appreciate the wants or deserts of a child, taking justice and affection for its guide? *Eade v. Eade*; (a) *Lechmere v. Lavie*; (b) *Hoy v. Master*. (c)

THE VICE-CHANCELLOR:—The will, in this case, is untechnical and obscure; but I think that there is not such a trust created as this court can act upon. One thing is clear, with respect to the testator's interest in his business: the widow is entitled to the capital absolutely, and to the whole of the profits until the eldest son attains twenty-one; and then he will take a moiety of the profits from that time. I think that the words: "trusting that she will act justly and properly to and by all our children," are a general expression of a wish and do not create a trust.

In the preceding part of his will, the testator says: "whatever property or effects I may die possessed of after my just debts are paid, or become entitled to, at or after my decease;" so that he is speaking, not only of the property which he might have at his death, but also of what might accrue to his estate afterwards. Then he says: "I do give and bequeath the whole and every of them, excepting only such sum or sums as shall be hereafter distinctly named and otherwise disposed of, to my dear and beloved wife; and I do hereby nominate constitute and appoint her my sole executrix of this my last will and testament: and, my reason for so doing, is the constant abuse of trustees which I daily witness among men: at the same time trusting she will, from the love she bears to me and our dear children, so [*6] husband and take care of what property there may be, for their good."

It was said by the counsel for the plaintiffs, that those words would create an absolute trust for the children. But it seems to me that the expression: "what property there may be," means such property as might happen to exist, having regard to the fact that the wife might sell or alien a part of it. Be-

(a) 5 Madd. 118.

(b) 2 Myl. & Keen, 197.

(c) Ante, vol. 6, p. 568

1839.—Carter v. Beard.

sides, if, by this first part of a will, a trust is created for the children, they must all take jointly and equally. But then comes the clause which directs that the wife, if she should marry a second husband, should convey to trustees, what property she might then possess, for the benefit of the children as they might severally need or deserve, taking justice and affection for her guide. This clause is inconsistent with the plaintiff's construction of the prior part of the will; for, if the widow marries again, she is to have a power of distribution amongst the children according to her estimate of their wants and deserts.

My opinion, therefore, is, taking the whole of this will, together, that there is not enough in it to create a clear, definite trust which this court will execute for the benefit of the children.[1]

[*7]

*CARTER v. BEARD.

1839: 25th May.—Lunatic; Debt; 3 and 4 W. 4, c. 104.

A person who was a lunatic, but had not been found to be so by inquisition, died seized of a small freehold estate, but not possessed of any personal property. His stepfather had received the rents of the estate, and had expended more than the amount of them in maintaining the lunatic; he also paid the lunatic's funeral expenses. Held that he was not entitled, under 3 and 4 W. 4, c. 104, to be paid either the surplus expenditure, or the amount of the funeral expenses, out of the lunatic's freehold estate.

In 1835 Enoch Beard died intestate and a lunatic, but he had not been found so by inquisition. He left a small freehold estate, but no personal estate whatever. The defendant was his eldest brother and heir, and also his administrator. The plaintiff was the second husband of the widow of the lunatic's late father, and had received the rents of the lunatic's estate, and applied them in maintaining the lunatic in an asylum, and had expended more than the rents in so doing. The plaintiff also paid the lunatic's funeral expenses.

The question was whether the amount of the funeral expenses, and the sums expended in the maintenance of the lunatic, over and above the rents of his estate, constituted a debt which the plaintiff was entitled to be paid out of the lunatic's freehold estate, under 3 and 4 Will. 4, c. 104.

It was argued, for the plaintiff, that, if a person became lunatic, and, sometime afterwards, a commission was issued against him, the Master would be directed to take an account of what the party who had maintained the lunatic before the issuing of the commission, had properly expended in his maintenance; and that the amount would be ordered to be paid to him out of the lunatic's property. *Rogers v. Price(a)*.

Mr. Jacob and Mr. Romilly appeared for the plaintiff.

(a) 3 Youn. & Jerv. 28.

[1] Vide *Wood v. Cox*, 2 Myl. & Cr. 184. *Bardwell v. Bardwell*, 9 Sim. 319, 323 and note *ibid.*

1839.—Schreiber v. Creed.

Mr. Knight Bruce and Mr. Bilton for the defendant.

*The Vice-Chancellor said that the funeral expenses could not be said [*8] to be a debt contracted by the lunatic : that the executor or administrator, and not the heir, was bound to bury the deceased ; and, consequently, the funeral expenses were payable out of the personal, and not out of the real assets of the deceased. His Honor then read the 3d and 4th Will. 4, cap. 104, and added that the plaintiff could not claim, as a debtor, what he had expended, beyond the rents, in the maintenance of the lunatic, as it was an act of bounty on his part, as the stepfather of the lunatic, and not a debt, either by specialty or simple contract, contracted by the lunatic, who was in a situation which incapacitated him from contracting a debt.[1]

*SCHREIBER V. CREED.

[*9]

1839; 30th and 31st May, and 1st June.—Covenant ; Agreement ; Plan.

A deed dated in 1827, and made between J. Pitt, of the one part, and the other persons who had executed the deed, of the other part, recited that Pitt, being seised in fee of the lands delineated in the plan thereto annexed, (being Pittville) and having it in contemplation to establish a spa at or near the north end of the lands, and to erect a pump room at or near the spot marked on the plan, and to lay out the rest of the lands for buildings, pleasure grounds, roads, &c., had caused the plan to be drawn, whereby the mode in which the lands were intended to be laid out and the purposes for which they were intended to be converted and used, were described, in order that the beauty and regularity of the whole of the design might be, for ever thereafter, preserved, *subject only to such alterations as should be made or approved of by Pitt, his heirs or assigns, and as should not destroy the general beauty of the same design*, and that each of the other parties to the deed, had purchased or agreed to purchase, one or more of the pieces of land described in the plan, as set out for building. The deed then contained covenants, by Pitt, his heirs and assigns, to complete the pleasure grounds, roads, &c., and to keep them in repair, and other covenants prescribing the manner in which the pleasure grounds, roads, &c., should be enjoyed and use by the occupiers of the houses to be erected on the building ground, and that Pitt, his heirs or assigns, would, on every agreement which should be entered into, by him or them, for the sale of any part of the building ground, require the purchaser to covenant with him, his heirs and assigns, not to erect any messuage, on any part of the ground, which might lessen in value, any other of the messuages erected or to be erected at Pittville.

In 1833, Pitt agreed to sell lots 2, 3, 4 and 5, of the building ground to Stokes ; and Stokes agreed with him to erect three houses on those lots, and that each house should stand back twenty-five feet from the western boundary of the lots, *and that Stokes, his heirs or assigns, would not do or suffer to be done, on the lots or in any building to be erected thereon, any act, deed, &c. which might be deemed a nuisance, injury or annoyance, or which might lessen in value any adjoining or neighboring lands or property, or any houses to be erected thereon.*

Stokes built two houses on lots 2 and 3 ; and, in 1833, Pitt conveyed these lots to him ; and Stokes, for himself, his heirs and assigns, entered into a covenant with Pitt, his heirs and assigns, with respect to those lots and the houses thereon, similar to the last mentioned stipulation in the agreement, Stokes subsequently gave up lots 4 and 5 to Pitt, and abandoned his agreement as to them, and then sold his house on lot 3 to the plaintiff. Pitt afterwards agreed to sell lots 4 and 5 to Creed. The agreement stipulated that the house to be erected on those lots should stand back *ten feet*, at the least, from the western boundary thereof, and it contained a stipulation for protecting the

[1] Vide *Jones v. Bruce*, 11 Sim. 221.

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adjoining property from injury, &c., similar to that in Stokes' agreement. Both Stokes and Creed executed the deed of 1827. Creed began to build a house on his lots, thirteen feet distant from the west boundary, which was twelve feet in advance of the plaintiff's house, and which the plaintiff alleged would be a nuisance or annoyance to him, and would lessen the value of his house, and consequently, would be a violation of the covenant in the deed of 1827, and of the agreement of 1833.

Held that the plan annexed to the deed of 1827, was merely a general plan, and was not intended to be strictly adhered to, but its details might be varied by Pitt, and with his sanction by the purchasers from him; and that the plaintiff was not entitled to avail himself, as against either Creed or Pitt, of the covenants of 1827, or of the agreement of 1833, for the purpose of preventing the completion of Creed's house in the manner intended, or the performance by Pitt, of the agreement with Creed.

By an indenture made the first of January, 1827, between Joseph Pitt, Esq., of the one part, and the several persons whose names were contained in the schedule thereto, and who had executed the deed, of the other

[*10] *part, after reciting that Pitt, being seised in fee of the lands and hereditaments delineated in the map or plan thereto annexed, and having it in contemplation to establish a spa at or near to the north end of the lands, and to erect a pump room, with suitable conveniences, at or near the spot marked out for that purpose on the map or plan, and to lay out the residue of such lands for buildings and lawns, pleasure grounds, plantations, streets, roads, drives, promenades, pond or pool and other ornaments and conveniences, lately caused the plan thereunto annexed to be drawn, whereby the mode in which the whole of the lands was intended to be laid out and formed, and the purposes to or for which the same were to be converted and used, were described, in order that the beauty and regularity of the whole of the design, might be, for ever thereafter preserved, *subject only to such alterations as should be made or approved of by Pitt, his heirs or as*

[*11] *signs, and as should not destroy the general beauty of the same design*; and that each of the other persons parties thereto, had purchased or contracted to purchase one or more pieces of the land described, in the map or plan, as set out for building; and, in consideration of the covenants of each of the same persons thereafter contained, Pitt had agreed with each of them, that he would cause a handsome pump room to be erected at or near the spot marked in the map or plan, and at his own costs and charges, form, and, for ever after, keep in repair, all the roads, drives, promenades, walks and footpaths in the map or plan marked and delineated, and that he would form and plant all the lawns and pleasure grounds in the map or plan delineated, and dig out and complete an ornamental pool of water, with stone bridges over the same, as specified in the map or plan; and that he, his heirs and assigns would, for ever after, keep the same lawns, pleasure grounds, pool of water and bridges in good repair and condition, and that he would also complete one or more sewer or sewers for carrying off the water, &c., from the whole of the premises: and, after further reciting that Pitt had nearly finished the pump room, and had completed most of the roads, drives, walks, promenades, footpaths, lawns, pleasure grounds, plantations, bridges

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and sewers, according to the plan, or with such alterations only as were there-
inbefore mentioned or referred to: it was witnessed that Pitt, for himself, his
heirs, &c., covenanted with each of the other parties thereto, their respective
heirs and assigns, that he, his heirs and assigns, would, thenceforth stand
seised of such parts of the said lands as were, in the plan, set out and deline-
ated as the lines and situations of, and as and for roads, ways, rides, drives,
walks, footpaths, promenades, lawns, pleasure grounds, plantations,
*pool of water and bridges, upon trust that all the same lands should [*12]
be laid out and completed, and, from time to time, improved by and at
the costs and charges of him, his heirs and assigns, as roads, ways, drives,
walks, footpaths, lawns, promenades, pleasure grounds, plantations, pool of
water and bridges, in the manner and plan delineated, or as near thereto
as circumstances should admit: and that the same should be completed
within two years from the date of the indenture, and be for ever there-
after kept in good order by him, his heirs and assigns: and that the
owners and occupiers for the time being of each part of the land in
the plan set out for building, and of the houses which should be erected
thereon, should have full liberty to use, either on foot or on horseback, and
with carts and carriages, according to the nature thereof respectively, all the
said roads, ways, drives, walks, promenades and footpaths: save only that
none of the roads, which, in the plan, were marked with the letter R. should
be used for timber carriages, wagons or carts; but all such like carriages,
and all coals, manure and other heavy goods, should be taken along one of the
back roads marked in the map or plan with the letter T.; and further, that
such owners and occupiers should have full liberty, at all times during the
day, to walk in any of the lawns and pleasure grounds; and further, that
Pitt, his heirs or assigns, should, *on every agreement which should thereafter
be entered into by him or them for the sale of any part of the land which
had been so as aforesaid laid out for building, require that the purchaser
and purchasers should, by covenant or agreement with him, his heirs or
assigns, owners for the time being of the pump room, bind himself and
themselves respectively, and his, her and their respective heirs, exe-
cutors, administrators and *assigns, not to erect any messuage or* [*13]
*tenement on any part of the ground at Pittville,(a) which should or
might lessen or deteriorate in value any other of the messuages then erect-
ed or to be thereafter erected at Pittville aforesaid, and not to carry on any
manufactory, or any other trade than that of a librarian, or hotel, or coffee-
house keeper, or nurseryman, or florist, in or on the ground set out for build-
ing as aforesaid, or the buildings thereon to be erected, except such parts
thereof as were marked, on the plan, with the letters A. B. C.: and that no
water should be drawn off from the pool, except for the use of Pitt, his heirs
and assigns, or the persons for the time being interested in the land laid out
for building. And each of the persons, parties to the deed of the second part*

(a) The name given to the property to which the deed related.

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covenanted, with Pitt, his heirs and assigns, to pay the yearly sums set opposite to their respective names in the first shedule to the deed, in order to enable Pitt, his heirs and assigns, to keep the roads, ways, &c., in good order, and not to do any act which might occasion annoyance or inconvenience to any of the persons having a right to use the said lawns and pleasure grounds, or which might injure, damage or deface the same; and to concur with Pitt, his heirs or assigns, in obtaining an act of Parliament for more effectually securing the performance of the covenants contained in the indenture, and for the better regulation, and the continued and uninterrupted enjoyment and maintenance of the property comprised in the plan, according to the same plan, and the terms and provisions of the indenture, and of the contracts entered into or to be entered into, with Pitt, his heirs or assigns, for the [*14] purchase of any parts of the same property under the "stipulations thereinbefore contained: and it was thereby agreed, between the parties thereto, that it should be lawful for Pitt, his heirs and assigns, from time to time thereafter, to make wells, and lay pipes, in or under any part of the land which had been laid out for lawns, pleasure grounds, plantations, streets, roads, drives and promenades, for the purpose of procuring medicinal or other water and conveying the same away to any place which he or they might think fit. The indenture then recited that Pitt had entered into contracts with various persons for sale of some parts of the property, the stipulations and agreements contained in which contracts, on his part, differed, in many respects, from the stipulations and agreements which were therein contained on his part; and that it was possible that some of those persons might not agree to the terms of the indenture: it was, therefore, declared, by the parties thereto, that, in the event of any such disagreement, the indenture and the covenants and agreements therein contained on the part of Pitt, his heirs and assigns, should be binding on him and them so far only as the same were capable of being performed consistently with any such contract entered into with any person who should not become a party to the indenture.

The bill, to which Pitt, as well as Creed, was made a defendant, alleged, after stating the before mentioned indenture, that the lands described in the plan annexed to the indenture, had been laid out, in conformity with the plan, for sites of buildings and in ornamental pleasure grounds, and that numerous allotments of such lands had been let or granted, to divers persons, in conformity with the plan; and that, in 1832, Pitt caused a public map or plan of the estate, showing, in a more detailed and particular manner, [*15] the intended sites of "the dwelling houses proposed to be erected thereon, to be prepared, and such plan had been ever since hung up for public inspection in his estate office at Cheltenham, and also in the Pittville pump room; and all lettings and contracts made or entered of or respecting such lands, had been made according to and on the terms of abiding by such last mentioned plan, and all persons who had become grantees of any parts of the lands had been required to execute and had executed the before

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mentioned indenture ; and numerous houses had been erected, by divers persons, on the pieces of land so taken ; and all such buildings and all other improvements made by persons who had taken parts of the lands, had been made on the faith that the said plan would be adhered to, and that the aforesaid covenants and agreements would be performed by all persons becoming lessees or grantees of any part of the lands : that, by an agreement dated the 13th of April, 1833, R. Stokes, architect, who had been employed, by Pitt, in preparing the aforesaid plan, agreed, with Pitt, to purchase lots 2, 3, 4, 5, 6, and 16, part of the Pittville estate and, in the division of that plan, called Segrave place, with liberty to use such of the pleasure grounds, sewers, roads, rides, walks and promenades at Pittville, as were specified in the agreement, subject to the stipulations and restrictions contained in the indenture of the first of January, 1827, being a deed for the general regulation and management of the Pittville estate : and Stokes, for himself, his heirs and assigns, covenanted with Pitt, his heirs and assigns to build on the six lots, within four years from the date of the agreement, the messuages after mentioned, of such respective elevations as had been approved of by Pitt (that is to say,) on each of lots 2 and 3, a messuage, but adjoining together so as to *form a double villa ; on lots 4 and 5, one messuage only ; [*16] and on each of lots 6 and 16, a messuage, to form parts of a row or pile of attached dwelling houses, intended to be called Segrave place ; and that the messuages to be erected on each of lots 2 and 3, *and the messuage to be erected on lots 4 and 5, should stand back twenty-five feet three inches from the west boundary of the same lots respectively*, and that the messuage on each of lots 6 and 16, should stand back, from the west boundary thereof, six feet six inches ; and that no erection or building of any kind whatsoever, should at any time thereafter be erected in front of any of the messuages thereinbefore agreed to be erected ; and that no other erection or building of any kind whatsoever should be erected on any part of the land, besides the said messuages, *except such as should be approved of by Pitt, his heirs or assigns, or his or their surveyors* ; and that Stokes, his heirs or assigns, would not at any time thereafter do or commit, or permit or suffer in or on the lots thereby agreed to be sold, or any part thereof respectively, or in any erection or building to be erected thereon, *any act, deed, matter or thing whatsoever which might be deemed a nuisance, injury or annoyance to, or which might deteriorate or lessen in value any adjoining or neighboring lands or property, or any messuages, tenements or dwelling houses to be erected thereon*. The bill then stated that the plan endorsed on the agreement, corresponded with that portion of the public plan, prepared by Stokes, which related to the pieces of land comprised in the agreement, so far as that the houses to be erected on lots 2, 3, 4 and 5 were to be in the same line of frontage towards the west : that Stokes erected two dwelling houses on lots 2 and 3, which were called Segrave Villa and Roden House, and they were conveyed to him, by Pitt, by lease and release of the 9th

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[*17] and 10th *of December, 1833, subject to the stipulations of the deed of arrangement of the 1st of January, 1827 ; and, by the release, Stokes covenanted with Pitt that no erection or building, of any kind whatsoever, should, at any time thereafter, be erected in front of those houses or either of them, and that no erections or buildings, of any kind whatsoever, should be erected on any part of the last mentioned lots, besides the houses already erected thereon, *except such as should be approved of by Pitt, his heirs or assigns*, or his or their surveyor for the time being ; and also that Stokes, his heirs, appointees or assigns, would not, at any time thereafter, do or commit, or permit or suffer to be done or committed, in or on those lots or either of them, or in or on any messuage or building erected or to be erected thereon, any act, deed, matter or thing whatsoever *which might be deemed a nuisance, injury or annoyance to, or which might deteriorate or lessen in value any adjoining or neighboring land or property, or any messuages erected or to be erected thereon*. The bill further stated that the plaintiff contracted with Stokes for the purchase of Roden House and the lot on which it was erected, and the same were, by indentures dated the 21st and 22d of March, 1836, conveyed to the plaintiff, his heirs and assigns, but subject to the covenants, stipulations and agreements contained in the indenture of the 10th of December, 1833, and in the deed of arrangement of the 1st of January, 1827 : that Stokes, afterwards, entered into some contract with Pitt, by virtue of which he re-conveyed all the lots of land comprised in the agreement of

April, 1833, except lots 2 and 3, to Pitt, his heirs and assigns : (a) that [*18] Pitt had since agreed to sell lots 4 *and 5 to Creed, and that an agreement had been made between them, with respect to those lots, containing a covenant, by Creed with Pitt, that he, Creed, would not do or commit, or permit or suffer, in or on the lots of land thereby agreed to be sold to him, or any part thereof respectively, *any act, deed, matter or thing whatsoever which might be deemed a nuisance, injury or annoyance to, or which might deteriorate or lessen in value any adjoining or neighboring lands or property, or any messuage or dwelling house erected or to be erected thereon* ; and that Creed had executed the deed of arrangement of the 1st of January, 1827 ; that great part of the value of the plaintiff's house consisted in the uninterrupted prospect which it possessed of the ornamental pleasure grounds mentioned in the deed of arrangement, and which lay towards the south-west of his house, which was built with a bow window for the sake of that view ; and that the plaintiff purchased his house upon the faith of the provisions and stipulations contained in the agreement of April, 1833, and in the deed of arrangement, and of the assurance which he thereby received that no building would be erected on the land adjoining his house on the south-west, (that is to say) on lots 4 and 5, which should project beyond the line of his house, or, in any way, obstruct or interfere with the view enjoyed by his house, but

(a) There was, in fact, no re-conveyance of these other lots. The benefit of the agreement, as to them, was relinquished by parol.

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that any building which might be erected on lots 4 and 5, would be erected in conformity with the stipulations of the agreement of April, 1833; but that Creed had begun to build on the land forming lots 4 and 5, which immediately adjoined the plaintiff's premises on the south-west, and he intended to erect a dwelling house thereon, immediately adjoining the plaintiff's premises on the south-west, the front of which would project, towards the western boundary of the last-mentioned lots, twelve feet and upwards beyond the line of the front of the plaintiff's house, and would not be removed, [*19] from the western boundary, more than twelve feet or thereabouts, instead of twenty-five feet, and which would, accordingly, intercept, from the plaintiff's house, the air and light and the view of the ornamental grounds towards the south-west, which constituted a considerable part of its value, and thereby greatly annoy the plaintiff, and very materially deteriorate the value of his house: that the manner in which Creed was proceeding to build his house, was not in conformity with the aforesaid plan,^(a) and was also a breach and violation of the covenants contained in the indenture of January, 1827, and, particularly, of the covenant that no person purchasing any part of the Pittville estate, should erect thereon any messuage or building which might lessen or deteriorate the value of any other of the messuages erected or to be erected at Pittville: that the plaintiff, and the other persons who had purchased ground and houses at Pittville, had done so on the faith that the said plan and covenants would be adhered to and enforced: that lots 4 and 5 were comprised in the agreement of April, 1833, and were the property of Stokes at the time when the plaintiff purchased his house; and that no person claiming those lots under Pitt or Stokes, was at liberty to build thereon in a manner contrary to the covenants or provisions of that agreement: that Creed claimed to be entitled, to the piece of land on which he was building, and which was comprised in the last-mentioned agreement, under the parties thereto or one of them, and that he was bound by the covenants therein contained; and that he had notice of such agreement at the time when the existing agreement between him and Pitt was entered into: that the defendants *alleged that the agreement between Pitt and Creed was dif- [*20] ferent from the agreement of April, 1833, and that by the former, Creed was expressly authorized, by Pitt, to build, on the piece of land adjoining the plaintiff's house, in the manner in which he was proceeding to do; and that Pitt refused to enforce the aforesaid covenant, in the deed of arrangement, against Creed: that Pitt was not at liberty to enter into any agreement, with Creed, authorizing or empowering Creed to build on the piece of land adjoining the plaintiff's premises, in any manner which would be in breach of the stipulations contained in the agreement of April, 1833: *that Pitt was, as to lots 4 and 5, the assignee of Stokes*, and that the defendants claimed the same under Stokes, and were bound by the stipulations of the agreement of

(a) The plan which was prepared in 1832.

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April, 1833, and that the agreement between Pitt and Creed, if it sanctioned any mode of building on the land adjoining the plaintiff's house which would be a breach of the stipulations of the agreement of April, 1833, was a fraud on the plaintiff: that no conveyance of the legal estate in lots 4 and 5, had been made, by Pitt to Creed; and that Creed had not yet paid the purchase money for those lots: that Pitt was a trustee of the aforesaid covenants, contained in the deed of arrangement, for the plaintiff, and ought to enforce the same, or allow the plaintiff to enforce the same, in his name, against Creed.

The bill prayed that it might be declared that the defendants were not at liberty to erect any house or building on lots 4 and 5, which should project towards the western boundary thereof beyond the line of the plaintiff's house, or any building whatsoever which should or might deteriorate or lessen in value the plaintiff's house; and that it might be declared that the [*21] "messuage which was then in the course of being erected, by Creed, would be an annoyance to and deteriorate and lessen in value the plaintiff's house; and, in case it should appear that Creed was erecting the same pursuant to the provisions of any agreement between himself and Pitt, then that it might be declared that Pitt had no power to authorize any building to be erected, on lots 4 and 5, which was an annoyance to or which deteriorated or lessened the value of the plaintiff's house; and that Creed might be restrained from further proceeding with the building which he was then erecting on lots 4 and 5, and also from erecting any building thereon which should project, towards the western boundary thereof, beyond the line of the front of the plaintiff's house, and also from erecting any building thereon which should be a nuisance, injury or annoyance to, or which might deteriorate or lessen in value the plaintiff's house; and that Pitt might be restrained from entering into or performing any contract or agreement which should authorize the erecting, on lots 4 and 5 or either of them, any building which should project, towards the western boundary of those lots, beyond the front of the plaintiff's house, or which should be a nuisance or annoyance to or deteriorate or lessen the value of that house.

The plaintiff now moved for injunctions, against the two defendants, according to the prayer of the bill. The material allegations in the bill, except that which charged Creed with notice of the agreement of April, 1833, were supported by affidavits, one of which added that, if Creed's house was erected in the manner proposed, the plaintiff's house would be deteriorated in [*22] value to the amount of 300*l.* at the least; and that a "person standing at the entrance of Creed's house, would be able to overlook the plaintiff's dining-room.

F. Dodd, who was Pitt's agent in respect of the Pittville estate, and the defendant Creed, made an affidavit, in which they deposed that Dodd, on taking the management of the estate, found the original plan, prepared by Stokes in 1832, in Pitt's estate office; and, according to that plan, the houses to be built

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on lots 2, 3, 4 and 5, were to stand back from six feet to six feet six inches from the western boundaries of those lots; but afterwards, some alterations were determined upon, and, amongst others, that the building sites of lots 2 and 3 and 4 and 5, should be thrown back eighteen feet from the western boundaries: and those alterations were adopted in the lithographed copies of the plan which Stokes procured to be made: that neither the original nor the lithographed plan was observed, by Stokes, in erecting Roden House and Segrave Villa on lots 2 and 3, those houses having been erected at the distance of twenty-five feet six inches from the west boundary; that, it having been found that the houses to be erected, by Creed, on lots 4 and 5, could not be placed further back, from the west boundary, than twelve feet, so as to leave sufficient space for stables behind them, Pitt, in his contract with Creed, agreed that *Creed should be at liberty to place those houses back from the west boundary any distance not less than ten feet*: that the lithographed plans had been hung up, in Pitt's estate office and in the pump room at Pittville, merely for the purpose, as the deponents believed, of general information, and in the same way as plans of cities, towns and other places, were commonly hung up or placed, in public rooms, for general information; and that similar plans had been hung up or placed *in several other places in [*23] Cheltenham, and distributed to solicitors and others, with the view to make the Pittville estate known to visitors and others: that, during Dodd's agency, neither the plan in the estate office nor that in the pump room, had been treated or considered, by Dodd, nor, as he believed, by any other person, as binding upon Pitt, by way of contract with any person with whom he might treat in regard to any of the Pittville property: that the original plan prepared by Stokes, had been departed from, to meet the wishes of parties dealing with Pitt, in several instances besides that of Stokes: that Dodd always understood that the plan referred to and indorsed upon the deed of January, 1827, was the only plan which Pitt was bound to observe; and that plan would not be deviated from, in any respect, by Creed's houses being placed, as then intended, at the distance of thirteen feet and eight inches from the west boundary: that those houses would not, in the least, obstruct the view of the ornamental grounds at Pittville from the plaintiff's house, or materially obstruct any other view therefrom which constituted a considerable part of its value, or materially intercept the light or air therefrom, nor would Creed's house be, with reason or on any sufficient ground, an annoyance to the plaintiff, or materially lessen the value of his house: and Creed said that, at the time of entering into his contract with Pitt, he had no knowledge or notice whatever, of any agreement having been entered into, between Pitt and Stokes, whereby the house to be built on lots 4 and 5 was to be thrown back twenty-five feet three inches from the western boundary of those lots.

Stokes made an affidavit in reply, in which he stated that the plan referred to in the deed of January, 1827, *did not show the particular [*24 sites or positions of the buildings intended to be erected on the Pitt-

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ville estate, but described merely the walks, drives and pleasure grounds; and showed, in a general way, what part of the estate was intended for building ground.

Mr. *Knight Bruce* and Mr. *Bethell*, in support of the motion :—In addition to the plan annexed to the deed of January, 1827, which regulated the mode in which the pleasure grounds, roads, pieces of water, &c., belonging to the Pittville estate, were to be used and enjoyed by Pitt and the proprietors of the ground allotted for buildings, there were two other general plans; one of which was prepared by Stokes in 1832, and the other was the lithographed plan. Those two plans differed, in some respects, from each other. The lithographed plan, however, was the only one that was shown to the public. Copies of it were hung up in Pitt's estate-office and in the pump room at Pittville, and were distributed to solicitors and others. According to that plan, (which was particularly known to Creed, during the whole of the time that the transactions between him and Pitt were going on,) the houses to be erected on lots 2, 3, 4 and 5, were, all of them, to have the same line of frontage. In 1833 Stokes agreed, with Pitt, to purchase those lots; and then a more particular plan was prepared and annexed to the agreement, according to which, the houses to be erected on those lots, were to be placed back twenty-five feet and three inches from the western boundary of the lots. The particularity of that plan is such as to preclude the necessity of deciding the case upon the general, lithographed plan; we do not, however, waive [*25] the benefit of it, but insist that it amounted to a representation *which was binding on Pitt. By the agreement of April, 1833, an equitable title to the lots comprised in it, was conferred by Pitt on Stokes. Stokes proceeded to erect Roden House and Segrave Villa, on two of those lots, in accordance with the terms of the agreement and the plan annexed to it. Afterwards Pitt conveyed those two lots, to Stokes, subject to the stipulations of the deed of January, 1827; and Stokes entered into covenants, with Pitt, conformable to the stipulations contained in the agreement of April, 1833. Stokes, afterwards, became embarrassed in his circumstances; and, being unable to complete his agreement as to the remaining lots, he gave them up to Pitt. Pitt, therefore, derived title, from Stokes, to the lots so given up; and, consequently, although he was the landlord, he must stand in the same position, with respect to them, as a mere stranger would have done. The covenants regarding lots 4 and 5, ran with lots 2 and 3, and the covenants regarding lots 2 and 3, ran with lots 4 and 5. When Stokes relinquished lots 4 and 5, he did not mean to prejudice any right that he had with respect to lots 2 and 3; and, when he conveyed lot 3, on which he had built Roden House, to the plaintiff, all the incidents belonging to that lot passed with it. The plaintiff then, being an assign of Stokes, is entitled to enforce the covenants contained in the agreement of April, 1833, and, consequently, to prevent Creed from proceeding to build, on lots 4 and 5, a house, which will stand twelve feet in advance of the plaintiff's house, and which, it is distinctly

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sworn, will be an injury and annoyance to him, and will deteriorate or lessen the value of his house. In *Keppell v. Bailey* (a) the lessees of certain ironworks "covenanted, for themselves, their heirs, executors, administrators and assigns, with a railway company, so long as they, their executors, administrators or assigns, should occupy the ironworks, to procure all the limestone, used in the works, from a certain quarry, and to convey it along the railway: and Lord Brougham, Chancellor, held that the covenant did not run with the land. There is, however, a passage in the judgment, to which we are anxious to call the attention of the court, in which his Lordship says: "Between the estates of the occupiers of the ironworks, and the estates or the persons of their associates in the railway speculation, with whom they covenant, there is no privity; no connection whatever of which the law can take notice. There was no unity of title in the estates of the contracting parties: the ironworks and the lime-pits or railway did not come to them, severally, from the same owner; they were not held by them, severally, under the same landlord." The ingredients which did not exist in that case, are found in this. Here, when the agreement of 1833 was entered into, both properties were in the same owners. [*26]

The effect of the deed of January, 1827, was to bring all the parties to it into one, common partnership. Every purchaser who executed that deed, became bound to Pitt, and, through him, to the other purchasers. Pitt took the covenants which were entered into, with him, by the purchasers of the different portions of his estate, for his own benefit and for the benefit of all those who had dealt or might deal with him: he is, therefore, a trustee of those covenants. By one of the covenants in the deed of 1827, he bound himself to require every person with whom he should contract for the sale of any portion of the building ground at Pittville, to enter into an agreement not to erect any messuage on any part of the "ground which might lessen or deteriorate in value any of the messuages then erected or to be thereafter erected at Pittville: and covenants to that effect, were inserted in the agreements with Stokes and Creed. Comyn's Dig. ;(a) *Laurence Pakenham's case* ;(b) *The Feoffees of Heriot's Hospital v. Gibson* ;(c) *Rankin v. Huskisson* ;(d) *Squire v. Campbell*.(e) [*27]

Mr. Jacob and Mr. Perry, for the defendant Creed, said that the plaintiff's counsel seemed to have lost sight of the fact that all the covenants on which they relied, were entered into with Pitt; and that he, being the covenantee, might release the covenants or enforce them or not, as he pleased; that, when Stokes gave up lots 4 and 5 to Pitt, all the covenants between them respecting those lots, were at an end: that the plaintiff's counsel were also mistaken in contending that the covenants ran with the different lots; for, in fact, they

(a) 2 Myl. & Keen, 517; see 533 and 544. See the observations on the judgment in 2 Sugd. Vend. & Purch. 471, &c.

(b) Covenant, B. (c) Cited from the Year Books in 2 Myl. & Keen, 539. (d) 2 Dow. 301.

(e), Ante, vol. 4, p. 13. (f) 1 Myl. & Craig, 459; see 479.

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did not run with the lots, but with the pump room, in which none of the purchasers of lots had any interest: that the plan was clearly intended to be a mere general plan and not to be final; for it was impossible that so extensive an undertaking as the formation of a new town, with public walks, roads and other conveniences, could be carried into execution, without alterations being necessary, from time to time, in some part of the original plan, and that, by the terms of the deed of January, 1827, the power of sanctioning such alterations, was vested in Pitt: that Pitt, himself, was not prohibited from building on the estate in any manner he thought fit: and the covenant, which had been relied on, in the deed of 1827, applied only [*28] to "purchasers of lots, not to lessees under a building lease for ninety-nine years. *Roper v. Williams* ;(a) *The Duke of Bedford v. The Trustees of the British Museum*.(b)

No counsel appeared for the defendant Pitt.

Mr. *Knight Bruce*, in reply, said that although the covenant in the deed of 1827, was entered into with Pitt, his heirs and assigns, owners, for the time being, of the pump room, yet that covenant would not run with the pump room, because it was not intended to benefit the owners of it, but the owners of the other lands; and that if Pitt himself had chosen to build on the estate in a manner not sanctioned by the covenant, he would have committed a fraud on the covenant.

THE VICE-CHANCELLOR:—In this case, if the plaintiff is entitled to the relief which he asks by his motion, it must be on the ground either of the general covenants contained in the deed of 1827, or on the ground of the covenants which are contained in the agreement of April, 1833. With respect to the covenants which are contained in the agreement of April, 1833, it is necessary to look at the very words of those covenants.

It appears that, in April, 1833, Mr. Pitt entered into an agreement with Mr. Stokes, by means of which Stokes was to become the purchaser of lots 2, 3, 4 and 5, and 6 and 16; and the covenants which Stokes entered into were: "that the messuages, tenements or dwelling houses to be erected [*29] ed on each of said lots numbered 2 and 3, and the messuage, tenement or dwelling house to be erected on the said lots numbered 4 and 5, shall be erected so as to stand back, twenty-five feet and three inches, from the west boundary of the same respective lots; and the messuage, tenement or dwelling house to be erected on each of the said lots numbered 6 and 16, shall stand back, respectively, from the west boundary thereof, six feet and six inches." Then it was further covenanted that, as soon as the messuage should have been completed and finished on lots 2, 3, 4 and 5, Stokes should lay out the ground, in the front thereof respectively, as ornamental pleasure gardens, and should fence the same in with iron palisades; and that no erection or building, of any kind whatsoever, should, at any time thereafter, be erected in front of the respective messuages, tenements or

(a) *Turn & Russ*. 18.(b) 2 *Myl. & Keen*, 552; see 563 and 564.

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dwelling houses, or any or either of them, therein before agreed to be erected and built as aforesaid on the pieces or parcels of land thereby agreed to be sold; and that no other erection or building, of any kind whatsoever, should be erected, on any part of the said pieces or parcels of land respectively, besides the messuages, tenements or dwelling houses, out offices and out buildings thereinbefore agreed to be erected and built thereon respectively as aforesaid, or any or either of them, except such as should be approved of by the said Joseph Pitt, his heirs or assigns, or his or their surveyor for the time being: and further that he, Stokes, his heirs and assigns, should not nor would, at any time or times thereafter, do or commit or permit or suffer, in or on the same several lots of land 'thereby agreed to be sold, or any part thereof respectively, or in any erection or building to be erected thereon or on any part thereof respectively, any act, deed, matter or thing whatsoever, which could, should or might be deemed a nuisance, injury or annoyance to, or which could, should or might *deteriorate or lessen in value any [*30] adjoining or neighboring lands or property, or any messuages, tenements or dwelling houses erected or to be erected thereon. None of the covenants that Mr. Pitt entered into in that agreement, appear to me to have any relation to the question between the plaintiff and the defendant. The agreement is, on the face of it, an agreement merely between Mr. Pitt and Mr. Stokes; and the very first thing that struck me on reading it, was that it was competent to Mr. Pitt, at any time he pleased, to release Stokes from any of the covenants, and to enter into any other covenants which might be agreed upon between himself and Stokes; and, if Mr. Pitt chose not to enforce the stipulation as to the mode of building the houses at certain distances from the west boundary, it seems to me that he was at liberty so to do. And, in my opinion, that part of the covenant which was most relied upon in favor of the plaintiff, namely, the latter part, which I have read, does not apply to the present case at all; because, when Mr. Stokes, who was going to take lots 2 and 3, 4 and 5, and 6 and 16, covenanted that he would not do, or permit or suffer to be done, on the lots agreed to be sold, that is, on all those six lots, or on any part thereof, or in any erection or building to be erected thereon or on any part thereof respectively, any act, deed, matter or thing whatsoever which could or should or might be deemed a nuisance, injury or annoyance to, or which could, should or might deteriorate or lessen in value any adjoining or neighboring lands or property, it is quite clear that he was not covenanting as to the mode of using lots 2 and 3, so as to affect lots 4 and 5, or lots 4 and 5, so as to affect lots 2 and 3. That part of the covenant was meant to apply, and does, in terms, apply only to the use which he should make of lots 2 and 3, 4 and 5 and 6 and 16, so as, by *that [*31] use of them, not to affect other lands; but there is nothing whatever, either in the terms or in the spirit of that part of the covenant, which can extend to restrict him in the use of a part of the lands agreed to be sold to him, so as not to injure the enjoyment of other parts of the same lands. If

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he was the purchaser of the whole, it would be absurd to say that he should be restricted in the use of a part, so as not to injure the remainder: for being the owner of the whole, he would not of course use one part so as to injure the remainder. In my opinion, therefore, no part of this covenant in the agreement of April, 1833, is capable of being made to bear on the question.

Stokes proceeded to erect a house on each of lots 2 and 3; and in the month of December in that year, a conveyance in fee simple was made by Mr. Pitt to Stokes, of the messuages on those two lots. Those two messuages are particularly described in the conveyance; and, in the description of them, it is stated that they are bounded, on or towards the south, by other land purchased by the said Robert Stokes of the said Joseph Pitt, alluding to the land forming lots 4 and 5; and then there follows a description rather more extended of those lands; and then, before the *habendum*, these words are introduced, as part of the very description of the property conveyed: "to be held and enjoyed upon the terms and under and subject to the payments, stipulations and restrictions mentioned and contained in an indenture bearing date on or about the 1st day of January, 1827, being a deed of arrangement for the general management, &c." Therefore, there is an express reference, in this deed of December, 1833, to the original deed of January,

1827. Then there follows nothing more than the usual covenants [*32] between a vendor and a purchaser, "as far as the covenants of Mr.

Pitt with Mr. Stokes are concerned; and then there come covenants, by Stokes: "that he will finish and complete the houses; and, further, that he shall not nor will, at any time or times hereafter, do or commit, or permit or suffer to be done or committed, in or on the said lots or pieces of ground or either of them, or in any messuage or building erected or to be erected thereon, any act, deed, matter or thing whatsoever, which can, shall or may be deemed a nuisance, injury or annoyance to, or which can, shall or may deteriorate or lessen in value any adjoining or neighboring land or property," that is to say, a covenant, by him, that he will not so use lots 2 and 3, as to produce an injury to any adjoining land; and, therefore, that covenant would, in terms, operate to prevent Stokes from so using lots 2 and 3, as to produce an injury to the lands comprised in lots 4 and 5, or the buildings to be erected on those lands. But it is that covenant and not the converse of it: and the covenant, as it stands, is not a covenant which, in terms or by any construction, however forced, that can be put upon it, can afford, to the plaintiff, any sort of relief: though I admit that, if it had been the converse, the case would have been totally different.

Then Stokes fell into difficulties: and it is represented that, in the beginning of the year 1835, he gave up lots 4, 5, 6, and 16 to Mr. Pitt. And, that there was a complete relinquishment and abandonment, on the part of Stokes, of any further benefit of the agreement of April, 1833, is perfectly manifest from the fact that in the year 1839, Mr. Pitt thought himself so entirely released, that he actually entered into the contract which was made between him

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and Mr. Creed: and it seems to me that, it is impossible to say that any right, either at law or in equity, remained in him to have any [*33] benefit from the agreement of April, 1833, beyond that which he had derived from it by means of the conveyance made in December, 1833. Mr. Pitt himself then, virtually, received back the covenants in the agreement of April, 1833; he, virtually, became in the same situation, with respect to Stokes, as if no portion of those covenants ever had been made with regard to lots 4 and 5. In the year 1838, Stokes conveyed the house which he had built on lot 3, to the plaintiff, Captain Schreiber; and Captain Schreiber, of course, will have the benefit of all those covenants which, as an assignee in law, he can have, under the deed of December, 1833.[1]

The next question is whether, by reason of the deed of January, 1827, Captain Schreiber has any right to the relief he asks.

With respect to that deed, I have to observe, in the first place, that it is, on the face of it, drawn in such a manner as purposely to avoid that species of dealing with respect to covenants, which for a great number of years, has been introduced into the profession and is perfectly familiar to the mind of every lawyer, namely that mode of drawing a deed so as to make some one person, or some set of persons, covenantees, for the express purpose that they may be trustees of the covenants made with them, for other persons who are either parties to the deed or strangers to the deed. That mode of dealing with covenants has become very general; and, I believe, that no one ever looked at any deed for forming a voluntary partnership (I mean one of those companies which are commonly called joint stock companies) without seeing that they are all formed upon the plan of having certain persons named as covenantees for the benefit of persons who, at large, may be [*34] interested in the undertaking which is the subject of the deed. That form, however, has been avoided in this case: and it seems to me that it never was the intention of Mr. Pitt that any such form should be adopted. It is not to be taken, as a mere matter of observation, that the thing has happened to be so; but I cannot but think, on reading over the deed of 1827, that it was expressly intended, by Mr. Pitt, that it should be so; because the deed begins with reciting: "that Joseph Pitt being seised in fee simple of the lands delineated in the plan thereunto annexed, and having it in contemplation to establish a spa, at or near the north end of the said lands, and to erect a pump room, with suitable conveniences, at or near the spot marked out for that purpose on the plan, and to lay out the residue of such lands for buildings, and for lawns, pleasure grounds, &c., lately caused the plan thereunto

[1] A covenant in a deed of land, not to erect a building on a common or public square owned by the grantor in front of the premises conveyed, is a covenant running with the land, and passes to a subsequent grantee of the premises, without any special assignment of the covenant. *Trustees of Watertown v. Cowin*, 4 Paige, 510. See further as to covenants running with the land, *Van Horn v. Crain*, 1 Paige, 455. *Astor v. Miller*, 2 Paige, 68. *Varick v. Briggs*, 6 Paige, 324. *Barclay v. Peine*, 1 Sim. & Stu. 449, 455. n. 2.

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annexed to be drawn, whereby the mode in which the whole of the land was intended to be laid out and formed, and the purposes to which the same was to be converted, appropriated and used, were pointed out and described, in order that the beauty and regularity of the whole of the design might be, for even thereafter, duly preserved, subject only to such alterations as should be made and approved of by Pitt, his heirs or assigns, and as should not destroy the general beauty of the same design." It is quite plain, from that mere recital, that Mr. Pitt never intended to be absolutely bound even by that which did appear on the plan; and it is remarkable that, although the plan did mark out whereabouts the pool should be, and where the rides and the drives should be, and stated what plots of land should be building ground, yet it did not point out, at all, what should be the form of the buildings on the pieces of

building ground, nor how much of each piece of ground should be [*35] covered with *buildings, or any thing else, except, generally, that there were to be open spaces for drives, walks, plantations, &c., which were made the subject of the covenants in this deed of 1827. It must be taken, therefore, that not only did Mr. Pitt reserve to himself a right to vary, generally, that which was expressed in the deed; but that he kept, in his own hands entirely, the mode of determining how the pieces of land allotted for buildings, should be covered with buildings, and what sort of buildings they should be covered with, and everything else that related to the buildings.

It was said that the whole of this deed is a bubble, if it be allowed to be dealt with in the manner in which it is now proposed, by Mr. Pitt, to deal with it in respect of lots 4 and 5. But I cannot say that I exactly agree to that proposition; because, in the first place, this deed covenants, generally, that there shall be plantations, walks, lawns and conveniences of that kind; and Pitt expressly covenants that, when he has laid them out, he, his heirs and assigns will, from time to time and for ever thereafter, or after the lands should have been so laid out, formed, finished or completed as aforesaid, at his and their own costs and charges, in all things well and effectually repair, and keep in repair, and in good order and condition, the said roads, ways, rides, drives, walks, footpaths, lawns, promenades, pleasure grounds, plantations, &c. It is quite plain, therefore, that a mode of dealing with the land which would go directly to destroy those lawns, promenades, &c., never could be permitted; because any one of the persons, parties to the deed, might have a remedy, as well by action of covenant as by bill in equity, to restrain

Mr. Pitt, his heirs or assigns, from any general dealing with the land [*36] which would have the effect of destroying those promenades *and plantations. If, for instance, it were said that Mr. Pitt would be at liberty to erect, on some vacant part of this building ground, a manufactory for making alkali; it is quite plain that the process of manufacturing it would destroy the trees and shrubs in the plantations, promenades, and pleasure grounds; and I apprehend that such a use as that, would be prohibited by this court. It is observable that there is another covenant about

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the use of the roads, &c. It is expressed that the parties who covenant with Pitt: "shall have full liberty, at their free will and pleasure, to use, either on foot or on horseback, and with horses, carts and carriages, according to the nature thereof respectively, all and every the said roads, ways, rides, drives, &c., save only that none of the said roads, which in the same map or plan are delineated or marked with the letter R., shall be used for timber carriages, wagons, carts or any such like carriages, but that such timber carriages, wagons, carts and such like carriages, and all coals, ashes, manure, rubbish, soil, building materials and other heavy goods and articles, shall be taken to and from the said land, along some or one of the back roads set out and delineated in the said map or plan, and therein marked respectively, with the letter S., except so far as it may be actually necessary, for want of other access, so to use some part or parts of such carriage roads in respect of any of the said land." So that it is perfectly plain, on the face of this deed, that there is sufficient express stipulation that the land, generally speaking, shall be used for the purpose of pleasure and the personal accommodation and convenience of the inhabitants of the houses, and shall not be allowed to be destroyed by the introduction of manufactories, or the conveyance of heavy goods: and, therefore, I do not think that this deed can be justly characterized as a "mere bubble, there being sufficient, in the [37] *corpus* of it, to enable all those who should have an interest in the land, to prevent Mr. Pitt, his heirs and assigns, if they ever should be so foolishly inclined, from perverting this Pittville estate to any other purpose than that to which the mere contemplation of the plan shows it was intended to be appropriated.

Then, after those general covenants about the use to be made of the roads, &c., Mr. Pitt covenants: "that he, his heirs and assigns shall and will, in every agreement which should thereafter be entered into by him, or them, for the sale of any part of the land or ground which has been so laid out for building, require that the purchasers shall, by covenant or agreement with him, his heirs or assigns, owners for the time being of the intended pump room, bind themselves, their heirs, executors, administrators and assigns, not to erect any messuage or tenement, on any part of the ground at Pittville, which shall or may lessen or deteriorate in value any other of the messuages now erected or hereafter to be erected at Pittville, and not to carry on any manufactory, trade, &c." Now the first observation which strikes me, and which struck me from the time when I first read that covenant, is that it is an extremely difficult one for a court to deal with (that is to say) in the way of giving relief upon it: because, if a house has once been built upon a plot of ground, it is very difficult to say that building a house on an adjoining plot of ground, does not, in some degree, deteriorate the value of the first house. It is perfectly plain, however, that it never was the intention that the covenant should have that construction: because the deed, itself, sets out with a sufficient manifestation of an intention that all the ground which, on the

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[*38] map, is designated as building *ground, should, at some time or other, be covered with buildings; and, of course, one house must be built at one time, and another house at a subsequent time; and, therefore, the mere building of a house which would necessarily deteriorate, in some measure, the value of the house that was first built, never could be considered as a breach of the covenant.

Then it was said that the value of one of the houses which Stokes has built, is deteriorated and lessened in value, because, on an adjoining plot of ground, another house is built with its front twelve feet in advance of the front of the first house. I am willing to admit that, *prima facie*, that is so in some degree; but, possibly, it may produce a benefit; because the house which is advanced so as, in an angular way, to come before the front of another house, may have the effect of sheltering and protecting that other house in a manner beneficial to it. I make that observation with reference to a part of this town which has lately been built upon, where one of the advantages of the houses has been stated to be that they do recede so as to be protected by houses on the east. I allude, particularly, to the houses in Hyde Park Gardens, where the circumstance that they do so recede is stated to be an advantage to them; because they are materially protected by the buildings which project to the east. I can conceive, therefore, that, in many cases, the advance, in the way in which the house on lot 4 is intended to be advanced, that is, angularly in respect of the fronts of the houses on lots 2 and 3, may be an advantage.

But, in judging of the meaning of the parties, you must, to a certain extent, look at what was actually done. Now, first of all, the plan was made [*39] which merely represented, generally, what was to be building *ground; and then another plan was made which showed that the houses to be built on lots 2 and 3 and 4 and 5, were to be in a position, with respect to Segrave place, in which they do not now stand nor are intended to stand. This shows that it was the intention of Mr. Pitt, from time to time, to exercise a discretion about the mode in which any of the buildings might be made to advance, or might be made to recede; and I cannot but think that this covenant, standing as it does, can be hardly said to be a covenant which would authorize this court to interfere in respect of the proposed advance of the house about to be built on lot 4.

Supposing, however, that it were so, then there is this further to be considered, namely, whether the plaintiff stands in a situation so as to be able to take advantage of the covenant. Now it is quite plain that, when Mr. Stokes took his conveyance in December, 1833, he never intended to bind Mr. Pitt if he, Stokes, did not proceed with the buildings, as it was then intended he should, on lots 4 and 5, to take care that those lots should be built on in the same manner as Stokes had, by his agreement of April, 1833, contracted to build on them. On that subject the deed of December, 1833, is totally silent: that deed is constructed, with respect to anything that regarded lots 4 and 5

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just in the same manner as if Stokes had supposed that he was himself to complete the agreement of April, 1833. It does not in any manner refer to the contingency which did happen, namely that he might not complete the agreement, and that the dominion over lots 4 and 5 would revert to Mr. Pitt. When Stokes gave up the land comprised in lots 4 and 5, he gave it up generally. No stipulation was then made, between him and Mr. Pitt, as to any dealing by Mr. Pitt, his heirs or assigns, with that *portion [*40] of the estate; but the matter was left to remain, entirely, on the footing on which the conveyance of December, 1833, had placed it.

I can easily understand that, when Mr. Stokes was dealing with Captain Schreiber, he might have had, in his mind, the contents of the agreement of April, 1833, and might have held out, to Captain Schreiber, that the intention was to have the houses on lots 4 and 5 built according to the stipulations of the agreement of April, 1833. But then I ask what was there to bind Mr. Pitt to have the houses built according to those stipulations?

It seems to me, therefore, inasmuch as Captain Schreiber can claim only under Stokes, and that Stokes has not taken any stipulation, from Mr. Pitt, for enforcing, as against Mr. Pitt, that stipulation which Mr. Pitt might have enforced as against Stokes, that the matter is left at large. And I do not see how, by any possibility, Captain Schreiber can avail himself of the benefit of that covenant contained in the deed of January, 1827, which his counsel have so much relied on, even supposing that, under that covenant, he had the right which he claims. His rights depend upon the conveyance that was executed to him by Stokes; and unless it can be made out that Captain Schreiber is, in any sense, an assignee of the benefit of the covenants, or a *cestuique trust* of the covenants contained in the deed of January, 1827, it appears to me that it is quite impossible to grant him relief: and I confess that from the first, it seemed to me that he had an extremely difficult case to maintain: and, upon the best consideration that I can give it, I think that the case is not maintainable in a court of equity.

Motion refused without costs.(a)

**HULKES v. DAY.—HULKES v. NEWTON.*

[*41]

1840: 30th November.—Construction; 1 and 2 Vict. c. 110, and 3 and 4 Vict. c. 82; Judgment Creditor; Stop-order; Practice.

Stock standing in the Accountant General's name to the separate account of a party against whom a judgment debt has been recovered, may be charged, under 1 and 2 Vict. c. 110, with the debts but the charging order must be made, not by a Judge in equity, but by a Judge at common law: and, although such order, in terms, charges the stock, it affects only the interest of the debtor in the stock, and, therefore, does not interfere with the rights of prior incumbrancers.

A court of equity will make a stop-order, as auxiliary to the charging order.

A party intending to apply for a stop-order, must give notice of his application to all other persons having like orders on the fund.

THE defendant Charles Day, being entitled on attaining twenty-three

(a) See *Whatman v. Gibson*, ante, vol. ix. p. 196.

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to several sums of stock standing in the name of the Accountant General in trust in these causes, to his separate account, mortgaged them, after he had attained twenty-one but before he had attained twenty-three, to two ladies named Taverner; and afterwards made a voluntary settlement of them, subject to the mortgage, on himself and any wife and children whom he might thereafter have. The Misses Taverner first obtained an order that the sums of stock should not be transferred or disposed of without notice to them, and then filed a bill to have the benefit of their security. In January, 1840, J. Williams, who had recovered judgment in an action against C. Day for 706*l.*, obtained an order from the Vice-Chancellor, under 1st and 2d Vict. c. [*42] 110, s. 14,(a) directing that the several sums of stock before mentioned, should stand charged with the payment, to Williams, of the 706*l.* and interest. In April, 1840, that order was discharged on the application of C. Day, the Lord Chancellor having decided, in another case, that the words, "a Judge of one of the superior courts" used in the 14th section of the act meant a Judge of one of the superior courts of common law. Accordingly in May, 1840, Williams obtained, from Mr. Baron Rolfe, first an order nisi, and, subsequently, an order absolute, charging the sums of stock with the payment to him of the 706*l.* and interest; and, afterwards, he presented a petition in the above causes, praying that none of those sums might be transferred, sold out or otherwise disposed of without notice to him.

The Misses Taverner and the trustees of the voluntary settlement, who had obtained similar orders, were served with copies of the petition, the Vice-Chancellor having ruled that, where an application was intended to be made for a stop-order, every person who had obtained a similar order with respect to the same fund, must have notice of the application.

*Mr. Knight Bruce and Mr. Chapman Barber in support of the [*43] petition:—If any doubt could be entertained as to whether the 1 and 2 Vict. c. 110, extended to stock standing in the name of the Accountant General, it is wholly removed by 3 and 4 Vict. c. 82, which, after reciting the 14th section of 1 and 2 Vict. c. 110, *declares* and enacts that the aforesaid provisions of the said act *shall be deemed and taken* to extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities or

(a) This section is as follows: "that if any person against whom any judgment shall have been entered up in any of her Majesty's superior courts at Westminster, shall have any government stock, funds or annuities, or any stock or shares of or in any public company in England (whether incorporated or not) standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities or shares, or such of them or such part thereof, respectively, as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made, in his favor, by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge, until after the expiration of six calendar months from the date of such order."

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shares as aforesaid, as also in the dividends, interest or annual produce of any such stock, funds, annuities or shares; and, whenever any such judgment debtor shall have any estate, right, title or interest, vested or contingent, in possession, remainder or reversion, in, to or out of any such stock, funds, annuities or shares as aforesaid, *which now are or shall hereafter be standing in the name of the Accountant General of the Court of Chancery*, or the Accountant General of the Court of Exchequer, or in, to or out of the dividends, interest or annual produce thereof, it shall be lawful for such Judge to make any order as to such stock, funds, annuities or shares, or the interest, dividends or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: provided always that no order of any Judge as to any stock, funds, annuities or shares standing in the name of the Accountant General of the Court of Chancery or the Accountant General of the Court of Exchequer, or as to the interest, dividends or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities or *shares, or payment of the interest, dividends or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities or shares, or the interest, dividends or annual produce thereof, in favor of the judgment creditor, with the amount of the sum to be mentioned in any such order.

Mr. *Spence* and Mr. *Rasch* appeared for the Misses Taverner.

Mr. *Wigram*, Mr. *Norton* and Mr. *Shadwell* for the trustees of the settlement.

Mr. *Jacob* and Mr. *Purvis* for C. Day :—The question which arises on the 1 and 2 Vict. chap. 110, is whether the provisions of that act apply to any stock except such as the judgment debtor has the entire interest in. The 14th section speaks, merely, of stock, &c., standing in the debtor's name in his own right, or in the name of any person in trust for him; and the next section, which it is material to look at with reference to this question, contains the same expressions, and enacts that the Judge's order shall restrain the Governor and Company of the Bank from permitting a transfer of such stock; but it does not direct that any persons except the debtor and the Governor and Company of the Bank, shall be served with notice of the order, nisi. It is plain, therefore, that the act does not contemplate stock in which any person besides the judgment debtor has an interest; for, were it otherwise, it would not have spoken, as it does, of the entirety of the stock, and have directed that the order should restrain the Bank from permitting a transfer to be made to any other person. If the act *had been meant to [*45] apply to stock in which the debtor had only a partial interest, it would have been unjust to enact that the order should restrain the Bank from permitting a transfer to be made to the other persons having an interest in the

 1840.—Hulkes v. Day.

stock, without their having been served with the order *nisi*. The 10th section of the statute of frauds, which is in *pari materia*, has been held to apply only to cases of simple trust. *Doe v. Greenhill*.(a)

Secondly: stock standing in the name of the Accountant General, is not within the 1 and 2 Vict. c. 110. Stock so circumstanced, was first made subject to the provisions of that act by 3 and 4 Vict. c. 82. That act did not receive the royal assent until the 7th of August, 1840; and it has no retrospective operation. It recites the 14th section of the first mentioned act, and that doubts had been entertained whether the provisions of that section extended to the cases after mentioned: and then it declares and enacts that those provisions shall be deemed and taken to extend to *the interest* of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent, as well in any such stocks, funds, &c., as aforesaid, as also in the dividends, interest or annual produce of any such stock, funds, &c. So far it is declaratory of the meaning of the former act. Then it goes on to provide, by a distinct enactment, as to stock standing in the name of the Accountant General, which had been omitted in the former act: and it says that, whenever any such judgment-debtor shall have any estate, right, title or interest, vested or contingent, in possession, remainder or reversion *46] in, to or out of any such stocks, funds, &c., as aforesaid, *which now are or shall hereafter be standing in the name of the Accountant General, or the dividends, interest or annual produce thereof, it shall be lawful for such Judge to make any order as to such stock, funds, &c., or the interest, &c., thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor. Then it provides that no order of any Judge as to any stock, &c., standing in the name of the Accountant General, or as to the interest, &c., thereof, shall prevent the Bank from permitting any transfer of such stock, &c., or payment of the interest, &c., thereof in such manner as the court may direct, or shall have any greater effect than if such debtor had charged such stock, &c., or the interest, &c., thereof, in favor of the judgment creditor, with the sum mentioned in the order. That proviso was introduced, into the act, in order to enable the Judge at common law to make an order without interfering with the rights of other parties having an interest in stock standing in the Accountant General's name. Supposing, therefore, that this act has a retrospective operation, the order made by Mr. Baron Rolfe is clearly erroneous; for it charges the stock, and not C. Day's interest in the stock, with the judgment debt.—[The Vice-Chancellor:—Would not Mr. Baron Rolfe's order, of itself, prevent a transfer of the stock?] Certainly it would; and, therefore, if we concede that the construction of the acts which the petitioner's counsel contend for, is correct, the order now sought to be obtained is unnecessary.

Mr. *Knight Bruce*, in reply, said that the 1 and 2 Vict. c. 6, s. 110, was a remedial act, and, therefore, ought to be construed so as to suppress the mis-

(a) 4 Barn. & Ald. 684.

 1840.—*Hulkes v. Day*.

chief and advance the remedy ;(a) that the object of the act was to give to 'creditors a more extensive remedy against the chattels of their [*47] debtors, than they had at common law ; that the words used, in the 3 and 4 Vict. c. 82, with reference to the former act, were, "shall be deemed and taken to extend to the *interest* of any judgment creditor," which meant, "shall be so construed as to extend, &c."

The Vice-Chancellor said in the course of the reply, that, if the words in the second act, had been, "shall be taken to extend," it might have been said that that act was intended to have a future operation ; but that the words were, "shall *be deemed* and taken to extend," which necessarily gave it a retrospective effect.[1]

His Honor delivered judgment as follows :—The first question is whether a stop-order is to be made upon this petition.

Before the second act passed, I had occasion to speak to the Lord Chancellor, on the subject of the first act ; and I distinctly understood, from his Lordship, that it was the intention of the legislature that any order which should have the effect of making a charge on stock standing in the name of the Accountant General, should be made, not by a Judge of this court, but by a Judge of the courts of law ; but the Lord Chancellor never expressed a doubt that the Judges of the courts of common law, might make orders which would charge stock standing in the name of the Accountant General, in which the party sought to be charged had an interest ; and it is clear to me, that, if there was any such doubt, it is removed by the subsequent act, which does both declare and define what shall be the construction of the former act.

"It appears to me that the case cited from 4 Barn. & Ald., has no [*48] application to the present case ; because, there the question was, whether, under the 10th section of the statute of frauds, certain lands were liable to a debt due to a judgment creditor. Those lands had been vested in trustees for a term of ninety-nine years, in trust to secure an annuity to a lady for her life, and subject thereto, in trust, to permit the settlor to receive the rents with the ultimate trust for the settlor who was the debtor. Now, I can perfectly understand, that there the term did interfere with the possession of the settlor, in whose favor the ultimate trust was declared : and, on the plainest construction of the statute of frauds, that case was rightly decided by the Judges of the King's Bench.

It seems to me that, in a case where the Accountant General holds a fund in trust for A. and other persons, he is a trustee for A. and those other persons ; and, if A.'s interest in the fund is subject to a charge, I see no reason why that circumstance should prevent an order being made, under the act,

(a) 1 Black. Comment. 86.

[1] As to retrospective statutes, see *Vaudry v. Geddes*, 1 Russ. & M: 208, and note 2, *ibid*. 3 Russ. 422, n. b ; where a number of American cases on the subject are referred to.

1840.—Hufkes v. Day.

to charge the fund. Then comes the second act which recites that doubts had arisen. [His Honor here read the first section of the 3 and 4 Vict. c. 82.] Now, whatever length of time may have elapsed between the date of Mr. Baron Rolfe's order, and the raising of this question, if I find a second act declaring that the first act shall be deemed and taken to extend to a particular subject, I think it must be deemed and taken to have extended to that subject from the time when the first act was passed. The second act is a statutory explanation of the first.[1] The latter part of the first section of the second act, goes on to declare that, whenever the judgment debtor [*49] shall have "any estate, right, title or interest, vested or contingent, in possession, remainder or reversion, in, to or out of any stock standing in the name of the Accountant General, or in, to or out of the dividends, interest or annual produce thereof, it shall be lawful for the Judge to make any order as to such stock, or the interest, dividends or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor. So that the true meaning was that, whether the interest of the debtor, in stock standing in the name of the Accountant General, was in possession, remainder or reversion, the first act should equally apply. Independently, however, of the second statute, the Lord Chancellor was certainly of opinion that the first act did apply to stock standing in the name of the Accountant General.

Then it was said that Mr. Baron Rolfe's order is wrong because it is too extensive. That order declares that the fund in question shall stand charged with the payment of 706*l.*; and therefore, it does, in terms, apply to the whole fund. But, though it is void as to a party who has a prior interest in the fund, it would be harsh to say that, because, at the time when it was made, C. Day had not the exclusive interest in the fund, it shall not extend to the interest which he then had. It follows, therefore, as a matter of course, that the stop-order must be made; but the Misses Taverner must be excepted out of it.

[1] "Statutes are also to be construed in reference to the law as it existed, or was supposed to exist at the time of making such statutes. Thus, if certain expressions in a statute, have a settled and determinate meaning at the common law, or by a settled judicial construction of the same words in a former statute, the court is bound to presume the legislature intended they should have a similar meaning, or receive the like construction in the new statute. And as one part of a statute is to be referred to for the purpose of ascertaining the meaning, of another part, so may other laws made by the same legislature, or upon the same or similar subjects, be referred to for the same purpose." *Walworth, Ch. Walker v. Devereaux*, 4 Paige, 252. So, as regards statutory explanation:—Where two acts of parliament, relating to the same subject, were passed at the same session, Wigram, V. C. observed; "In considering the [first] statute, &c., I admit to the fullest extent, my obligation to collect the intent of the legislature in passing that act, from the act itself; but having before me what I cannot but regard as legislative declarations, that that act, standing alone, does not with perfect accuracy express the object of the legislature in passing it, I am bound to scan its provisions with the utmost care, if, in any case, those provisions are in apparent conflict with the ordinary principles upon which justice is administered." *Du Vigier v. Lee*, 2 Haro, 332. And see what is said by Lord Cottenham in *Ex parte Prideaux*, 3 Myl. & Cr. 333. *Seddon v. Connell*, post, 77.

 1839.—Newman v. Newman.

A petition, presented by the trustees of the voluntary settlement, praying that what was due to the Misses Taverner, might be raised and paid to them out of the *stocks and funds in court, and that the remainder of those stocks and funds might be transferred to the petitioners, was heard at the same time as Williams' petition, and was dismissed with costs. [*50]

 ANONYMOUS.

1840; 24th December.—Practice; Affidavits.

Where a motion to dissolve an injunction is ordered to stand over at the plaintiff's request, affidavits filed after 10 o'clock of the day for which the notice was given, cannot be read when the motion is made.

THE VICE-CHANCELLOR said that, where notice was given of a motion to dissolve an *ex parte* injunction, and, on the motion being mentioned, it was ordered to stand over at the plaintiff's request, he would not allow any affidavits to be read on the hearing of the motion, unless they were filed before 10 o'clock of the day for which the notice was given. His Honor added that he had informed the Lord Chancellor that such was the course which he meant, in future, to take, and that his Lordship approved of it as a general rule.

 *NEWMAN v. NEWMAN.

[*51]

1839; 1st June.—Will; Construction; Remoteness.

Testator devised his real estates to trustees, in trust for his son for life, and, after the son's death, in trust to sell and stand possessed of the proceeds, in trust for all his grand-children, the children of his son and three daughters, (whom he named,) *who should attain the age of twenty-four years*. The son and daughters had children living at the testator's death, but none born afterwards. Held that the trust for the grand-children was void for remoteness.

CHARLES NEWMAN, the elder, made his will dated the 26th of July, 1824, and which was partly as follows: "I give and devise, unto my son, Charles Newman, all that my messuage, farm and lands called Butlers or otherwise, situate, lying and being in Mount Bures and Bures Hamlet, in the county of Essex, or, one of them, and also all those messuages and lands called Barnards and Coppens or otherwise, situate, lying and being in Bures Hamlet and Mount Bures aforesaid, or one of them, and all my messuages, lands, tenements and hereditaments whatsoever and wheresoever, to hold the same farm, messuages, lands, tenements, hereditaments and premises unto and to the use of my son, Charles Newman, and his assigns, for and during the term of his natural life, and, from and immediately after the decease of my said son Charles Newman, I give and devise the same farm, messuages, lands, tene-

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ments, hereditaments and premises unto my brother, John Newman, and my grand-son, Charles William Newman, and their heirs, upon trust that they, the said John Newman and Charles William Newman, or the survivor of them, or the heirs of such survivor, do and shall, with all convenient speed after the decease of my said son Charles Newman, absolutely sell and dispose of the same; and I declare my will to be that the said John Newman and Charles William Newman, and the survivor of them, and their and his heirs, executors and assigns, shall stand and be possessed of and interested in the clear money to arise or to be produced by the sale or sales of my

[*52] aforesaid estates and estate, hereditaments and *premises, and of and in the rents, issues and profits thereof, from the decease of my said son Charles Newman until the same shall be sold, *in trust for all and every my grand-children*, the children of my said son Charles Newman, of my daughter Elizabeth, the wife of James Stutter, of my daughter, Ann Heald, and of my daughter, Sarah, the wife of — Grimwood, respectively, lawfully begotten, *who shall attain the age of twenty-four years*, equally to be divided among my said grand-children attaining that age as tenants in common. I give and bequeath, unto my said son Charles Newman and the said John Newman, the sum of 1000*l.* of lawful British money, upon trust to invest the said sum of 1000*l.* as soon as may be practicable after my decease, in their or his names or name, in the public or parliamentary stocks or funds of Great Britain, or in or upon government or real securities in England at interest, and upon trust that they, my said son Charles Newman and the said John Newman, and the survivor of them, and their and his executors, administrators and assigns, do and shall pay the interest, dividends and annual produce of the aforesaid sum of 1000*l.*, and of the stocks, funds and securities in or upon which the same shall be invested, unto my said daughter Elizabeth, the wife of James Stutter, during the term of her natural life, for her separate use, independently of the debts, control or engagements of her present husband or of any future husband with whom she may intermarry, and her receipts, notwithstanding her coverture, to be good and sufficient discharges for the same; and, upon and immediately after the decease of the said Elizabeth Stutter, upon trust to pay, transfer and assign the aforesaid principal sum of 1000*l.*, and the stocks, funds and securities in or upon which the same shall be invested, and the dividends, interest and proceeds

[*53] thereof, *unto all and every the children and child of the said Elizabeth Stutter lawfully begotten, who shall attain the age of twenty-one years, equally to be divided between or among such children (if more than one) as tenants in common, and, if only one, then the whole to that one child, to which said children and child attaining the age of twenty-one years I give and bequeath the same accordingly. And I give and bequeath, unto my said son Charles Newman and the said John Newman, the sum of 2000*l.* of like lawful money, in trust to invest the same, with all practicable speed after my decease, in their or his names or name, in the public or parliamentary

1839.—*Newman v. Newman*

stocks or funds of Great Britain, or in or upon government or real securities in England, at interest, and upon trust that they, my said son Charles Newman and the said John Newman, and the survivor of them, and their and his executors, administrators and assigns, do and shall pay, transfer and assign the aforesaid sum of 2000*l.*, and the stocks, funds and securities in or upon which the same shall be invested, and the dividends, interest and proceeds thereof which shall not be applied under the power or direction hereinafter contained, unto all and every the children and child of my said daughter Elizabeth Stutter lawfully begotten, who shall attain the age of twenty-four years, equally to be divided between or among such children (if more than one) as tenants in common, and, if only one, then the whole to that one child, to which said children or child attaining the age of twenty-four years, I give and bequeath the same accordingly." The testator bequeathed two other sums of 1000*l.* in trust, as to one, for his daughter Ann Heald, and, as to the other, for his daughter Sarah Grimwood and their children and child who should attain twenty-one; and he bequeathed two further sums of 2000*l.* in trust, as to *one for the children and child of Ann Heald [*54] who should attain twenty-four, and as to the other, for the children and child of Sarah Grimwood who should attain that age. The will then proceeded thus: "And I hereby declare my will to be that my said trustees and trustee for the time being, do and shall pay and apply the dividends, interest and annual produce of the respective portions or shares, of and in the aforesaid trust funds, to which my said grand-children, the children of my said son and daughters, shall respectively be entitled *in expectancy or contingency*, under the trust hereinbefore declared, for or towards the maintenance, education and benefit of my said respective grand-children, until they shall respectively attain the age at which the said portions or shares of and in the said respective trust funds *will become absolutely vested*." The testator then gave pecuniary legacies to certain persons absolutely; and, after payment of his just debts, legacies and funeral and testamentary expenses, he gave all the residue and remainder of his moneys, stocks, funds, mortgages and securities for money, furniture, plate, goods, chattels and personal estate and effects whatsoever and wheresoever to his son Charles Newman, for his own use and benefit; and appointed him and John Newman executors of his will.

The testator made a codicil to his will, dated the 25th of April, 1827, which, after reciting that, by his will, he had given his real estates before mentioned to his son Charles Newman, for his life; and, after his son's decease, to John Newman and Charles William Newman, and their heirs, upon trust to sell the same, and had declared that the clear money arising from the sale thereof, with the rents, issues and profits thereof from the *decease of [*55] Charles Newman, until the same should be sold, should be in trust for all and every the children of Charles Newman, Elizabeth Stutter, Ann Heald, and Sarah Grimwood, who should attain the age of twenty-four years, equally

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to be divided among them attaining that age as tenants in common, proceeded as follows: "Now I declare my will to be that it shall be lawful for my said brother, John Newman, and my said grandson, Charles William Newman, and the survivor of them, and the heirs of such survivor, by the direction and with the consent in writing of my said son, Charles Newman, to sell the said farm, messuages, lands, tenements, hereditaments and premises in the lifetime of my said son; and, in such case, I direct my said trustees and trustee to invest the clear money arising from the sale of the said farm, messuages, lands, tenements, hereditaments and premises, in the public funds of Great Britain, or in or upon government or real securities in England, at interest, and to pay the dividends, interest and annual produce thereof unto my said son, Charles Newman, for and during the term of his natural life; and, immediately upon and after his decease, my will is that the said John Newman and Charles William Newman, and the survivor of them, &c., shall stand and be possessed of and interested in the said trust money, funds and securities arising from the sale of the said farm, lands, messuages, tenements, hereditaments and premises, in trust for my said grand-children, the children of my said son Charles Newman, of my daughter Elizabeth, the wife of James Stutter, of my daughter Ann Heald, and of my daughter Sarah, the wife of — Grimwood, respectively, who shall attain the age of twenty-four years, equally among them my said grand-children attaining that age, as tenants in common, as in my said will is expressed."

[*56] *The testator died in August, 1828, leaving his son Charles Newman, the younger, and his three daughters named in his will him surviving. The son and daughters had, each of them, several children living at the testator's death; but none of them had a child born afterwards.

The bill was filed by a son of Charles Newman, the younger, against his father and the testator's other children and grand-children, alleging that Charles Newman was about to cut timber on the devised estates; and that he pretended that the devises and gifts, in the will and codicil, to the testator's grand-children, were void for remoteness and uncertainty, and that he was absolutely entitled to the estates in fee simple, as the testator's heir. The bill prayed that the rights and interests of the plaintiff and defendants in the estates, might be declared, and that Charles Newman might be restrained from cutting timber thereon.

Charles Newman demurred for want of equity.

Mr. *Jacob* and Mr. *L. Wigram*, in support of the demurrer, said that the trust declared of the money to arise from the sale of real estates, was for a class of persons which was to be determined on their attaining the age of twenty-four, and, therefore, it was too remote, according to *Leake v. Robinson*: (a) that it was true that the will contained a clause for the maintenance of the grand-children; but, if that clause applied to the fund to arise from the

(a) 2 Mer. 363.

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sale of the real estates, (which was very doubtful,) it spoke of the shares of the grandchildren as being contingent; and that, in *Judd v. Judd*,^(a) there was a similar clause; but, nevertheless, it was held that "the [*57] children of Sarah Judd were not intended to take vested interests until they attained twenty-five, and, consequently, that the bequest to them was void for remoteness.

Mr. *Knight Bruce* and Mr. *Elderton*, in support of the bill.—If the property comprised in this suit, is to be considered as real estate, the devise is good, according to *Boraston's case*,^(b) *Doe v. Nowell*,^(c) *Bromfield v. Crowder*,^(d) *Phipps v. Williams*,^(e) *Doe v. Ward*.^(f) But, if it is to be considered as personal estate, then the clause for maintenance, which clearly includes the proceeds of the sale of this property, affords a strong ground for holding that the grand-children take vested interests in their shares. In that clause, the testator has used the words "absolutely vested." He seems to have intended to draw a distinction between vesting in enjoyment and vesting in interest.

THE VICE-CHANCELLOR:—I should have thought that the case of *Doe v. Ward* was within the terms of *Boraston's case*. In *Doe v. Ward* the testator gave his freehold and leasehold estates, after the death of his daughter, to such of her children as she then had or might have, if a son or sons, at his or their age or ages of twenty-three. That is *Boraston's case*.

In that case and in the other cases of the same class, "there was, in [*58] the first place, a gift to the party intended to take; and then followed the words "at, if or when" that party shall attain a particular age; and it was held that those words were used, merely, for the purpose of pointing out the time at which the devisee was to take in possession. But, in the case now before me, there is no gift except to such of the testator's grand-children as shall sustain the character of attaining the age of twenty-four. The attainment of that age, is part of the constitution of the character of the original taker.[1]

The devise of the legal estate is good; but the person in whom it is vested, is a trustee for the heir at law.

Demurrer allowed.

(a) Ante, vol 3, p. 525. (b) 3 Rep. 19, a. (c) 1 M. & S. 327. (d) 1 New. Rep. 313.

(e) Ante, vol. 5, p. 44. The House of Lords did not reverse that part of the judgment which related to the devise in trust for Geo. Holland Ackers: with reference to which it was cited in the argument above. See 3 Clark & Fin. 665.

(f) 9 Adol. & Ell. 582.

[1] See further as to present gift and postponed payment, *Watson v. Hayes*, 5 Myl. & Cr. 125. & C. 9 Sim. 500, 501, note, Am. ed., where a number of recent decisions on the subject are cited.

 1840.—Seddon v. Connell.

SEDDON v. CONNELL.

1840; 10th and 11th June.—Joint Stock Company; Fraud; Public Officer; Construction of 7 Geo. 4, c. 46, and 1 and 2 Vict. c. 96.

A. filed a bill against the public officer of a joint stock bank, alleging that he had been induced to purchase 500 shares in the bank, by fraudulent representations made by the directors, in their reports, as to the prosperous state of the company's affairs, and praying a declaration to that effect and that the purchase might be declared void, as between him and the company, and that the latter might repay him his purchase money.

Held that, as the litigation was between one member of the partnership as such, and the other members as such, the public officer was improperly made a party to it as representing the company; and a demurrer by him was allowed.

By a deed of settlement dated the 1st of July, 1834, made between the several persons whose names were thereunto subscribed (except the persons parties thereto of the second part) of the one part, and Andrew Cassels and William Walter Cargill of the other part; after reciting that it had been agreed to form a joint stock banking company in Manchester, under [*59] the style *or firm of "The Northern and Central Bank of England," and under the authority and conformably to the provisions of 7 Geo. 4, c. 46, intituled, "an act for the better regulating co-partnerships of certain bankers in England;" and that the parties had agreed to raise among themselves, a capital of 500,000*l.* to enable them to carry on the business of the company, and that the capital should be divided into 50,000 shares of 10*l.* each: the parties thereto of the first part covenanted with Cassels and Cargill, in the manner specified in the several articles and clauses thereafter contained; and, by such articles, it was (among other things) declared that there should be nine directors of the company, and that Henry Moulton and James Hardie and the several other persons therein named, should be the first directors, and that every director should faithfully and impartially discharge the duties of his office, and should, at every yearly general meeting, exhibit, to the proprietors present, a true and accurate summary or balance-sheet and report of the profits and accumulations or losses of the company, from the time of the commencement of its business to the end of the period included in the last preceding report, and of the state and progress of the affairs of the company; and that, unless a board of directors should declare to the contrary, no dividends should be made of the profits of the company for the period preceding the general meeting to be held in April, 1835; but such profits should be retained and form part of a fund to be called "The reserved Surplus Fund;" and that, in every succeeding year, the net profits of the company, after setting apart such proportion, not exceeding one-fourth part thereof, as the directors should think requisite for forming and maintaining the surplus fund, should be divided among the proprietors; and [*60] that, previous to every general meeting, *the directors should determine upon and declare such dividends out of the clear profits of the

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company ; and that no person should be capable of being elected or of continuing a director of the company, unless he was the holder of 100 shares ; and that no subscriber of any shares should be considered as a proprietor of the company in respect thereof, until he should have executed the deed of settlement, or a deed prepared under the direction of the directors, by which he should covenant to abide by the rules and regulations therein contained ; and that every proprietor of the company, as between him and all the other proprietors of the company, should be answerable and liable for the debts, losses and demands of the company, in proportion to their share and interest, for the time being, in the funds or property of the company.

At a general meeting of the company held on the 28th of April, 1836, a report of the directors was read, representing the affairs of the company to be in so flourishing a state that a dividend of 7l. per cent. could properly be paid out of the clear profits of the company ; and such dividend was then accordingly declared, by the directors, on the amount of capital then subscribed, being 10l. on each share. After the declaration of that dividend, it was resolved that, instead of an annual meeting, there should, in future, be half yearly meetings in February and August in each year, for the purpose of making out a balance sheet and report of the profits and loss of the bank and declaring a dividend ; and a supplementary deed of settlement was afterwards prepared for carrying that resolution into effect. Accordingly a general half yearly meeting of the company was held on the 25th of August, 1836, at which the directors made a report which was, partly, to the effect following :

* "The directors have much pleasure in informing the shareholders [*61] that, after deducting all bad debts and expenses for the half year ending the 30th of June, last, the net profits amount to 36,626l. 13s. 4d. ; the premiums received for shares during the same period, to 13,930l., making together, the sum of 50,556l. 13s. 4d. From this statement the directors feel fully warranted in declaring a half yearly dividend at the rate of 8l. per cent. per annum. The directors have further to report that, after paying this dividend amounting to 31,200l., there will remain a balance, upon the half year, of 19,356l. 13s. 4d., which they propose to add to the former surplus of 20,838l. 9s. 4d., making the surplus fund 40,195l. 2s. 8d. at 30th June, 1836. The directors cannot conclude this report without congratulating the shareholders on the steady and increased prosperity of the bank." These reports were printed and sent to the shareholders, and were inserted in the various newspapers circulated in Lancashire.

In August, 1836, the plaintiff, having a sum of 6000l. for which he was desirous of finding a safe and beneficial investment, and having seen printed copies of the above reports, was thereby, induced to think that the affairs of the company were in a flourishing condition, and that the purchase of shares therein would be a desirable investment ; but, before he made the investment, he made inquiries, as to the affairs of the bank, of Moulton, the chairman, Hardie, one of the directors, and Evans, the manager of the bank ; and all

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of them told him that the affairs thereof were in a very flourishing condition, and fully warranted the representations made of them in the reports, and assured him that he might safely invest his money in the purchase of shares.

The plaintiff, relying upon such representations and on those contained in the reports, expressed, to Moulton and Hardie, his determination to invest his 6000*l.* in the purchase of shares, and they undertook to procure and did procure 500 shares, being part of certain reserved shares then in the hands of the directors, to be granted, to the plaintiff, by the directors, at a premium of 4*l.* per share. The plaintiff paid the whole of the purchase money for the 500 shares, except 1000*l.*, with which his account with the bank was debited; and he executed the deeds of settlement, and was the last person but one who executed those deeds. Shortly afterwards the affairs of the bank became very much embarrassed; and the directors, finding it impossible to meet the engagements of the company, applied, to the Bank of England, to make them large advances for that purpose, which the Bank of England agreed to do; but the full amount of the pecuniary assistance required by the company or the terms upon which it was to be made, were not made known, to the plaintiff and most of the other shareholders, until the latter end of December, following. After the plaintiff had purchased his shares, the market price of the bank shares fell; and the plaintiff spoke to Moulton on the subject; and Moulton assured him that the fall was only temporary, and that there was no real ground for alarm, and recommended the plaintiff to take advantage of the fall and to purchase some more shares. The plaintiff, relying on those representations, purchased, from time to time up to the 6th of December, 1836, 115 more shares of different persons. Previously to the Bank of England making any advance to the Northern and Central Bank, the affairs of the latter were investigated by certain persons appointed by the Bank of England; and it was then discovered that the affairs of the company had been, for a long time, involved in pecuniary difficulties, and that they were never in such a prosperous state [62] as to justify the directors in making the reports and declaring the dividends before mentioned, and that such reports and dividends had been made and declared and that many other fraudulent practices had been adopted, by the directors, to deceive the public and keep up the price of shares, in order that they might dispose of the reserved shares and of other shares, belonging to them individually, at high premiums. The plaintiff also then discovered that Moulton, Hardie and Evans, in making the before mentioned representations to him, had been imposing on him in order to induce him to purchase the 500 shares; and that, at the time when they made those representations to him, they well knew that the same were untrue, and that the company had been, for a long time, and was then in great and increasing pecuniary difficulties. On the 29th of August, 1839, a general and extraordinary meeting of the shareholders of the bank was held, at which it appeared that one-fourth part of the paid up capital had been lost, and the

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was declared to be dissolved; and certain persons were directed to ap its affairs. On the 16th of December, 1839, William Smith, the manager of the bank, informed the plaintiff that the directors had declared the shares standing in his name, to be forfeited to the company in consequence of his not having paid them what was due on his account current.

The bill, after stating as above, alleged that all the debts of the company had been paid; and that, inasmuch as the plaintiff was induced to purchase his 500 shares by the fraudulent representations aforesaid, as well as by the fraudulent means adopted, by the directors, to deceive the public with respect to the real state of the affairs of the bank and to keep up the market price of shares, he was entitled to have the purchase set aside and his purchase money repaid to him by the company: that he was more [*64] especially induced to purchase the shares by means of the fraudulent representations of Moulton, Hardie and Evans: that Hardie had since died intestate and wholly insolvent, without leaving any assets for the payment of his debts: that if, in the opinion of the court the plaintiff was not entitled to the relief prayed against the company, then he was entitled to be repaid the purchase money of the 500 shares, by Moulton and Evans: that Connell had, pursuant to the act of Parliament, been duly appointed and was then one of the public registered officers of the company, in whose name the company might sue and be sued either at law or in equity.

The bill prayed that it might be declared that the plaintiff was induced to purchase the 500 shares by means of the fraudulent representations and practices of the directors, and, more especially, by the fraudulent representations of Moulton, Evans and Hardie, and that such purchase might, as between the plaintiff and the company, be declared to be void; and that the company might be ordered to repay, to the plaintiff, the amount of his purchase money, with interest thereon: or, in case the court should be of opinion that the plaintiff was not entitled to have the purchase set aside as against the company, then that it might be declared that the plaintiff was by reason of the fraudulent representations of Moulton and Evans, entitled to have his purchase money, with interest, repaid to him by Moulton and Evans, and that they might be ordered to pay the same to him.

Connell demurred, to the bill, for want of equity, and because Hardie's personal representative, and the persons who were directors of [*65] the bank at the time when the plaintiff purchased the shares in the bill mentioned (the 500 shares *qu. ?*) were not made parties to it.

Mr. Jacob and Mr. Sharpe, in support of the demurrer:—The bill alleges that the directors of the company, that is to say, those who were directors in the year 1836, made divers fraudulent representations for the purpose of deceiving the public at large, and inducing the public to buy shares at prices which were beyond their value; and it particularly mentions three persons of the names of Moulton, Hardie, and Evans as having been concerned in

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The plaintiff, relying upon such representations and on those contained in the reports, expressed, to Moulton and Hardie, his determination to invest his 6000*l.* in the purchase of shares, and they undertook to procure and did procure 500 shares, being part of certain reserved shares then in the hands of the directors, to be granted, to the plaintiff, by the directors, at a premium of 4*l.* per share. The plaintiff paid the whole of the purchase money for the 500 shares, except 1000*l.*, with which his account with the bank was debited; and he executed the deeds of settlement, and was the last person but one who executed those deeds. Shortly afterwards the affairs of the bank became very much embarrassed; and the directors, finding it impossible to meet the engagements of the company, applied, to the Bank of England, to make them large advances for that purpose, which the Bank of England agreed to do; but the full amount of the pecuniary assistance required by the company or the terms upon which it was to be made, were not made known, to the plaintiff and most of the other shareholders, until the latter end of December, following. After the plaintiff had purchased his shares, the market price of the bank shares fell; and the plaintiff spoke to Moulton on the subject; and Moulton assured him that the fall was only temporary, and that there was no real ground for alarm, and recommended the plaintiff to take advantage of the fall and to purchase some more shares. The plaintiff, relying on those representations, purchased, from time to time up to the 6th of December, 1836, 115 more shares of different persons. Previously to the Bank of England making any advance to the Northern and Central Bank, the affairs of the latter were investigated by certain persons appointed by the Bank of England; and it was then discovered that the affairs of the company had been, for a long time, involved in pecuniary difficulties, and that they were never in such a prosperous state [63] as to justify the directors in making the reports and declaring the dividends before mentioned, and that such reports and dividends had been made and declared and that many other fraudulent practices had been adopted, by the directors, to deceive the public and keep up the price of shares, in order that they might dispose of the reserved shares and of other shares, belonging to them individually, at high premiums. The plaintiff also then discovered that Moulton, Hardie and Evans, in making the before mentioned representations to him, had been imposing on him in order to induce him to purchase the 500 shares; and that, at the time when they made those representations to him, they well knew that the same were untrue, and that the company had been, for a long time, and was then in great and increasing pecuniary difficulties. On the 29th of August, 1839, a general and extraordinary meeting of the shareholders of the bank was held, at which it appeared that one-fourth part of the paid up capital had been lost, and the

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The bill, after stating as above, alleged that all the debts of the company had been paid; and that, inasmuch as the plaintiff was induced to purchase his 500 shares by the fraudulent representations aforesaid, as well as by the fraudulent means adopted, by the directors, to deceive the public with respect to the real state of the affairs of the bank and to keep up the market price of shares, he was entitled to have the purchase set aside and his purchase money repaid to him by the company: that he was more [*64] especially induced to purchase the shares by means of the fraudulent representations of Moulton, Hardie and Evans: that Hardie had since died intestate and wholly insolvent, without leaving any assets for the payment of his debts: that if, in the opinion of the court the plaintiff was not entitled to the relief prayed against the company, then he was entitled to be repaid the purchase money of the 500 shares, by Moulton and Evans: that Connell had, pursuant to the act of Parliament, been duly appointed and was then one of the public registered officers of the company, in whose name the company might sue and be sued either at law or in equity.

The bill prayed that it might be declared that the plaintiff was induced to purchase the 500 shares by means of the fraudulent representations and practices of the directors, and, more especially, by the fraudulent representations of Moulton, Evans and Hardie, and that such purchase might, as between the plaintiff and the company, be declared to be void; and that the company might be ordered to repay, to the plaintiff, the amount of his purchase money, with interest thereon: or, in case the court should be of opinion that the plaintiff was not entitled to have the purchase set aside as against the company, then that it might be declared that the plaintiff was by reason of the fraudulent representations of Moulton and Evans, entitled to have his purchase money, with interest, repaid to him by Moulton and Evans, and that they might be ordered to pay the same to him.

Connell demurred, to the bill, for want of equity, and because Hardie's personal representative, and the persons who were directors of [*65] the bank at the time when the plaintiff purchased the shares in the bill mentioned (the 500 shares *qu. ?*) were not made parties to it.

Mr. Jacob and Mr. Sharpe, in support of the demurrer:—The bill alleges that the directors of the company, that is to say, those who were directors in the year 1836, made divers fraudulent representations for the purpose of deceiving the public at large, and inducing the public to buy shares at prices which were beyond their value; and it particularly mentions three persons of the names of Moulton, Hardie, and Evans as having been concerned in

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specific representations made to the plaintiff individually. The parties accused are the directors and officers of the company in 1836, and especially Moulton, Hardie, and Evans; Moulton and Hardie being directors, and Evans being the manager of the bank. Hardie, however, is not represented on this record.

The plaintiff has endeavored, in this suit, to avail himself of the provisions of certain acts of Parliament,^(a) by which, for certain purposes, the public officers of banking companies may sue and he sued on behalf of the company, that is to say, on behalf of the company for the time being. With that view the plaintiff has filed his bill against Mr. Connell, whom he states to be the public registered officer of the bank, and he treats Mr. Connell as the representative of the entire company, that is, of the entire company as it exists in the year 1840, not as it existed in 1836. The bill prays that it may be declared that the plaintiff was induced to purchase the 500 shares, by [*66] means of the "fraudulent representations and practices, hereinbefore mentioned, of the directors of the said company; which must mean the directors at the time the representations were made, or, in other words, the directors of 1836. That is a declaration which is to govern the rest of the prayer: and then the bill prays that such purchase may, as between the plaintiff and the company, be declared to be void, and that his purchase money may be repaid to him. Now, in praying relief against the company, in a bill filed against a public officer of that company in the year 1840, the plaintiff is praying relief against the members of that company as they exist in the year 1840; and we submit that he has erred in imagining that, for the fraud committed on him in 1836, by the directors of the company, he has a remedy against those individuals who constitute the company in 1840. His remedy is against the persons who committed the fraud on him, namely, the directors of the company in 1836, and, especially, Moulton, Hardie and Evans; and, if he has any remedy against any other members of the company, it is not a remedy against the entire company as it exists in 1840, but only a remedy against those who constituted the company at the time when he entered into it, that is, against all the members of the company except himself,—against all those who participated in the receipt of his money. Secondly: the plaintiff has erred in making Connell the party to be sued as representing the company. The plaintiff is himself a member of the company, not only in respect of the 500 shares which he purchased of the directors; but also in respect of the 115 shares which he purchased of different persons. This then is not a suit by him against the entire company, but against the company *minus* one. The question raised on this record is not a question between Seddon and [*67] *the Northern and Central Bank; but between Seddon and all the members of the bank except Seddon. In a suit of that nature, that is, where the dispute is an intestine one, the acts of Parliament do not authorize the public officer to represent the company. He is authorized to represent

(a) 7 Geo. 4, c. 46, and 1 and 2 Vict. c. 96.

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the company where one member of the company, has, in his individual character, private dealings with the company, by keeping a banking account with them. In such a case the act of Parliament^(a) provides that, for the purposes of his separate dealings with the company, he shall sue them exactly in the same way as if he were a stranger, and that there shall be no set-off of his rights as a partner, against his rights as a customer or creditor: therefore, if Seddon had deposited money in this bank, or had got a bill signed by this bank, and a dispute arose between him and the bank, then that would be a case in which he might bring his action or suit against the public officer: because, in that case, the public officer would represent the entire bank, including Seddon; and Seddon would have to bear his proportion of whatever was recovered in that action or suit: he would, in his character of customer, recover the balance of his account; but, in his character of shareholder, he would have to bear his proportion of that balance, and of the costs, too, if any. Now that is not the nature of the present suit: but it is one in which the plaintiff seeks to disengage himself from the partnership; raising therefore a question between himself and the other members.

We now call the attention of the court to the enormous and whimsical injustice which would be done, if "the species of suit which this [*68] plaintiff has framed, could be sustained. As Connell is made a defendant, as representing the entire company, the case is just the same as if, instead of his being made a defendant, the names of all the existing members of the company, appeared as defendants on this record. Now the case represented is that the directors of the company in the year 1836, formed a scheme to delude the public at large into buying shares in this bank, and that that scheme succeeded to a great extent; and that they entrapped the plaintiff and a great variety of other persons: so that the plaintiff is not the only sufferer by the fraud of the directors: and, consequently, if he were to succeed in this suit, he would obtain relief not only against the other innocent victims of the directors, but also against himself; for he does not seek to extricate himself from the other 115 shares which he purchased; but admits himself to remain a member of the company in respect of those shares. Again, each of the other victims would be entitled to have exactly the same relief against the rest of the company, including the plaintiff: so that you would have not the practicers of the fraud being made responsible to the victims, but one victim being made responsible to another and to himself. It is obvious, therefore, that nothing like justice would result from sustaining the present bill. The truth is, the real remedy for a person who, like the plaintiff, has been fraudulently entrapped into purchasing shares in a partnership, is to call upon those who did entrap him, to make good to him what he has paid, and to take back the shares with the liabilities upon them, and to indemnify him against all liability. *Stainbank v. Fernley.*^(b)

(a) 1 and 2 Vict. c. 96.

(b) *Ante*, vol. 9, p. 556.

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[*69] *Thirdly: the company is no longer in a situation in which the clauses in the act of Parliament relating to the public officers of companies, apply: for it is stated, in the bill, that the company is dissolved, and that all the debts are paid off; and, therefore, practically speaking, the banking business is terminated and the partnership is at an end: and, under the acts of Parliament, the power of suing the public officer and the power of suing by him, exists only whilst there is a partnership. Although the partnership may exist, for the purpose of winding up its affairs as between the co-partners, it is impossible, on these acts of Parliament, to show that this power of suing and being sued, continues for that purpose.

The defendant has demurred also for want of parties. It is hardly necessary to say anything on that ground, for it is clear that the directors of 1836, who are primarily liable, and Moulton, Hardie and Evans, who are specifically charged with fraud, ought to have been made parties. With respect to Hardie, it is said that he is dead and that he has not left assets for the payment of his debts; but it is not stated whether he has or has not a representative.

Mr. Knight Bruce, Mr. Stuart and Mr. Geldart, for the plaintiff:—First: with regard to the objection as to the absence of Hardie's personal representative from the record. The statement is that Hardie has departed this life intestate, and that he died wholly insolvent without leaving any assets for the payment of his debts. It is not stated, nor is it material to state, [*70] whether any representation to him has been taken out or not. If his personal representative were a necessary party in any view of the case, the allegation that he died insolvent without leaving any assets for the payment of his debts, is alone sufficient to prevent its being necessary to make his representative a party.

But there are still stronger grounds for contending that it was not necessary to make his personal representative a party. In the case of a breach of trust, which, in this court, stands on the footing of a joint and several debt, the court requires all the persons who were concerned in committing the breach of trust, to be parties to the suit; because contribution may be enforced, *inter se*; but, where there can be no contribution, the reason fails. So, in the courts of common law, if all the parties to a contract are not made parties to the action, the defendant may either plead in abatement or demur, according to the circumstances; but he cannot do so in the case of a *tort*; for every *tort* is, in its nature, several, and the plaintiff may sue any one of the parties by whom the *tort* was committed, and there can be no defence, either by plea or demurrer, against that mode of proceeding. In equity the distinction exists, not between contract and *tort*, but between matters as to which contribution may be enforced and matters as to which it cannot. A breach of trust is in the nature of a wrong; but it is treated only as a matter of civil debt, that is as a contract; and there may be contribution. A man may commit a breach of trust without being guilty of a moral fraud. But where there is a case of palpable fraud, where several persons acting, to a certain extent,

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jointly, make false and fraudulent representations to an individual, with a view to induce him to engage in a particular speculation, that is a case which, though it is not a matter of contract, is *remediable in equity; [*71] but it is not a case in which this court will enforce contribution. It was, therefore, matter of surplusage to allege that Hardie was dead; and still more so, to allege that he had died insolvent; because, if he had been living and in the most flourishing circumstances, it was purely optional, in the plaintiff, to make him a party or not. *Evans v. Becknell*.^(a) Even if this had been a case of contract, the allegation of insolvency would have been perfectly sufficient to dispense with Hardie's presence or that of his representative. *Cockburn v. Thompson*; ^(b) *Angerstein v. Clarke*; ^(c) *Madox v. Jackson*.^(d)

The next and the most important question in this case, is whether Connell is properly made a party to this suit, as representing the company. Suppose that there was a partnership consisting of four persons, and a friend or relation of one of the partners, but not by his desire or in concert with him, makes a false and fraudulent representation to A. B., that the partnership is solvent and flourishing, and recommends him to join it; and he joins it accordingly. In such a case, there might be considerable difficulty in showing that the partnership might be treated as a nullity, and that A. B. might file a bill, against the person who induced him to enter into the partnership, for the purpose of obtaining compensation for the loss occasioned by the fraud, and also against the members of the firm for the purpose of avoiding the contract which the other defendant had induced him to enter into. That, however, is not the case on this record; and it may be admitted that, in such a case, A. B.'s only remedy would be against the party who made the representation. But, is the case the same where one of the *partners, has by [*72] fraudulent representations, induced the formation of the partnership?

There the contract itself is vitiated by the act of one of the parties to it; and, if that contract is founded in fraud, the whole of the transaction fails; and more especially if the party engaged in that transaction, be one taking a prominent part on behalf of the partnership, and authorized to act for the partnership. There no one could doubt that the contract would be vitiated, and that the bill to be filed would be a bill against all the partners to be relieved from the partnership, that is, a bill against the four co-partners to get back the money which they had obtained by means of the fraud of one of them, and against that one, to make him answerable for all the consequences beyond the mere fact of annulling the agreement. The connection, of the party who perpetrated the fraud, with the partnership, entitles the deluded party to be delivered from the whole transaction. Now, in this case, Moulton and Hardie were directors, and Evans was the manager of the company: so that they were not only partners, but agents of the company: and the bill ex-

^(a) 6 Ves. 174.^(b) 16 Ves. 326.^(c) 3 Swanst. 147, note.^(d) 3 Atk. 406.

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pressly charges that, by their false representations, as well as by the false representations contained in the reports of the whole body of directors, the plaintiff was induced to purchase the 500 shares in the bank. In such a case there can be no doubt that the plaintiff is entitled to that which he asks by his bill, namely, to rescind the transaction, to get back his money from the partnership; and, moreover, to fix the perpetrators of the fraud with the consequences of the fraud.

Then it was suggested that there is no right to sue the company in respect of a demand of this description; and various ingenious arguments were [*73] adduced in support of that proposition, relating to the state of the "law rather than to the state of the cause: for, what is this but a debt due from the partnership to an individual. Now the 7 Geo. 4, c. 46, provides that: "all actions, suits and proceedings, at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate or others, whether members of such co-partnership or otherwise, against such co-partnership, shall and lawfully may be commenced, instituted and prosecuted against any one or more of the public officers nominated as aforesaid for the time being of such co-partnership, as the nominal defendant." And the 1 and 2 Vict. c. 96 provides: "that any person now being or having been, or who may hereafter be or have been a member of any co-partnership now carrying on, or which may hereafter carry on the business of banking under the provisions of the said recited acts, may, at any time during the continuance of this act, in respect of any demand which such person may have either solely or jointly with any other person, against the said co-partnership or the funds or property thereof, commence and prosecute, either solely or jointly with any other person (as the case may require) any action, suit or other proceeding at law or in equity against any public officer appointed or to be appointed, under the provisions of the said acts, to sue and be sued on the behalf of the said co-partnership; and that any such public officer may, in his own name, commence and prosecute any action, suit or other proceeding, at law or in equity, against any person being or having been a member of the said co-partnership, either alone or jointly with any other person against whom any such co-partnership has or may have any demand whatsoever; and that every person being or having been a member of any such co-partnership, shall, either solely or jointly with any other person (as [*74] the case may require) be capable of "proceeding against any such co-partnership by their public officer, and be liable to be proceeded against, by or for the benefit of the said co-partnership, by such public officer as aforesaid, by such proceedings and with the same legal consequences as if such person had not been a member of the said co-partnership." Now the issue here raised is that, in effect, the plaintiff has not become a member of the partnership; inasmuch as his junction was obtained by fraud: and he is suing the partnership as he alleges it to stand, that is, as a partnership without him. This then is a case for an equitable action, against the partnership

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for money had and received, as in *Colt v. Wollaston*,^(a) and *Green v. Barrett*.^(b) Whom, then, is the plaintiff to sue but the public officer of the company? But, if the plaintiff is to be treated, for any purpose, as a member of the co-partnership (which, we submit, he cannot be,) still he has a right, by the express terms of these acts of Parliament, to sue the partnership. The embarrassment (if any) arising from such a proceeding, is one which the act of Parliament has created, and the court must deal with it as well as it can. All that your Honor decided in *Stainbank v. Fernley*, was that the defrauded party had a right (if he pleased so to do,) to treat the partnership as subsisting, and to proceed for compensation and indemnity against one or more of the perpetrators of the fraud, omitting the rest, without repudiating the partnership or seeking to set aside the engagements or liabilities which had been created by the fraud. That case, therefore, is an authority in our favor; for it shows that it is not necessary to make either Hardie's representative or the other directors, parties to this suit. Again: the directors did not join with Moulton, Hardie and Evans in making "the representa- [75] tions which induced the plaintiff to purchase his 500 shares in the bank: and, even if they had done so, it would have been optional, in the plaintiff, to make them co-defendants or not; because the case made by his bill is not one in which this court will compel contribution. Besides, the company is represented on this record, by its public officer, and, therefore, it would have been improper as well as unnecessary to make the directors parties.

The only objection to the bill which remains unanswered, is that the acts of Parliament which have been referred to do not authorize the public officer to be sued where the partnership has been dissolved. That is a gratuitous assumption and contrary to every principle both of law and justice. It has been repeatedly laid down by Lord Eldon and other Judges, that, with respect to demands on a partnership the partnership continues until all those demands are satisfied. The dissolution has relation only to future transactions; the partnership continues as to all antecedent ones. Suppose that a joint stock banking company had received a deposit of half a million for a purpose which was to be answered in two or three days, and that by the provisions of their deed of settlement, they were enabled to dissolve on short notice; then, according to the argument in support of this last objection, all that they would have to do would be to dissolve, and the creditor would be driven to obtain his money by suing all the shareholders. Such a consequence would be so oppressive and so utterly at variance with the language and spirit of the acts of Parliament and with the rules of law, that it was scarcely necessary to say a word upon it. It is quite clear that, as to its obligations; the "part- [76] nership continues until all those obligations are discharged.

THE VICE-CHANCELLOR :—The question regarding Mr. Connell, is a

(a) 2 P. W. 154.

(b) Ante, vol. 1, p. 45.

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very important one; and I shall not determine it, without reading over the act of George the 4th, as well as the act of her present Majesty. There is weight in the observation that the acts of Parliament were not meant to apply to a case where one member of a partnership makes a demand against the other members.

11th June.—THE VICE-CHANCELLOR:—The only question which I am now about to determine, is whether Mr. Connell is properly made a defendant to this bill, in his character of one of the public officers of the Northern and Central Banking Company.

I have read over both the acts of Parliament: and, in my opinion, it is perfectly plain that neither of them was meant to apply to demands made by one or more members of a partnership against the other members of that partnership.

The relief which the plaintiff asks, is that it may be declared that he was induced to purchase the 500 shares in the bank, by means of the fraudulent representations and practices, thereinbefore mentioned, of the directors of the company, and, more especially, by the fraudulent representations of the defendants Moulton and Evans, and of Hardie; and that, as between the [*77] plaintiff and the company, such purchase may be declared to be void; and that the company might be ordered to repay, to him, the amount of his purchase money. It is obvious, therefore, that the plaintiff, at the same time as he asks that, as between him and the company, the relief may be given, admits that, with respect to all other persons, he is a member of the company.

Now there has been a legislative interpretation put by the act 1 and 2 Vict. on the effect of the act of 7 Geo. 4; though there are words, in the 7 Geo. 4, which might, I think, have made it questionable at least whether the act of Geo. 4 did not, itself, comprehend the very cases which are provided for by the 1 and 2 Vict. However the act of the 1 and 2 Vict. after reciting the act of the 7 Geo. 4, and an act of the 6 Geo. 4, and that it was expedient those acts should be amended, proceeds to enact; "That any person now being, or having been, or who may hereafter be, or have been, a member of any co-partnership now carrying on, or which may hereafter carry on the business of banking under the provisions of the said recited acts, may, at any time during the continuance of this act, in respect of any demand which such person may have, either solely or jointly with any other person, against the said co-partnership, or the funds or property thereof, commence and prosecute either solely or jointly with any other person (as the case may require,) any action, suit or other proceeding, at law or in equity, against any public officer appointed or to be appointed, under the provisions of the said acts, to sue and to be sued on the behalf of the said co-partnership; and that any such public officer may, in his own name, commence and prosecute any action, suit or other proceeding at law or in equity, against any person being

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or having been a member of "the said co-partnership, either alone or [*78] jointly with any other person against whom any such co-partnership has or may have any demand whatsoever; and that every person being or having been a member of any such co-partnership, shall, either solely or jointly with any other person (as the case may require,) be capable of proceeding against any such co-partnership, by their public officer, and be liable to be proceeded against, by or for the benefit of the said co-partnership, by such public officer as aforesaid, by such proceedings, and with the same legal consequences as if such person had not been a member of the said co-partnership, and that no action or suit shall in anywise be affected or defeated by reason of the plaintiffs or defendants, or any of them respectively, or any other person in whom any interest may be averred, or who may be in anywise interested or concerned in such action, being or having been a member of the said co-partnership; and that all such actions, suits and proceedings shall be conducted and have effect as if the same had been between strangers." I look upon this as a legislative declaration[1] that the particular cases which were provided for by 1 and 2 Vict. were not provided for by the 7 Geo. 4. But it is perfectly plain that the act of the 1 and 2 Vict. though it meant to give relief in a case where one member of a partnership might, either solely or jointly with another person, have a demand against the partnership, or *vice versa*, the partnership might have a demand against a member of the partnership, either solely or jointly with some other person, no part of it can by any construction however forced, be made to provide for determining a question between one member of the partnership as such, and the other members of the partnership as such. In my opinion, therefore, there is no ground whatever for making Connell a party to the suit in the 'character of public officer of the company, thereby representing [*79] the whole company.

If the plaintiff chooses to seek relief as against the other members of the company, he must seek it in some other form; in what form, it is for him to be well advised before he amends his bill.

Demurrer allowed.(a)

(a) The Vice-Chancellor, in the course of the argument on the demurrer filed by the defendant Moulton, a report of which is subjoined, said that what he had decided on Connell's demurrer was, in effect, that inasmuch as the public officer of the company did not, under the acts of Parliament, represent all the company except one, and as the plaintiff was, in effect, suing all the company except himself, the public officer was improperly made a party: that, as Mr. Jacob had said, the acts of Parliament did not authorize suits by one or more of the partners against the rest, to be managed by means of making the public officer a party.

[1] As to statutory explanation, see ante, 48, n.

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Demurrer; Pleading; Parties; Fraud.

A. filed a bill against a company, and also against some of the directors of the company, praying relief against the company, and if he should be held not to be entitled to relief against the company, then praying relief against the directors. Held that the bill was demurrable.

An allegation in a bill that a person who would have been a necessary party, was dead, insolvent, and without leaving any assets for payment of his debts, is sufficient to dispense with his representative being made a party.

Where a bill is filed for relief in respect of a fraud alleged to have been committed by several persons, it is not necessary that *all* the persons charged with the fraud should be made defendants.

The defendants Moulton and Evans demurred, separately, to the bill, on the same grounds as the defendant Connell had done, namely, for want of equity and because Hardie's representative and the persons who were directors of the bank at the time when the plaintiff purchased his shares, were not made parties to the bill.

[*80] *Mr. Jacob and Mr. Sharpe, in support of Moulton's demurrer:—The question that arises on this demurrer is quite independent of either of the acts of Parliament before referred to.

The bill first prays relief against the company; and then it prays as follows: "Or in case this court shall be of opinion that the plaintiff is not entitled to have the purchase set aside, as against the said company, then that it may be declared that the plaintiff, is by reason of the fraudulent representations, hereinbefore mentioned, of the said defendants H. Moulton and T. Evans, entitled to have the amount of his purchase money repaid to him by the said defendants H. Moulton and T. Evans, and that they may be ordered to pay the same to him." Now, it is essential to the maintaining of a suit in equity, that the plaintiff should know and state the relief which he is entitled to. Where, a defendant is liable to the plaintiff in one of two ways; as, for instance where he is bound either to transfer stock or to pay money to the plaintiff, or is liable to be charged either with interest or with profits in respect of money due from him to the plaintiff, relief may be prayed against him in the alternative; because he is responsible, to the plaintiff, *quacunq;ue via*. But a plaintiff cannot file a bill against A. and B. praying relief against A. and then praying relief against B. in case only he fails in obtaining relief against A. The case of *Edwards v. Edwards(a)* somewhat resembles this. There the plaintiffs stated that their title was good at law; and, if not, that it was a

case for equitable relief. Lord Eldon allowed a demurrer to the bill, [*91] on the ground that the plaintiffs were *bound to state, distinctly, whether their case was at law or in equity. It so happens, in this case, that Connell's demurrer for want of equity, has been allowed: but, if that had not been the case it would have been clear, on reading the prayer of this bill, that either his demurrer or the demurrers of Moulton and Evans must be allowed.

Supposing, however, that the bill had not prayed relief, contingently,

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against Moulton and Evans, it would still have been erroneous for want of parties. It states quite as strong a case against Hardie, as it does against Moulton and Evans: but, by way of excuse for not making his representative a party, it alleges that he departed this life insolvent and without leaving any assets for the payment of his debts. It is, however, quite consistent with that allegation, that he may have left assets sufficient to pay 19s. in the pound on all the demands on his estate.

If the plaintiff is entitled to any relief at all, it must be relief against all the persons who were concerned in the fraud of which he complains. On that part of the case the plaintiff's counsel have advanced a doctrine which was never before heard of in a court of equity. They said that, in a case of gross fraud, that is, where three persons concur in cheating another, a bill may be filed against one of them alone, without making the others parties; because there can be no contribution. But where is the line drawn between that which, in common language, is called fraud, in respect of which it is said, a court of equity does not enforce contribution, and that which, in a court of equity alone, is termed so, and in respect of which a court of equity does enforce contribution, such as a dealing between an attorney and his client, or between a guardian and his ward. A court of equity makes [*82] no distinction between the different kinds of fraud; it deals with every thing as a matter of property. It does not make any man pay damages for fraud; but makes him make restitution. The principle of equity, in all such cases where it gives relief, is to cause restitution to be made, of the property that has been improperly acquired, by the persons who have acquired it, whether by gross fraud or by that which, in equity alone, is called a fraud. Why then is Moulton sued alone? The plaintiff's money was applied for the benefit of the company at large: and, consequently, all the old directors and shareholders ought to have been made parties; for it is by them that restitution ought to be made.

We submit, therefore, that the bill is erroneous, first, because it prays relief against Moulton, in the event only of the bill being dismissed as against Connell the representative of the company; and, secondly, because Hardie's representative and the other persons who are equally liable to make restitution to the plaintiff, are not made parties.

Mr. *Knight Bruce*, Mr. *Stuart* and Mr. *Geldart*, in support of the bill:—

The course which has been pursued, in this case, of putting in three separate demurrers, was wholly unnecessary, and tends only to increase expense: for, though a demurrer cannot be bad in part and good in part, yet it may be bad as to one or more of the demurring parties and good as to the rest.

In many cases of fraud, as for instance where persons are concerned in fraudulently procuring a deed, they *having no interest in the pro- [*83] perty, restitution is out of the question. In such a case it is not restitution, but damages which this court gives, although the relief is not so called.

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Lingard v. Bromley.(a) The fraud with which the directors are charged, was not committed by them in concurrence with Moulton, Hardie and Evans, but was a totally different and distinct act.

The cases of *Cockburn v. Thompson*, *Angerstein v. Clarke* and *Madox v. Jackson*, which have been before cited, show that the allegation that Hardie died insolvent, is quite sufficient to dispense with the presence of his personal representative on this record.

Lastly; it was said that the bill is erroneously framed, because it prays relief against Moulton and Evans, in case only the company shall not be held liable. Now Moulton and Evans are directly liable, to the plaintiff, on the ground of fraud. The company may, perhaps, in the progress of the cause, discharge themselves by evidence, and be held not liable to the plaintiff's demand. The plaintiff then has a right to sue Moulton and Evans, they being liable to him, at all events. But can they complain because he does not deal harshly with them, but chooses to proceed against the party who has got his money before he resorts to them for it. The rule established by *Edwards v. Edwards* and other cases of that description, has no application to the present case. All that those cases decide, is that the plaintiff must (as has been done here) state his case intelligibly; that, if he comes to a court of equity for relief, he must show that he comes on equitable grounds and that he is entitled [*84] to relief in a court of equity. If he states a case which *may be either a case at law or in equity, the court cannot tell what he means.

We trust that, as the bill states a clear case of fraud against Moulton, his demurrer for want of equity as well as for want of parties, must fail.

Mr. Jacob and Mr. Sharpe in support of Evans' demurrer:—All the arguments in support of Moulton's demurrer apply, equally, to Evans'. Moreover, Moulton was a director and shareholder; but it is not stated anywhere in the bill, that Evans was either one or the other. He is stated to have been manager of the bank. That shows only that he was clerk, secretary or agent of the company. It cannot be assumed that, because he was employed as manager, he was a partner in the bank. An agent to the perpetrators of a fraud may be made a co-defendant to a bill to be relieved against the fraud, for the purpose of being subjected to the costs of the suit, but not for the purpose of having relief prayed against him. Here, however, the plaintiff does not pray for costs against Evans, but, obviously, brings him before the court, not as an agent against whom he prays costs, but as a principal, against whom he prays relief, and relief only. In common cases, the costs of the suit are given as incidental to the relief, and, therefore, they need not be specifically prayed for. Consequently, bills in general need not have a separate prayer for costs: but, if a plaintiff has a case only for costs against a defendant, he must make the costs a specific part of his prayer: for costs being incidental to the relief,

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if no relief is prayed against the defendant, there is nothing to which the costs can be incident. Therefore, as this bill does not "pray specifically for costs, against Evans, it cannot be supported against him. [*85] There is another ground too, which makes his case stronger than that of any of the other defendants. He, not being a shareholder, was not one of the recipients of the money. The bill, therefore, as to him, is clearly out of court.

Mr. *Knight Bruce*, Mr. *Stuart* and Mr. *Geldart* for the plaintiff, read several passages in the bill, in order to show that Evans was a shareholder in the bank; and particularly one in which it was alleged that a great number of shares in the bank, were allotted to him on cash credit, and that he was allowed, from time to time either to sell them at a premium or to retain them; and they said that the admission, made by the defendant's counsel, that an agent might be made a defendant to a suit to be relieved against a fraud, showed that a court of equity regarded a moral fraud as a *tort*: and they cited *Stainbank v. Fernley*, *Burrowes v. Lock*,^(a) and *Evans v. Bicknell*.^(b)

Mr. *Jacob*, in reply, said that an agent, in a case of fraud, was made a party to the suit, for the purpose of being subjected, not to damages, but only to costs.[1]

13th July.—THE VICE-CHANCELLOR:—As to Moulton and Evans it is objected that Hardie's representatives are necessary parties. I think that they are not necessary parties; because he is stated to have died insolvent, a point expressly decided in *Madox v. Jackson*,^(c) and uniformly acted upon ever since.

"I also think that the other directors are not necessary parties: [*86] *Lingard v. Bromley*:^(d) because the remedy sought here is in respect of their fraudulent act, that is a *tort*, and not a mere breach of trust.[2]

As to Evans, upon the bill, I think it must be taken that he is not a shareholder. But, whether he was a shareholder or not, is immaterial; because a case of fraudulent misrepresentation is sufficiently stated against him in

(a) 10 Ves. 470.

(b) 6 Ves. 174.

(c) 3 Atk. 405.

(d) 1 V. & B. 114.

[1] Vide *Beadles v. Burch*, post, 332. *Graham v. Coape*, 3 Myl. & Cr. 643.

[2] Vide *Stainbank v. Fernley*, 9 Sim. 556. "In cases of this kind where the liability arises from the wrongful act of the parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party. It is, therefore, not necessary to make all parties who may more or less have joined in the act complained of; nor would any one derive any advantage from their being all made defendants, because, as the decree would be general against all found to be guilty of the charge, it might be executed against any of them." Lord Cottenham. *The Attorney General v. Wilson*, Cr. & Ph. 28. Lord Cottenham, in previous decisions, has shown his disposition to get rid of the technical rules, as to necessary parties, when the operation of those rules would be subversive of justice. *Mare v. Malachy*, 1 Myl. & Cr. 559. *Taylor v. Salmon*, 4 Myl. & Cr. 134, 141. The Federal Courts, in the exercise of their equity jurisdiction, have found themselves embarrassed, not merely by the technical rule, but by other considerations arising from constitutional, or statutory restrictions. Ought any system of positive legislation to exist, which requires judges to exercise their ingenuity—even sophistry—to prevent its acting unjustly?

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respect of which he is liable, though he gained nothing by it. *Arnot v. Biscoe.*(a)

But it seems that the relief asked against Moulton and Evans, is only in the event of the court not giving relief against the company. The prayer is expressly so framed: and therefore in that respect I think the demurrers, both of Moulton and Evans, must be allowed; for the bill must show, as against each defendant, that the plaintiff has a direct right to relief. But the plaintiff, upon this bill, can only have relief contingently.[1] It seems to me that the prayer has been so constructed by mistake; and that relief should have been directly asked against Moulton and Evans. Therefore, though I allow the demurrers, I think it right that the plaintiff should have leave to amend upon the usual terms.(b)

[*87]

*LEICESTER v. LEICESTER.

1839: 15th March.—Practice; Election.

Although the time for excepting to the answer to the original bill may have expired, yet, if the plaintiff amends his bill, the defendant cannot obtain an order for the plaintiff to elect whether he will proceed at law or in equity until the time for excepting to the answer to the amendments has expired.

Whether that time is to be computed according to the old practice, or the new orders: *Qu.?*

THE defendant Mary Leicester put in her answer on the 18th of April, 1838. The plaintiff then amended his bill. The defendant answered the amendments on the 22d of February, 1839; and, on the 6th of March following, she obtained an order that the plaintiff might elect whether he would proceed at law or in equity.

The plaintiff now moved to discharge that order, for irregularity.

Mr. Jacob and Mr. Anderdon in support of the motion:—It is irregular to obtain an order for putting a plaintiff to his election whether he will proceed at law or in equity, before the time for excepting to the answer has expired. If the new orders are to regulate the time allowed for excepting, two months have not elapsed since the answer to the amended bill was put in. If the old practice applies, then, the answer to the amendments having been filed in vacation time, the plaintiff has eight days of the ensuing term, to except to it. *Browne v. Poyntz*,(c) *Coupland v. Bradock*.(d) In either case, therefore, the order has been irregularly obtained.

Mr. K. Bruce and Mr. Sharpe for the defendant:—Two very important points of practice are here involved. First: with regard to the time for excepting. Secondly: in respect to this being a case of an original and amended bill.

(a) 1 Vez. 95.

(b) The above was copied from the Vice-Chancellor's own note of his judgment

(c) 3 Madd. 24.

(d) 5 Madd. 14.

[1] Vide Jac. 336, n. 1.

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*According to the old practice, the defendant obtained the order to elect at the expiration of eight days from filing his answer. That was considered a reasonable period, as, on the one hand, affording to the plaintiff a sufficient time to determine whether he would except to the answer or not; and, on the other, as preventing the defendant from being unreasonably delayed from procuring the order. At the end of eight days, if no exceptions were filed, the order to elect followed as of course. The plaintiff was still at liberty to except to the answer by procuring a special order for leave to except *nunc pro tunc*; but neither the circumstance that the plaintiff obtained the special order, nor the fact that the answer proved insufficient, was allowed to prejudice the order obtained by the defendant. The 4th of Lord Lyndhurst's Orders has dispensed with the necessity of obtaining the order for leave to except *nunc pro tunc*, but it leaves the old practice unaltered in other respects. In *Coupland v. Bradock* Sir J. Leach says that, if exceptions are not filed to the answer within eight days after it is put in, it is to be assumed that the plaintiff is satisfied with the answer. If the practice be as contended for by the plaintiff, a party may bring an action and file a bill on the same day. He will then have two months, for excepting, from the filing of the answer; and, just before that time has expired, he may obtain an order to amend, and procure further time for excepting to the answer to the amendments. By the new rules of pleading at common law, execution will always be obtained in the action before the time for getting the order to elect has arrived.

Secondly: This case is novel in this respect. The time to obtain the order to elect, must be reckoned from the time of filing the answer to the original bill. The plaintiff cannot be allowed to procure an advantage by amending his bill. The principle of the court has always been to discourage a plaintiff's not stating, at once, the whole of his case. An amended bill has reference back, in regard to time, to the original bill. The only question with regard to the order, is whether the subject matter of the bill and action, is the same; and, if the original bill has been answered and the time for excepting to that answer has expired, the fact of the bill being subsequently amended and those amendments answered, cannot vary the right to the order to elect. In this case, the prayer of the original bill is unaltered by the amendments.

If the practice of the court be against the defendant, a new order on the subject is absolutely necessary. (a)

THE VICE-CHANCELLOR:—The fourth general order of 1828, as amended in 1831, itself assumes an existing distinction between the filing of an answer in and out of term.[1] The language is this: "That, in all cases, whether the defendant's answer be filed in *term* time or *vacation*, the plaintiff shall

(a) See the first of Lord Cottingham's orders of 9th May, 1839, which was made in consequence of the decision in the above case.

[1] Vide 2 Russ. 640.

 1839.—*Leicester v. Leicester.*

be allowed two months to deliver exceptions to such answer." I observe that Mr. Smith, in his very useful treatise on the practice of this court,^(a) states the rule thus: "The defendant must file a sufficient answer, and the time must have elapsed for excepting to that answer, before he can put the plaintiff to his election to proceed at law or in equity:" and he refers to [*90] *Browne v. Poyntz* *in support of that proposition. In that case, Sir J. Leach says: "It is irregular to obtain an order to elect before the common time for filing exceptions is expired:" But, in *Coupland v. Braddock*, he thus states the practice: "If no exceptions are taken to the answer within eight days after it is put in, it is to be assumed that the plaintiff is satisfied with the answer." I must consider that, when, in that last case, Sir J. Leach said: "within eight days after the answer is put in," he meant eight days with reference to the case then before him, that is, he meant to say (the answer in that case having been put in during the vacation,) within the eight first days of the ensuing term; and it is remarkable that, in that case, the defendant waited until the ninth day of the term ensuing the filing of his answer, before he obtained the order.

In this view of the case, as the answer to the amended bill was filed on the 24th of February, the time for excepting will not expire until the end of the eight first days of Easter term.

Then, with regard to the question whether the computation of time is to be made from the time of putting in the original answer or from the time of answering the amended bill.—It appears to me that it would be absurd that the time for obtaining the order to elect, should be governed by the time of filing the answer to the original bill, notwithstanding that bill has been amended and an answer put in to those amendments. The order, as drawn up by the defendant, itself recites, as the ground of making it, that the defendant has put in his answer to the amended bill. If, therefore, the time for obtaining the order to elect, was to be computed from the time of putting in the answer to the original bill, it would have been unnecessary to do what [*91] this order most distinctly *does, namely, recognize the answer to the amended bill. The Master is directed, by the order, to inquire whether the subject of the action at law and of the suit in equity, is the same; and it would be absurd to suppose that the Master is only to look at the original matter, and not at the amendments, to see whether the claim at law is identical with the claim in equity.

Then, with regard to the prayer of the bill being unaltered by the amendments. The prayer might, very possibly remain the same, and yet there might be great alteration in the facts on which that prayer was originally grounded. In this view of the case, even on the old practice, which is the most favorable one for the defendant, I think this order is wrong.^(b)[1]

(a) Vol. 1, p. 561, 2d ed.

(b) Affirmed by the Lord Chancellor, in March, 1839.

[1] As to election between suit at law and in equity, see 1 Russ. & M. 423, n. 1.

1841.—Smith v. Cleasby.

SMITH v. CLEASBY AND OTHERS.(a)

1841; 29th and 30th January.—Affidavits; Practice.

Plaintiff obtained an *ex parte* injunction. Defendant filed his answer, and served a notice of motion to dissolve the injunction. Exceptions were taken to the answer, to which the defendant submitted and then filed a further answer. Between the filing of the exceptions and the putting in of the further answer, the plaintiff filed affidavits in support of the injunction. The defendant then moved to dissolve on the notice served prior to putting in his further answer. Held, that the affidavits so filed by the plaintiff, might be read on the hearing of the motion.

An injunction had been obtained *ex parte*, restraining the defendant, Cleasby, from suing out a *fiat* in bankruptcy against the plaintiffs. On the 9th of January, Cleasby filed his answer; and, on the 14th, he served a notice of motion to dissolve the injunction. Exceptions were then taken to the answer; to which Cleasby submitted; and, on the 26th, he filed a further answer. In the interval between the filing of the ex- [*92] ceptions and the putting in of the further answer, the plaintiffs filed affidavits in support of the injunction. The defendant then moved to dissolve on the notice served on the 14th. On the hearing of the motion, the plaintiff's counsel proposed to read the affidavits filed in the interval before mentioned; to which the defendant's counsel objected.

Mr. Knight Bruce and Mr. Cankrien for the plaintiffs, said that an insufficient answer was no answer. *Gregor v. Lord Arundel*,(b) *Turner v. Turner*,(c) *Attorney General v. Young*:(d) and that Lord Eldon was in the habit of looking at an answer, in order to judge whether it was sufficient or not.

Mr. Richards, Mr. James Parker, and Mr. Calvert, for the defendant, contended that affidavits could not be read against an answer, except for certain purposes, such as verifying documents and facts not admitted or denied by the answer. *Smythe v. Smythe*,(e) *Norway v. Rowe*.(f)

THE VICE-CHANCELLOR:—I have had a better opportunity of considering the question respecting these affidavits than I generally have of considering such points; and my opinion is that the way in which the defendant Cleasby, has thought proper to conduct his defence, makes it imperative on me to receive these affidavits.

He put in his answer on the 9th of January; and, on the 14th, he gave the notice of motion to dissolve. But he need not have given [*93] that notice of motion: he might have waited to see whether the plaintiffs would or would not except to that answer, which he must have known at the time, was an insufficient answer, and to which, he might have reasonably expected that exceptions would be filed. I say so, because, as soon as the exceptions were filed, he submitted to them. He, therefore, on having filed an imperfect answer, thought proper, whilst it was in an imperfect state,

(a) *Ex relations*, Mr. Nicholl.

(d) 3 Ves. 209.

(b) 8 Ves. 87.

(e) 1 Swanst. 252.

(c) 1 Dick. 316.

(f) 19 Ves. 144.

 1841.—Smith v. Cleasby.

to give the notice of motion. If he had withdrawn it, and had served a second notice after he had satisfied the exceptions by putting in a full answer, then, I apprehend, further affidavits could not have been received. But I have now to decide on that notice of motion which he served at a time when his answer was imperfect; and it appears to me that the fact which has been stated, namely, that Lord Eldon would look through the answer to see if it was an imperfect answer or not, though it is not exactly this case, yet is an acknowledgment of the principle on which I proceed, namely, that the document which does appear to have been an imperfect answer, was only an affidavit against which affidavits might be filed.[1] And my opinion is, that for the purpose of hearing a motion made in pursuance of *this* notice, I am bound to receive the affidavits.

[1] The same train of reasoning appears to have influenced the Master of the Rolls, Lord Langdale, in *Ord v. White*, 3 Beav. 357, 367, which was also a motion to dissolve an injunction. He says; "it is not necessary to decide the question as to the admissibility of the affidavits, but the point having been argued, I think it right to state my present opinion; which is, that where facts of this nature, essential to the plaintiff's case, are alleged in the bill, and the defendant by his answer, says he knows nothing respecting them, and neither admits nor denies them, it is competent for the plaintiff to prove them by affidavit. I should submit with the greatest respect to what Lord Eldon said in *Barratt v. Tickell*, (Jac. 154,) if I could see that his attention had been called to the former cases, in which he is reported to have expressed a contrary opinion. It is not, however, necessary to decide the point in this case, but I state the present inclination of my opinion, in order that parties may be aware of the impression which they will have to remove from my mind, in cases similarly situated. If the affidavits were to be received in the present case, there could be no doubt of the propriety of continuing the injunction." In the case above referred to by the Master of the Rolls, (but which is not noticed in the principal case,) the question arose on a motion to dissolve the common injunction, which had been extended to stay trial, Lord Eldon used the following language: "The ground on which I declined to receive the affidavits is this, that if the circumstances stated in them be true, it appears to me that, though they cannot be established by the admission of the defendants, they may be given in evidence at the trial; and, I do not recollect that the exception to the rule has been carried further than this; that if deeds or letters be stated in the bill, and the defendant says he does not know whether the statement be correct or not, then you may verify them by affidavit; but, as to facts and circumstances which the defendants do not know of, if you cannot have the benefit of them from the defendants' consciences, you cannot have the benefit of them at all, except so far as you may be able to prove them at the trial." As to the admission of affidavits in support of the bill, on a motion to dissolve an injunction, see further, *Hoffman v. Livingston*, 1 Johns. Ch. Rep. 211. *Lloyd v. Jenkins*, 4 Beav. 230. Am. Ch. Dig. Evidence, X. Injunction, IX.

1841.—*Spry v. Bromfield.*

SPRY v. BROMFIELD.(a)*[*94]**

1841 : 30th January.—Will ; Construction.

Testator gave all his estates, real and personal, to his executors, in trust to be disposed of by them as after mentioned. He then gave all his real estates, houses, and lands, to his wife, for life : "and, after the decease of my wife, I give my houses, lands, and estates in B. to J. B., but at his death, I will that the whole shall be for the use of the said J. B.'s wife and children, and which children, at the death of their mother, shall inherit the same jointly during their lives ; and, if the said children shall die before they arrive at the age of twenty-one, I will that my houses and estates at B. go to H. S.," who was the testator's heir.

J. B. and his wife had three daughters and one son. The daughters were living at the date of the will, and at the testator's death. The son was born afterwards. After the death of J. B., but in the lifetime of his wife, two of the daughters died, intestate and unmarried, one before and the other after attaining twenty-one, leaving their brother their heir. After the deaths of the prior devisees, the son and the surviving daughter, both of whom had long attained twenty-one, executed a deed in the nature of a recovery, by which they limited the lands in B. to the use of themselves and their heirs as tenants in common. Held that they took an estate in fee simple, as tenants in common, in the lands in B.

THE case sent for the opinion of the Barons of the Court of Exchequer, after setting forth the will proceeded thus :

The testator afterwards made and published various codicils to his will ; but none of them affected the aforesaid devises of the estate at Boldre. The testator died in the year 1799, without having altered or revoked his will and codicils, leaving the Rev. John Hume Spry, D. D. in the will called the Rev. Hume Spry, his heir at law : and the will and codicils were proved, by Celia Bromfield, the widow, and William Forsteen, in the proper ecclesiastical court. The said Celia Bromfield, the widow of the testator, entered into the possession of the devised estates in the parish of Boldre, upon or soon after the testator's death ; and she continued in "such possession. [*95] down to the time of her death, which took place in 1831. The Rev. John Bromfield and Anne his wife, named in the will, had five children, namely, Henry John Bromfield, who died an infant in the lifetime of the testator, and Eliza Bromfield, Georgiana Bromfield, Laura Bromfield, and William Arnold Bromfield. Eliza Bromfield, Georgiana Bromfield and Laura Bromfield, were all born in the testator's lifetime ; and, together with their parents, were all living at the respective times of the testator's making his will and of his death. William Arnold Bromfield was born in 1801. The Rev. John Bromfield died in 1801, intestate, leaving the said Anne Bromfield, his widow, and his four last named children him surviving. The said Georgiana Bromfield, one of the children, attained the age of twenty-one years. Laura Bromfield, another child, died under that age : and both Georgiana and Laura survived their father, and died without having been married ; and they respectively left the said Anne Bromfield their mother, and

(a) See a report of this case, ante, vol. 9, page 534. [Vide post, 224.]

1841.—*Spry v. Bromfield.*

the said Eliza Bromfield and W. A. Bromfield, their sister and brother, them surviving; and the said W. A. Bromfield was their heir at law. The said Georgiana Bromfield did not execute any assurance of her estate or interest in the said Boldre property which she might be held to have been capable of conveying, or any assurance by which a joint tenancy might have been severed. The said Anne Bromfield died, on the 9th of May, 1832, intestate as to real estate, leaving the said Eliza Bromfield and W. A. Bromfield her surviving; and the said W. A. Bromfield was and is the heir at law of his said mother. The said Eliza Bromfield and W. A. Bromfield (who are the defendants in this suit) upon or immediately after the death of their mother, entered into the possession of the entirety of the said devised estate in the parish of Boldre, claiming under the will of the said Philip Bromfield; and they have ever since been and still are in possession thereof. Some time after the death of Anne Bromfield, the said Eliza Bromfield and W. A. Bromfield duly made and executed a disposition for barring all estates tail, remainders and reversions in the premises, under the statute of the 3d and 4th Will. 4, c. 74, "For the abolition of fines and recoveries, and the substitution of more simple modes of assurance," and, thereby, limited the use to themselves and their heirs as tenants in common.

The case then stated the proceedings which had taken place in the Court of Chancery, and added that the question submitted to the Court of Exchequer, was, what estate do the defendants Eliza Bromfield and William Arnold Bromfield take, in the lands at Boldre, devised by the will of the testator, Philip Bromfield.

The point argued for the plaintiff, was that the defendants W. A. Bromfield and Eliza Bromfield took estates for life only in the lands at Boldre; and that, the devise or limitation over in favor of the plaintiff and his children in case the children of John Bromfield and Anne his wife should die before they arrived at the age of twenty-one years, having become incapable of taking effect, the reversion in fee simple immediately expectant upon the determination of the estates for life of the said defendants, had become absolutely vested in the plaintiff as heir at law of the testator.

The points argued for the defendants, were: first, that the Rev. John Bromfield took an estate tail either in possession or in remainder expectant on the life estates of himself and his wife, Anne Bromfield: which estate tail descended on the defendant W. A. Bromfield, or, secondly, that the defendants Eliza Bromfield and W. A. Bromfield became, in the events which happened, joint tenants for their lives, with several inheritances in fee simple, of and in the lands at Boldre.

The following certificate was returned by the Barons of the Exchequer:—

"We have heard this case argued by counsel, and have considered it; and are of opinion that the defendants Eliza Bromfield and John Arnold Brom-

1841.—Elworthy v. Billing

field[1] take an estate in fee simple, as tenants in common, in the lands in Bolder devised by the will of the testator Philip Bromfield.

"Dated this 30th day of January, 1841.

"ABINGER.
E. H. ALDERSON.
J. GURNEY.
W. H. MAULE."

*ELWORTHY v. WILLIAM PAYNE BILLING and Others. [*98]

1841; 1st February.—Sale under Decree; Bidding.

E. B., one of several defendants, having purchased an estate sold under the decree, for 810*l.*, without having obtained leave to bid; another defendant moved that the estate might be again put up to sale at 810*l.*, and if it should fetch more, that the sale to E. B. might be set aside, and that he might pay the expenses of the re-sale and costs of the motion. The court refused the application, but without costs.

THE premises in question in this cause having been put up for sale by auction, in September last, in pursuance of the decree, Edward Billing, one of the defendants, bid at the auction, *without having obtained the leave of the court so to do*, and became the purchaser of the premises at the sum of 810*l.* A motion was now made, on behalf of Thomas Billing, another of the defendants, that the premises might be again put up for the sale before the Master, at the sum of 810*l.*; and, if they should be re-sold for more than that sum, then that the sale to Edward Billing might be set aside, and that he might be ordered to pay all the expenses of the re-sale and of the motion.

Mr. *Sharpe*, for the defendant, Thomas Billing, said that every party to a cause in which an estate was directed to be sold, was a vendor and a trustee for the sale of the estate; and, therefore, the court did not allow any party to the cause to bid at the sale without having first obtained the leave of the court; that, in general, property which had been once sold, did not fetch so high a price at a second sale; and, besides, it might not sell so well in February or March, as it would have done in September: that it was sworn, by the affidavits in support of the motion, that, in consequence of Edward Billing having bid for the property, other persons who were present at the auction were prevented from bidding for it; and that that allegation was not traversed by the affidavits in opposition to the motion; that the cases **Ex parte Reynolds(a)* and *Ex parte Lacey,(b)* although they related [*99] to purchases made by assignees of bankrupts, were applicable, in principle, to the present case.

Mr. *Knight Bruce* appeared for another of the defendants, and supported the motion.

(a) 5 Ves. 707.

(b) 6 Ves. 525.

[1] Vide Erratum, post, 166.

1841.—*Elworthy v. Billing*.

Mr. *Jacob* and Mr. *Willcock*, for the defendant Edward Billing, said that the application was irregular, as it asked that Edward Billing might be held to his purchase unless some one else would give a higher price for the property; which, in effect, was adopting the purchase and repudiating it at one and the same time: that, if an answer was irregularly filed, the plaintiff in the suit could not move for payment into court of the balance admitted, by the defendant, to be in his hands, and, at the same time, that the answer might be taken off the file; but he must either accept the answer or reject it altogether: that assignees in bankruptcy were trustees for the sale of the bankrupt's property, and, consequently, the cases cited were cases in which trustees for sale had sold to themselves; but it was quite a different case where the objection to the transaction was, at the utmost, an objection of irregularity: that the auctioneer ought not to have accepted the biddings made by E. Billing: that, it appeared, by the affidavits in opposition to the motion, that Thomas Billing, the party on whose behalf the application was made, was present, with his solicitor, at the sale; and that E. Billing bid for the property in their presence and hearing. For what purpose were they present except to watch the sale? Why then did they not interfere to prevent the bidding from being accepted? It is, at the utmost, a case [*100] of irregularity; and, at all events, the court will not set aside the sale, because one of the parties asks it, without seeing whether it is beneficial or not.

The Vice-Chancellor, having observed, in the course of the argument, that only two of the parties to the cause supported the application, delivered judgment as follows:

There is a difference between a mere party to a cause and assignees in bankruptcy, with respect to purchases made without the permission of the court. Assignees in bankruptcy sell the bankrupt's property, because it is their duty to do so under the statutes relating to bankrupts, and without the direction of the court. They are, merely, trustees for sale; and, therefore, it is reasonable that, where they purchase the property for themselves, such orders should be made against them as were made in the cases cited.[1] But, as far as my experience goes, there is no instance of a similar order being made, where the purchaser was, merely, a party in the cause, and not, as such, the party to conduct the sale.[2] Ordinarily, the plaintiff in the suit has the conduct of the sale. But, in this case, the application is made only by one and supported by another of several co-defendants in the suit.

[1] It is a rule of universal application that, "no party shall be permitted to purchase an interest in property and hold it for his own benefit, when he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account, and for his individual use." *Walworth, Ch. Van Epps v. Van Epps*, 9 Paige, 241. *Hawley v. Cramer*, 4 Cow. 717, 740.

[2] Whether the attorney of the party may become a purchaser at such sale, see *Hawley v. Cramer*, 4 Cow. 718, 739.

 1839.—In re West Retford Church Lands.

The court, having made a rule that, where property is sold under a decree, no party shall bid for it without the permission of the court; all that it has to do is to take care that its own rule is enforced; but it will not enforce it against a party to a cause, in the same manner as it will against assignees in bankruptcy.

I never remember a case in which a party to a suit has bid at a sale directed by the court without its permission, where the court has made such an order as is now asked. But, as the party did wrong by bidding at the sale without having obtained the leave of the court, the proper [*101] course is to refuse the motion without costs.(a)[1]

IN THE MATTER OF THE WEST RETFORD CHURCH AND POOR LANDS,
AND IN THE MATTER OF 52 GEO. 3, c. 101.

1839; 3d and 4th June.—Charity; Jurisdiction; Stat. 52 Geo. 3, c. 101.

Where two classes of persons claim, adversely to each other, the right of administering the funds of a charity, the court will not decide the question, on a petition presented under 52 Geo. 3, c. 101.

THIS was a petition presented by two of the trustees of the church and poor lands of West Retford. It stated that, by an indenture dated the 7th. of June, 1699, and made between William Johnson of the one part, and Wil

(a) The Vice-Chancellor kindly furnished the reporter with the following note of a manuscript case in his Honor's possession :

WILSON v. GREENWOOD,
Easter Term, 1819

Bill filed by assignees of a bankrupt partner against the solvent partner for an account and sale of the partnership effects. An order was made, in July, 1818, for a sale of the partnership effects before the Master. The defendant attended the sale and bid, and was declared the highest bidder. A motion was made, by Mr. *Horne*, to set aside the sale, on the ground that the partner was not at liberty to bid. Lord Eldon refused it.—Mr. *Heald* and Mr. *Shadwell* for defendant, the purchaser.

[1] There being a question, whether a mortgagee foreclosing and selling under the power usually contained in mortgages in the state of New York, without proceeding by bill in equity, could become a purchaser, the doubt was removed, and permission for the purpose given by statute. (1 Rev. Stat. 2d ed. p. 451, § 7, which is, however, merely a re-enactment.) It must be very obvious and palpable, that sheriffs, masters in chancery, and all other public officers, cannot themselves, either directly, or indirectly, become purchasers, although there were no statutory prohibition; and that a court of equity, according to its established and familiar doctrine, would set aside such sale. In *Davoue v. Fanning*, 2 Johns. Ch. Rep. 252, Kent, Ch. says; "I may refer to the statute which prohibits a sheriff, or other officer, to whom an execution is directed, from purchasing at the sale under it. This is an affirmance of the same general rule; and the other statute which allows a mortgagee selling under a power, to purchase in the land, provided the sale be, in every other respect, regular and fair, does, by that very exception, recognize the existence of the rule in all other cases." And see Paley on Principal and Agent, 34, n. (m.) where the question as to the capacity of trustees, and *qua* trustees to become purchasers, is succinctly considered. The present editor, in a forthcoming edition of that work has engrafted upon the note, just referred to, some valuable extracts from, and additional references to, American and late English authorities.

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liam Wintringham, &c., of the other part, after reciting that Johnson and divers other persons had been seised in fee, in trust for the church and poor of West Retford, of a messuage and tenement, situate in West Retford, [*102] in the occupation of William Atkinson, of the yearly value of 10*l.* theretofore given to the church and poor of West Retford, and also of a cottage or tenement in West Retford, in the occupation of John Judson, of the yearly value of 20*s.* also theretofore given to the use of the church of West Retford; and that the trustees were all dead except Johnson: Johnson, for continuing the charity and settling the premises on other trustees, with the advice and direction of W. Simpson, &c., commissioners for charitable uses by virtue of a commission under the Great Seal bearing date the 16th day of July then last, granted, to the parties to the deed of the second part and their heirs, the messuage, cottage and premises, in trust for the church and poor of West Retford. The petition then stated that it was not known at what time or for what purpose the charity was founded; but it was believed that, from the earliest period at which the charity was known to have existed, the rents and profits of the estate had been considered as applicable, in equal moieties, to the repairs of the church and relief of the poor of West Retford: that in the years 1753 and 1790, new trustees of the premises were appointed by instruments purporting to convey the premises to such trustees respectively, but which were insufficient for that purpose: wherefore, by an indenture of feoffment bearing date the 3d day of April, 1797, and made between Anthony Barker (surviving son and heir at law of John Barker, junior, who was the survivor of the trustees named in and appointed by the said indenture of the 7th day of June, 1699,) of the first part, and the Reverend Abraham Youle, &c. of the second part, and J. Holmes of the third part, after reciting that the parties of the second part had agreed to accept a grant and to become trustees of the premises: It was witnessed that, for continuing the trust, Anthony Barker granted and enfeoffed, the charity estate, to [*103] the parties of the second part and their heirs, in trust for the church and poor of West Retford: and it was agreed that, when the trustees should by death, be reduced to four, the survivors should convey the premises to eight or more proper persons, to be appointed by such surviving trustees, and to the heirs of such grantees or feoffees, to the use of such surviving trustees and of such grantees or new trustees and their heirs, on the trusts aforesaid; and so, from time to time as often as the trustees should be reduced to four. The petition next stated that other of the trustees appointed by the indenture of the third day of April, 1797, being dead, the four surviving trustees, in the year 1818, appointed eight other persons to be trustees of the premises in the room of the dead trustees; and by indentures of lease and release of the 19th and 20th of May, 1818, the premises were conveyed to the surviving and new trustees, their heirs and assigns, in trust for the church and poor of West Retford; that, four of the last mentioned trustees having died, the surviving trustees, in the year 1829, appointed four other

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trustees in the place of the deceased trustees, and, by indentures of lease and release of the 9th and 10th of October, 1829, the premises were conveyed to the last mentioned surviving and new trustees, their heirs and assigns, in trust for the church and poor of West Retford; that, prior to the year 1797, the rents of the charity estate were inconsiderable, and were received, by the church-wardens and overseers of the poor of West Retford, in equal moieties, and applied by them respectively without any interference on the part of the trustees; that, in 1798, the charity estate was let at an advanced rent, and the trustees, being apprehensive lest they should be responsible for the due application of the rents and profits of the estate, claimed the right to interfere; and they and their successors, from time to time, did interfere in the application of such rents and profits; although such right on their part, was not [*104] admitted by the church-wardens or overseers; that, in August, 1827, the commissioners appointed, under 58th Geo. 3, c. 91, and 59th Geo. 3, c. 81, to inquire concerning charities, made their inquiry concerning the charity, and, in their report, bearing date the 26th of January, 1828, they stated, with respect to the charity, as follows: "It is urged by the Reverend Mr. Youle, (who then was the rector of Retford and one of the trustees) that, although the trustees have the power of letting and managing the estate, the rector, church-wardens and overseers of the poor of West Retford, ought to receive the rents of the estate, either from the trustees or the tenants, and ought to apply one moiety for the use of the church and the other moiety for the use of the poor; but it appears to us that, whatever may have been the customary mode of disposing of the income of the charity when it was of small amount, it is the duty of the trustees themselves to take care that the rents are correctly applied, and particularly that they are kept distinct from the funds raised by the parochial rates:" that, ever since the making of the report, the trustees for the time being of the estate, had claimed and exercised the right of seeing to the proper application of the rents and profits of the estate; but the church-wardens and overseers of the poor of West Retford still insisted that the trustees had merely the power of letting and managing the estate and receiving the rents, and that it was the duty of the trustees to pay over such rents to the church-wardens and overseers, to be applied by them without any interference or control on the part of the trustees, and without any liability to account to the trustees for the due application thereof; and that, at a parish meeting in West Retford convened by the church-wardens and overseers, and held in December, 1838, a determination was expressed, "by the majority of the church-wardens and overseers of the [*105] poor, to insist upon their right to require the trustees of the estate to pay over the rents and profits to them, to be applied by the church-wardens and overseers without any control or interference on the part of the trustees: that it would be for the benefit of the charity that all doubts as to powers and duties of the trustees with respect to the application of the rents and profits of the estate, should be removed. The petition prayed that the powers

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and duties of the trustees with respect to the application of the rents and profits of the estate, might be ascertained and declared.

It appeared, from one of the affidavits in opposition to the petition, that, after the petition was answered, the church-wardens and overseers commenced ejectments against the tenants of the charity estate, which were still pending.

Mr. *Knight Bruce* and Mr. *K. Bayley*, in support of the petition, contended that the view, taken by the charity commissioners, as to the mode of applying the rents of the charity estate, was correct.

Mr. *R. Atkinson*, for all the trustees except the petitioners, said that they were anxious to have the directions of the court.

Mr. *Jacob* and Mr. *Cankrien*, for the church-wardens and overseers of the poor of the parish, said that the parish officers contended that the legal estate in the charity lands, was vested in them, under the 59th Geo. 3, c. [*106] 12; (a) and, consequently, that there was a dispute and only "as parties to whom the administration of the charity belonged, but also as to the parties to whom the legal estate in the charity property was vested; and, therefore, the case ought to have been brought before the court by information, and was not a fit subject for a petition under 52d Geo. 3, c. [*107] 101. *Doe v. Hiley*, (b) **Attorney General v. Lewin*, (c) *In re Dean Clark's Charity*, (d) *In re Phillipott's Charity*, (e) *The Corporation of Ludlow v. Greenhouse*. (f)

Mr. *Knight Bruce*, in reply:—The 59 Geo. 3, c. 12, received the royal assent in 1819, and ever since that time as well as before, the trustees of the charity estate have been treated and dealt with, as trustees, by the parish. The language of the 17th section of the act is that the church-wardens and overseers of the poor: "shall and may and they are hereby empowered to accept,

(a) That act after empowering parish officers to purchase lands for building workhouses and employing the poor, enacts: "that all buildings, lands, and hereditaments which shall be purchased, hired, or taken on lease by the church-wardens and overseers of the poor of any parish, by the authority and for any of the purposes of this act, shall be conveyed, demised, and assured, to the church-wardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish; and such church-wardens and overseers of the poor, and their successors, shall and may, and they are hereby empowered to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, and also all other buildings, lands, and hereditaments belonging to such parish; and, in all actions, suits, indictments, and other proceedings for or in relation to any such buildings, lands, or hereditaments, or the rent thereof, or for or in relation to any other buildings, lands, or hereditaments belonging to such parish, or the rent thereof, and in all actions and proceedings upon or in relation to any bond to be given for the faithful execution of the office of an assistant overseer, it shall be sufficient to name the church-wardens and overseers of the poor for the time being, describing them as church-wardens and overseers of the poor of the parish for which they shall act, and naming such parish; and no action or suit, indictment or other proceeding, shall cease, abate or be discontinued, quashed, defeated, or impeded by the death of the church-wardens and overseers named in such proceedings, or the death or deaths of any of them, or by their removal or the removal of any of them from, or the expiration of their respective offices."

(b) 10 Barn. & Cress. 885.

(c) Ante, vol. 8, p. 366.

(d) Ibid. 34.

(e) Ante, vol. 8, p. 381.

(f) 1 Bligh, N. S. 17.

 1839.—In re West Retford Church Lands.

take, and hold, &c.” It is obvious that the language of that section relates to future acquisitions of property, and to cases where no trustees might be appointed, or none could be found, as the case in *Doe v. Hiley*. The legislature could not have meant to enact that, in every case of a parochial trust, whether there were existing trustees or not, the parish officers should be the trustees. It would be monstrous to say that the legislature intended that no parish should have individual trustees; but that, in every case where the lands were held in trust for a parish, the legal estate should be taken out of the trustees and vested in the church-wardens and overseers. *Allason v. Stark*.(a) In *The Attorney General v. Wilkinson*,(b) and many other cases, it has been decided that, where a charity is founded for the relief of the poor of a parish, the funds ought to be applied, exclusively, to the relief of the poor of the parish who do not receive parochial relief; and, consequently, the rents of this charity estate are not applicable to any purposes in which the parish officers have any concern; but the court has [*108] to decide to what purpose they ought to be applied.

The petition does not state, nor could it have stated that any question was raised respecting the legal estate in the charity property. We did not come here with any knowledge that there was any contest about the legal estate; and, therefore, the pendency of the ejectments which have been commenced, by the parish officers, against the tenants of the charity estate, cannot render the proceeding by petition, improper.

The only question then is whether the case stated on this petition, is a proper subject for a petition under the 52 Geo. 3, c. 101. It is difficult to conceive anything more extensive than the language of that act. It enacts that, in every case of a breach of any trust or supposed breach of any trust created for charitable purposes, or wherever the direction or order of a court of equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful, for any two or more persons to present a petition to the Lord Chancellor, &c., praying such relief as the nature of the case may require.—[The Vice-Chancellor: My impression always has been that, if the question be what persons have a right to administer a trust for charitable purposes, that is, if the right be disputed between A. and B., the question must be decided on information and not on petition. So too, if the question be what are the purposes to which the funds of the charity ought to be applied, that is a question which ought to be decided on information.]—The case stated on this petition is not a complicated one. The only question is, how is the trust to be administered? Surely a case which raises the simple question whether the trustees are, themselves, to apply the rents of the charity estate, or are [*109] to pay them over to the church-wardens and overseers, is a fit subject for a petition. There is nothing here which is *extra* the charity, that is no question is raised by this petition which is adverse to the charity. The 52

(a) 9 Adol. & Ell. 255.

(b) 2 Beavan, 370.

 1839.—In re West Retford Church Lands.

Geo. 3, c. 101, applies to every case which is *intra* the charity. *In re Upton Warren*.^(a)

At the conclusion of the reply Mr. Jacob observed that *Allason v. Stark* was a case of special trust, and was exactly similar to *The Attorney General v. Lewin*.

THE VICE-CHANCELLOR:—Putting out of the question anything relating to the legal estate, and looking, merely, at the case as it stands upon the petition, I cannot but think that it does show an adverse question raised, in the first place, as to the power of those who are called trustees, to do anything more than receive the rents of the charity estate, and hand them over to the church-wardens and overseers.

The petition first states the manner in which the legal estate has been transferred from one set of trustees to another, by means of a series of deeds. It then states that the trustees claimed a right to interfere, and that they and their successors, from time to time, did interfere in the application of the rents and profits. Then it states that the charity commissioners visited the parish and gave their opinion; which opinion I really do not understand: because they say; "that, although the trustees have the power of letting and managing the estate, the rector, church-wardens and overseers of the poor [*110] of West Retford, ought to receive the rents of "the estate, either from the trustees or the tenants, and ought to apply one moiety for the use of the church and the other moiety for the use of the poor; but it appears to us that, whatever may have been the customary mode of disposing of the income of the charity when it was of small amount, it is the duty of the trustees themselves to take care that the rents are correctly applied, and particularly that they are kept distinct from the funds raised by the parochial rates." It is very strange that the commissioners should have thought that the trustees were to hand over the rents to the parish officers, and still to see them administered. Perhaps circumstances might be stated which would make that opinion more reconcileable with itself than it at present appears to be. Still it represents that there was a question raised as to the duty of those whom, for the present purpose, I call trustees, to superintend the church-wardens and overseers of the poor in the application of the rents paid to them. The petition then states: "that, ever since the making of the commissioners' report, the trustees for the time being of the estate, have claimed and exercised the right of seeing to the proper application of the rents and profits of the estate." Then the petition states that a meeting was held and a determination was expressed, by the majority of the church-wardens and overseers of the poor, to insist upon their rights. So that, on the petition, it is represented that there is a question about the right and authority of the trustees, and the rights of the church-wardens and overseers as contradistinguished from the rights of the trustees: and, supposing that there were no question,

(a) 1 Myl. & Keen, 419.

1839.—Lett v. Randal.

between the church-wardens and overseers and the trustees, as to their respective rights, still there is a question as to how the rents are to be applied.

"If there had been no contending parties, and the trustees had only [*111] wanted to know how the rents ought to be applied by them, then the court would have had authority to direct a reference to a Master, upon petition. But, here it is evident, upon the face of the petition, that the court is not able to stir a step without first deciding upon the adverse right claimed, by the trustees, as against the church-wardens and overseers. And the strong impression which was made on my mind by hearing the Ludlow case when it was argued in the House of Lords, is that, if there be such an adverse question about a charity as is here stated, a petition under the act, is not the mode in which it ought to be brought before the court for decision. But, in coming to this conclusion, I am not so much influenced by the question that has been raised with respect to the legal estate in the charity property, as by what appears, on the face of the petition itself, with regard to the conflicting claims of the parties who insist upon a right to administer the funds of the charity: and, on that ground alone, I dismiss this petition with costs.[1]

*LETT v. RANDALL.

[*112]

1839: 5th June.—Will; Construction.

Testator gave his real and personal property, to trustees, their heirs, &c., upon trust to pay and divide the same unto and amongst all and every his children who might be living at his decease share and share alike, for their lives: "and in case any of my said children, being daughters, shall marry and shall happen to depart this life in the lifetime of her or their husband or husbands, I direct that the share or shares of her or them so dying, shall go to her or their respective husband or husbands for his or their life or lives, and, from and after his or their decease, then to be equally divided amongst all and every the child and children of my said daughter and daughters then living; and, in default of any such child or children, then I direct such share or shares shall go and be divided, equally, to and amongst all and every my said children who shall be then living." The testator left a son and seven daughters. One of the daughters died a spinster. Held that, on her death, her share in the testator's property did not go to her surviving brothers and sisters, but became undisposed of.

A PETITION presented by William Randall, the only son and heir of William Randall the testator in the cause, stated that the testator made his will, dated the 1st of July, 1824, in the following words: "I direct that all my just debts, funeral expenses and the charges of proving this my will, may be, in the first place, duly paid and satisfied, by my executors hereinafter mentioned, as soon as conveniently can be after my decease. I give, devise and bequeath, unto Thomas Lett, Nathaniel Randall, and Thomas Lett the younger, and their heirs, executors and administrators, all and singular my freehold and leasehold and copyhold estates, and also my personal estate, of what nature or kind soever the same may be or consist of, upon trust to pay and make up, unto my dear wife, the sum of 1200*l.* per annum, includ-

[1] Vide Reporter's note, post, 123.

 1839.—In re West Retford Church Lands.

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[1] Vide Reporter's note, post, 123.

 1841.—*Reece v. Humble.*

therefore, that the testator, himself, had no uniform plan of disposing of his property. Therefore it is extremely difficult, when he has not, by any express words, pointed out who shall be the takers of the shares of those daughters (for there might be more than one) who might happen to die without children, to say that, of necessity, the shares are given to those of his children who might be living at the death of the daughter or daughters who might happen to die without children, or to those of his children who might be living at the testator's decease.

If I were to hold that those children were to take who were living when the event happened of the daughter or daughters dying without children, that does not secure the testator from dying intestate: because it might happen that all the other children might die in the lifetime of one daughter, which daughter might happen to be the only child who died without any child or children: in which case there would be no person to [*117] "take under the gift over: and, therefore, I do not see how it is possible to put such a construction on the will, as to make it a total disposition of the testator's property, in every event that may happen. Consequently, I think that the safe way is to adhere to the rule of law; and that is that, if the property in dispute is not given in express words, it is not given at all.

Declare that, in the event that has happened, the share of the deceased daughter, Sarah Randall the younger, in the testator's freehold, copyhold the leasehold estates, is undisposed of, and that, as to the freehold and copyhold estates, it descended, upon her decease, to the petitioner as the heir at law and customary heir of the testator, and that, as to the leasehold estates, it devolved upon the next of kin of the testator.

REECE v. HUMBLE.

1841: 10th February.—Practice; Injunction.

The court will grant the common injunction on any day, although out of term, and not a seal day or a continuation of the seal

MR. GLASSE moved for the common injunction, under the 10th of Lord Brougham's Orders,[1] the eight days after the defendant's appearance having expired.

The first seal after H. T. was on the 8th of February; at which time the eight days had not expired. The day on which the motion was made was neither a seal day nor a continuation of the seal; but was appointed for hearing causes.

Mr. Glasse said that he entertained a doubt whether the court would grant the motion before the second seal, which would be on the 22d of February.

[1] The order will be found in the Appendix, 1 Myl. & K. vii.

 1839.—In re Reading Dispensary.

*The Vice-Chancellor said that, with respect to granting the common injunction, he had, long since, abolished all distinction between seal days and other days; and made the order. [*118]

 IN RE READING DISPENSARY.

1839: 3d June.—Charity; Jurisdiction.

The court has no jurisdiction to make an order on a petition presented under 52 Geo. 3, c. 101, for transferring the funds of a dispensary to a hospital, and amalgamating the two institutions.

THIS was a petition presented, under Sir Samuel Romilly's act (52 Geo. 3, c. 101,) by the president and other officers of the Reading Dispensary, for carrying into effect the report of a committee, which had been approved by a large majority of the subscribers to the dispensary, present at a general meeting, recommending that the funds and effects of the institution should be transferred to a hospital which had been recently established in Reading, called the Royal Berkshire Hospital, and that the two institutions should be consolidated. By the rules of the dispensary, a subscriber of one guinea annually, was a governor during the continuance of his subscription, and a subscriber of ten guineas, in one sum, was a life governor, of the institution; and the governors were empowered, at a general meeting, to make, alter or rescind rules for the management of the charity, to elect and remove officers, physicians and surgeons, and to make any order affecting the funds of the charity. By the rules and regulations of the hospital, an annual subscription of two guineas, was required to constitute a governor, and a donation of thirty guineas, a life governor: but the committee of subscribers to the dispensary, recommended that the persons who should be governors of the dispensary at the time when the two institutions were united, should enjoy the same privileges with respect to the hospital, as they had [*119] enjoyed with respect to the dispensary.

The petition prayed that the trustees of the dispensary might be ordered to transfer the funds and effects of that institution to the hospital, or that it might be referred to the Master to inquire and state whether it was fit and proper that such transfer should be made.

Mr. *Jacob*, in support of the petition, said that the plan of establishing a county hospital in Reading, had been approved of by the magistrates of Berkshire: that great additional benefit would accrue to the poor inhabitants of the town and its vicinity, if the proposed plan were carried into effect: that, in reality, it was nothing more than enlarging a dispensary into a hospital: that a hospital included all the benefits of a dispensary, but not *vice versa*; and that there was good ground for believing that the dispensary could not be supported in addition to the hospital, as a great number of the subscribers to the former had already transferred their subscriptions to the latter.

Mr. *Knight Bruce*, Mr. *Wigram* and Mr. *Sharpe* for some of the subscribers

 1839.—*In re Reading Dispensary.*

to the dispensary, opposed the petition on the ground that it sought to apply the funds of the institution, which amounted to more than 5000*l.*, to purposes for which they were not originally intended, and to change, in a great measure, the nature of the charity. They added that, if the court had any power to do what was asked, an information and not a petition ought to have been filed.

Mr. *Kee*, for the trustees of the dispensary submitted to act as the court should direct.

[*120] "THE VICE-CHANCELLOR:—In this case, I do not say that, if an information had been filed, the court might not have felt itself authorized to do what is asked by this petition. But, even if an information had been filed, it is certainly a case in which the court would have paused before it made such an order as is now asked. One reason why I think so, is that the court would be extremely cautious in doing any act that might tend to prevent the raising, from time to time, of contributions in support of institutions such as this dispensary.

By the constitution of the dispensary, every contributor of ten guineas, becomes a governor for life, and every annual subscriber of one guinea, becomes a governor. It is impossible to look at the manner in which these institutions are conducted, without seeing that people are induced, in some degree, to support them, for the sake of the influence which they acquire by means of having a share in the management. I know, from my own observation of what takes place in similar societies in London, that that feeling contributes, very much, to keep up such charities. The constitution of the Royal Berks Hospital, is very different from that of the dispensary: because those only who subscribe thirty guineas are to be life-governors, and those who subscribe two guineas are to be governors during the continuance of their subscriptions. Consequently the amount of the subscriptions required to constitute governors of the hospital, is quite different from the amount required to constitute governors of the dispensary; and, on that account, it may be reasonably supposed that the governors of the latter, would consist, in part at least, of a different class of persons from the governors of the former and, if

[*121] the court should, at any time, take upon itself to put an end to the dispensary and to amalgamate it with the hospital, it would, I think, be doing an act which, when publicly known, would tend very much to check the formation of other similar charities. Therefore, even if an information had been filed, the court would, I think, have paused before it made the order asked by this petition.

Besides, it appears to me that, under Sir Samuel Romilly's act, the court has no jurisdiction to do what is asked: because, ever since the passing of that act, the received opinion has been that it is so to be dealt with as to be made applicable only to cases where the conduct of the trustees of a charity comes under consideration, and to cases where it becomes necessary to give some order or direction for the administration of the funds of the charity.

1839 —In re Reading Dispensary.

But I cannot conceive that an order or direction, the direct effect of which is to put an end to a charity, can be considered as an order or a direction for its management.

In my opinion the rules of the dispensary which have been referred to, do not at all, authorize the governors, as such, to do what is proposed by this petition. One of those rules is that the governors shall make, alter or rescind rules and regulations for the management of the charity, and elect and remove officers, physicians, and surgeons, and make any order affecting the funds of the charity. Surely what is meant by that, is that they may make any order affecting the funds of the charity which is conducive to its continuance. I cannot suppose that it could be intended that the very order which gives to the governors the power to make, alter, or rescind rules and regulations for the management of the charity, *and to elect and re- [*122] move officers, physicians and surgeons (all of which measures have reference, plainly, to the continuance of the institution,) should extend to enable the governors to take an order which should so affect the funds of the charity, as to make it incapable of being carried on from the time when such order should be made. Another of the rules prescribes: "That the management of the institution shall be in the hands of a president, three vice-presidents, a treasurer, and a committee of six, three of whom shall form a quorum; who shall inspect the accounts, report the state of the dispensary, and the number of patients received in the year, and produced the same at the annual general meeting." It is quite plain, therefore, that the management of it, means the management of it as an existing institution.

Inasmuch, then, as no complaint is made about the management of the dispensary as an existing society; but the sole object of this petition is, in effect, to put an end to it by amalgamating the funds with the funds of the hospital, which will be governed in a totally different manner, and which would make it cease to have a separate existence, I am of opinion that the petition asks what, the court is not authorized to do, at any rate, under Sir S. Romilly's act: and, if the court sees that the object ultimately aimed at, is one which it has no jurisdiction to order, it will not do so idle and frivolous a thing as to send a preliminary inquiry to the Master. Moreover, there would be this further objection to a preliminary inquiry. By the petition, it is asked that it may be referred, to the Master, to consider whether the transfer will be proper to be made, or, in other words, I am asked to refer a question of law to the Master; which, I *apprehend, this court will never do. [*123] The result is that I shall abstain from making any order on the petition.(a)

(a) The parties who opposed the petition, had not been regularly served with it; and, therefore, were not entitled to appear at the hearing. Had they been regularly served, it is presumed that the petition would have been dismissed with costs. See ante, p. 101. [111].

1839.—Edwards v. Goodwin.

EDWARDS v. GOODWIN.

1839; 6th June.—Plaintiff; Practice; Witness.

Although the plaintiffs in a creditor's suit, have no common interest, yet the court will not, even after decree, allow one of them to examine the other, as a witness in the Master's office, in support of his debt.

MOTION, *after decree*, by one plaintiff in a creditor's suit, to examine his co-plaintiff, in the Master's office, as a witness to prove the debt alleged to be due to the party making the motion. The debt of the co-plaintiff, had been admitted by the master; subject, however, to the question whether it was not barred by the statute of limitations, which remained to be decided.

The *Solicitor General*, in support of the motion, said that the rule that a plaintiff could not examine a co-plaintiff as a witness, did not apply to this case; because, the decree had been made, and, therefore, the plaintiffs were no longer acting together: that the two plaintiffs had no common interest; but had separate rights; and consequently the matter as to which it was proposed to examine the co-plaintiff, was one in which he had no interest: that no bill of discovery could be filed against the co-plaintiff, as he was not the party liable to the demand: and though *Walker v. Wingfield*,^(a) [*124] was a "case in which the defendants were allowed to examine a plaintiff, yet there was no substantial distinction between that case and the present; for, the two plaintiffs in this case, had no common interest; and, the decree having been made, the bill could not be dismissed with costs: in this case, as in that, the co-plaintiff did not object to be examined: that, in *Fereday v. Wightwick*,^(b) an application by a defendant to examine a plaintiff, was refused; but, there, a bill of discovery might have been filed; and, moreover, the application was made before decree.

The other cases cited in support of the motion, were *Amiter v. Swanton*,^(c) and *Troughton v. Getley*.^(d)

Mr. *Wigram* and Mr. *Heathfield*, appeared to oppose the motion.

THE VICE-CHANCELLOR:—I have no authority to make the order.

The party proposed to be examined, has an interest in maintaining the suit; to the costs of which he would be liable in case the bill should be ultimately dismissed.[1]

(a) 15 Ves. 178.

(b) 4 Russ. 114.

(c) Amb. 393.

(d) 1 Dick 382.

[1] A defendant may examine a mere nominal plaintiff, with his assent, as a witness against the real plaintiff; but a defendant who has a common interest with the plaintiff in the suit, cannot examine such plaintiff as a witness against a defendant for the purpose of resisting the claim made by the bill. *Walworth, Ch.* says; "Where the complainants and a part of the defendants have a common interest, adverse to that of the other defendants, an application by those defendants to examine a complainant against such other defendants is substantially the same as if the complainants themselves made the application; in which case it is the settled law of the court that one complainant cannot be examined as a witness either in behalf of himself, or of a co-complainant. The proper course when the nature of the suit will admit of such a change, is to move to strike out

1841.—Brown v. Weatherby.

*BROWN v. WEATHERBY.

[*125]

1841: 19th and 20th February.—Heir; Parties; Stat. 3 and 4 Will. 4, c. 104.

To a suit for administering the real assets of a testator, under 3 and 4 Will. 4, c. 104, the heir as well as the devisee, is a necessary party.

The case of *Weeks v. Evans*, reported ante, vol. 7, p. 546, overruled.

ON the case of *Weeks v. Evans*, reported ante, vol. 8, page 546, being cited on the argument of a demurrer in the above mentioned cause, the Vice-Chancellor doubted whether the decision in that case was warranted by the facts stated in the report. In consequence of which Mr. G. Richards, who was one of the counsel in *Weeks v. Evans*, procured and furnished his Honor with the papers in that cause.

On the next day his Honor made the following observations on the reported case.

In this suit of *Weeks v. Evans*, I have been furnished, by Mr. Richards, with the brief. It was a creditor's suit by two persons on behalf of themselves and all other the creditors of a deceased; and it appears that the deceased devised all his estate to his wife, whom he made his executrix. She proved the will; and it further appears that, at the time of the death of the testator, he was a trader within the meaning of the bankrupt laws. The wife being the sole defendant, the cause came on as a short cause, I presume; and the common decree was made in a creditor's suit. The minutes as drawn up, merely directed accounts of the personal estate. It seems that, at some subsequent time, there was some mention of this cause to the court; for the Registrar has a note to the following effect: "Heir not a necessary party." That is also the note on the brief of counsel. At a subsequent time, there was an application in three causes, that is, in this cause, in a cause wherein J. Lowe and others were plaintiffs and Anna Evans [*126] was the defendant, and in a cause in which Anna Owen and others were plaintiffs and Anna Evans was the defendant. An order was made, on the 1st of February, 1836, by which the costs of the heir at law were directed to be paid by Anna Evans. What effect the other suits had on the order, I cannot tell; but there was some sort of arrangement by which the heir at law was to have his costs paid. Otherwise I should say that, but for that specialty, the decision is wrong.(a)

the name of the nominal complainant who is not interested, and make him a party defendant, so that he may be examined as a witness to sustain the suit." *Echford v. De Kay*, 6 Paige, 565. And see *Benson v. Chester*, Jac. 577.

(a) *Ex relatione*, Mr. Nicholl. Mr. G. Richards stated that the report of *Weeks v. Evans*, comprised all the necessary facts.

 1839.—Willis v. Brown.

WOODROFFE v. DANIEL.

1839 : 6th June.—Practice ; Solicitor ; Inspection of Documents.

Where documents, which a defendant is ordered to produce, are permitted to remain in his solicitor's office, for the plaintiff's inspection, the solicitor is not entitled to charge the plaintiff for inspecting them ; although the clerk in court would have been entitled to demand 6s. 8d. per hour.

On a motion in this cause, made by Mr. *Jacob* and opposed by Mr. *Knight Bruce*, the Vice-Chancellor ruled that, where documents in the possession of a defendant are allowed to remain in his solicitor's office instead of being deposited with his clerk in court, the solicitor is not entitled to make any demand upon the plaintiff for inspecting them : although the clerk in court, if they had been deposited with him, would have been entitled to charge the plaintiff 6s. 8d. per hour for the inspection. It being for the accommodation of the defendant that the documents are allowed to be inspected at his solicitor's office.

[*127]

*WILLIS v. BROWN.

1839 : 10th and 18th June.—Bedford Level ; Construction of the Bedford Level Act, 15 Cha. 2, c. 17. By the Bedford Level act, it was enacted, that all conveyances by indenture, of the 95,000 acres allotted to the then Earl of Bedford, or any part thereof, entered with the registrar of the level, should be of equal force to convey the freehold and inheritance thereof, as if the same were for valuable considerations, enrolled within six months, in one of the King's courts of record at Westminster, and that no lease, grant, or conveyance of, or charge out of or upon the 95,000 acres or any part thereof, except leases for seven years or under in possession, *should be of force but from the time it should be entered with the registrar.* Conveyances were afterwards made of part of the 95,000 acres, but were not registered. Held that those conveyances were nevertheless valid for all purposes, except for entitling the grantees to the privileges conferred, by the act, on the owners of lands within the Level, and for the other purposes of the act.

By an order made in this cause on the 20th of December, 1837, it was referred to the Master to inquire and state whether a good title could be made to the farms, lands and hereditaments sold, under the decree, to John Dobede, Esq. The Master reported that a good title could be made to all the hereditaments, except a freehold farm called Metlam Farm, situate in the parish of Soham in the Isle of Ely.

The farm in question formed part of the 95,000 acres of fen land mentioned in an act of Parliament passed in the 15th year of King Charles the Second, c. 17, intituled : "An act for settling the draining of the Great Level of the Fens called Bedford Level." That act, after reciting that certain moors, marshes, fenny and low surrounded grounds within the counties of Northampton, Norfolk, Suffolk, Lincoln, Cambridge and Huntingdon, were called the great level of the fens, and, after several fruitless undertakings for draining the same, were, upon the desires of many persons of worth, under-

1839.—Willis v. Brown.

taken to be drained by Francis then late Earl of Bedford, and that the said Earl was to have, for his recompense for effecting that difficult work, only 95,000 acres of the said "grounds: which was a work of so [*128] great and public concernment that his late Majesty, King Charles the First, gave great encouragement to the said Earl and others whom he had taken in to be adventurers and participants with him therein; and in order to the effecting thereof, the said Earl and his adventurers and participants, had bestowed great sums of money for the perfecting the same; and, after his death and some interruptions, William, Earl of Bedford, son and heir to Earl Francis, with divers of his adventurers and participants proceeded in the completing and finishing the said works; and the commissioners appointed as therein mentioned, did adjudge the same drained; but the same could not be preserved without a perpetual, constant care, great charge, and orderly government: it was enacted that William, Earl of Bedford, son and heir of Earl Francis, and the adventurers and participants of the said Earl Francis and Earl William or either of them, their heirs and assigns, should be a body politic and corporate by the name of "The Governor, Bailiffs, and Commonalty of the Company of the Conservators of the Great Level of the Fens;" which corporation should consist of one governor, six bailiffs, twenty conservators, and commonalty, and should have a common seal, and assemble and meet together when, where, and as oft as they pleased, and appoint a registrar and other officers, and allow them salaries and remove them and make new at their pleasure: and William, Earl of Bedford, was to be the first governor, and certain other persons therein named, were to be the first six bailiffs, and certain other persons therein named, the first conservators: and the said governor, bailiffs and conservators were to continue until Wednesday in Whitsun week in the year 1664, and from thenceforth until new elections by the said corporation, or the major part which should be then present: and that the said "governor, bailiffs [*129] and conservators should and might lay taxes, from time to time, upon all the said 95,000 acres only for support, maintenance, and preservation of the said great level, and levy the same, with penalties for non-payment, and all other things do in order to the support, maintenance and preservation of the said great level and works made and to be made: sect. 2. That the said governor, bailiffs and conservators of the said corporation for the time being, for the maintenance and preservation of the said Great Level by convenient outfalls to the sea, should, for ever thereafter, be and were thereby made and constituted commissioners of sewers for and of the said Great Level of the Fens; and they were thereby invested with all the powers and authorities of commissioners of sewers within the same: sect. 5. That all conveyances by indenture of the said 95,000 acres or any part thereof, entered with the said registrar, in a book to be kept for that purpose, should be of equal force to convey the freehold and inheritance of the said 95,000 acres or any part thereof, as if the same conveyances by indenture, were for valuable considera-

1839.—*Wilks v. Brown.*

tions of money enrolled, within six months, in one of the King's courts of record at Westminster; *and no lease, grant, or conveyance of, or charge out of or upon the said 95,000 acres or any part thereof, except leases for seven years or under in possession, should be of force, but from the time it should be entered with the said registrar as aforesaid,* the entry whereof being endorsed by the said registrar upon such lease, grant, conveyance or charge, should be as good and effectual in the law as if the original book of entries were produced at any trial at law or otherwise: sect. 8. That the said corporation should give public notice, from time to time, of the parts and proportions of the said 95,000 acres for which any tax or penalty were [*130] or should be in arrear, by affixing *openly at the shire house or market place in Ely aforesaid, a schedule, in parchment, under the seal of the said corporation, containing such parts and proportions of the said 95,000 acres for which any tax or penalty should be in arrear, with the names of the respective owners, entered upon the tax roll with the said corporation, of the said parts and proportions of the said 95,000 acres so in arrear: sect. 12. That the said governor, bailiffs, conservators and commonalty, upon Wednesday in Whitsun week, yearly, should, at a public meeting to be holden for the said corporation by the greater number then present, elect a new governor, bailiffs and conservators respectively; provided that none should be capable to be or continue governor or bailiffs, that should not have 400 acres or more of the said 95,000 acres, nor to be a conservator that should not have 200 acres or more of the said 95,000 acres, nor should any of the commonalty have a voice in elections that had not 100 acres or more of the said 95,000 acres; and that the said governor, bailiffs and conservators should and might be removed, by the said governor, bailiffs, and conservators and commonalty, or the greater number of them present at their public meetings, and new chosen in place of him or them so dead or removed: sect. 15.

The vendors made out the following title to the farm. By articles of the 20th of May, 1723, made previous to the marriage of the Honorable Charles Townshend with Awdry the daughter of Edward Harrison, the farm, of which Edward Harrison was seised in fee, was agreed, by him, to be conveyed to the use of C. Townshend for life, with remainder to trustees to preserve, &c., with remainder to the use that Awdry Harrison might receive a rent charge of 1000*l.* a year, with remainder to the use of the first [*131] and other sons of *the marriage successively in tail male, with divers remainders over, with the ultimate remainder to Edward Harrison, his heirs and assigns; and by indentures of lease and release of the 17th and 18th of March, 1726, a conveyance was made pursuant to those articles. Those indentures were registered at the Fen office on the 19th of December, 1828.

By an indenture of bargain and sale, dated on the 22d of June, 1751, and by a recovery suffered in pursuance thereof, in Trinity term in the 24th and 25th years of King George 2d, the farm was limited to such uses as Charles, who had been then become Viscount Townshend, and the Honorable George

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Townshend, his eldest son by Awdry his wife, should jointly appoint, and, in default thereof, to the uses limited by the release of the 18th of March, 1726. The indenture of bargain and sale was not entered at the office of the commissioners of the Lower Fen drainage until the 29th of March, 1815.

By indentures of lease and release and appointment of the 16th and 17th of December, 1751, Charles Viscount Townshend and George Townshend appointed and conveyed the farm to divers uses which afterwards determined or failed of effect, with remainder to the use of the first son of the body of George Townshend on the body of Charlotte Lady Ferrars to be begotten, in tail male, with divers remainders over. The last mentioned indentures were not entered at the Fen office until the 29th of March, 1815.

By a bargain and sale dated the 13th of February, 1776, and by a recovery suffered in Hil. term, in the 16th year of Geo. 3d, George Townshend, then Viscount Townshend, and George Townshend Baron de Ferrars, his eldest son conveyed and limited the farm, to such uses as they [*132] should jointly appoint, or as Baron de Ferrars, if he should survive his father, should appoint, and, in default thereof to the uses limited by the release of the 17th of December, 1751. The last mentioned indenture of bargain and sale was not entered at the office of the commissioners of the Lower Fen drainage until the 29th of March, 1815.

By lease and release and appointment of the 19th and 20th of March, 1777, George Viscount Townshend and his son Baron de Ferrars, appointed and conveyed the farm to certain uses, to secure a yearly rent charge of 200*l.* to Lord de Ferrars and such other persons as should, during the life of Lord Townshend, be entitled to the barony, in manner therein mentioned, with a limitation to the use of George Viscount Townshend and his assigns for life, with remainder to trustees to support contingent remainders, with remainder to such uses, &c., as George Viscount Townshend and Lord de Ferrars, during their joint lives, should appoint, and, in default of such joint appointment, then as Lord de Ferrars, if he should survive George Viscount Townshend, should appoint, and, in default of such last mentioned appointment, to the use of George Viscount Townshend and the heirs male of his body, with divers remainders over. The indenture of lease of the 19th of March, 1777, was entered at the Fen office on the 14th of August, 1814; but the release was never entered there.

By indenture of the 23d of December, 1777, in consideration of the marriage between George Townshend Baron de Ferrars and Charlotte Mainwaring Ellerker, George Townshend Baron de Ferrars covenanted, in case he survived his father, to settle hereditaments of the *yearly [*133] value of 5000*l.*, of which he should become seised in tail as aforesaid on the decease of his father, George Lord Viscount Townshend, to certain uses which have since determined or failed of effect, with remainder to the use of the first and other sons of the then intended marriage successively in tail male, with divers remainders over. The last mentioned inden-

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ture was entered at the Fen office on the 19th of December, 1828. George Viscount Townshend, who, some time before his death, was created Marquis Townshend, died in 1807.

George Townshend Baron de Ferrars, who, on the death of his father, became George Marquis Townshend, by his will bearing date the 19th of July, 1811, devised the farm to his brother, Lord John Townshend and Robert Blake, Esq., and their heirs, upon trust, by mortgage or sale thereof, to levy and raise so much money in aid of his personal estate not specifically disposed of, as would be sufficient to pay his debts, legacies, and funeral and testamentary expenses, and, as to such part thereof as should not be sold for those purposes, upon trust to convey the same to the use of Lord John Townshend and Robert Blake and their heirs, during the life of Lord Charles Vere Ferrars Townshend, son of the testator, upon the trusts therein mentioned, and, after the decease of Lord Charles Vere Ferrars Townshend, to the use of the first and every other son of Lord Charles Vere Ferrars Townshend, successively, in tail male, with divers remainders over.

The Marquis of Townshend died on the 23th of July, 1811. By lease and release of the 12th and 13th of June, 1815, the release being made between Lord John Townshend, Robert Blake, the present Marquis of Townshend [*134] (who was the son of the late Marquis,) and various other persons, after reciting indentures of lease and release of the 30th and 31st of May, 1811, by which the late Marquis conveyed his estates in Cambridgeshire and certain other counties to John Smith and Francis William Saunders and their heirs, upon certain trusts for raising and paying several sums of money, and, subject thereto, in trust for the late Marquis his heirs and assigns; and after reciting the will of the late Marquis and his death: it was witnessed that, *for barring all estates tail* (if any) and all reversions and remainders thereupon expectant or depending of and in the estates comprised in the release of the 31st of May, 1811, and *for confirming and corroborating the title of Smith and Saunders, as trustees as aforesaid, of and in the same estates, and for strengthening and confirming* the title of Lord John Townshend and Robert Blake, as devisees as aforesaid, of and in the same estates, the four last mentioned persons, together with the present Marquis, conveyed the farm and other estates unto and to the use of Sir Giles Godin and his heirs, to make him tenant to the *præcipe* for the purpose of suffering three or more recoveries, which were to enure to the use of Smith and Saunders and their heirs, upon the trusts therein mentioned. The recoveries were accordingly suffered in Trinity term in the 55th year of Geo. III. The indentures of the 12th and 13th of June, 1815, were not entered at the office of the commissioners of the Lower Fen drainage, until the 19th of December, 1828; and they were so entered and registered at the request and expense of Thomas Skeels, a purchaser of part of the estates of the late Marquis Townshend, from Smith and Saunders, the trustees for sale.

By lease and release of the 5th and 6th of February, 1816, Smith and

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Saunders and Lord John Townshend and Blake conveyed the farm to William Dunn Gardner *his appointees, heirs and assigns. The last [*135] mentioned indentures were entered at the Fen office on the 18th of June, 1818.

By lease and release of the 28th and 29th of May, 1818, Gardner conveyed the farm to John Shearing, the testator in the cause, his heirs and assigns. The last mentioned indentures were entered at the Fen office on the 15th of June, 1818.

A petition, presented by two of the parties to the suit, after stating the 8th section of the Bedford Level act, and the deeds and other matters before mentioned, alleged that, by the articles of agreement of the 20th of May, 1723, and the indentures of lease and release of the 17th and 18th of March, 1726, George, Marquis of Townshend, became tenant in tail male of the Metlam farm, under the limitation thereof, therein contained, to the use of the first and other sons of Charles Townshend, by Awdry Harrison, successively in tail male: that George Marquis of Townshend, died in the year 1807, leaving George Townshend Baron de Ferrars, his eldest son and heir at law him surviving, who, thereupon became Marquis of Townshend and entitled to the Metlam farm, for an estate tail to him and the heirs male of his body; and, afterwards, viz. in the year 1811, died leaving the present Marquis, his eldest son and heir at law, who, thereupon, became entitled to the farm for an estate tail to him and the heirs male of his body; that Dobbie, the purchaser under the decree, contended that the estate tail created by the articles of agreement of the 20th of May, 1723, and the indentures of the 17th and 18th of March, 1726, was intended to have been barred by the indenture of bargain and sale of the 22d of June, 1751, and the recovery *suffered in pursuance thereof in Trinity term in the 24th [*136] and 25th years of Geo. 2d; but the same indenture and recovery had not that effect, as the bargain and sale was not entered at the Fen office till the year 1815, and there was no tenant to the *præcipe* at the time the recovery purported to be suffered; and that estate tail was not barred by the bargain and sale of 1776, and the recovery suffered in pursuance thereof, by reason of the bargain and sale not having been entered at the Fen office till the year 1815; and, further, that the same estate tail was not barred by the lease and release of the 12th and 13th of June, 1815, and the recovery suffered in pursuance thereof, by reason of the last mentioned indentures not having been entered at the Fen office till the year 1828; and the possession which had been had thereunder, had not been adverse to the present Marquis of Townshend, because his title to the farm *was thereby admitted*, and those indentures, having been entered at the Fen office in the year 1828, the possession of the farm could not become adverse to the parties claiming under the estate tail, till the death of the present Marquis. But the petitioners contended that the title was good, whether it was to be considered as a title depending upon the operation of the above mentioned act of Parliament, which, they

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submitted, was only a registry act, and did not require deeds to be entered with the registrar appointed by virtue of the act, except for the purpose of enabling the corporation to know who were the owners liable to the assessments referred to by the act, or for the benefit of third parties; or whether it was to be considered as a title depending upon adverse possession, under the statute of limitations (3 and 4 Will. 4, c. 27 :) for that the right of the present

Marquis of Townshend must be considered as having been an expectant estate under the 3d section of that act, the time *for claiming

which, or the adverse possession against which began on the demise of his father in July, 1811; and that, under the 2d section of the same act, the present Marquis had twenty years for asserting his right; and, not having so done, he was barred; and, under the 21st section of the act, all those persons were also barred that he might have lawfully barred; and that neither the recovery deeds of June, 1815, nor the enrolment of those deeds in 1828, was any acknowledgment of the right of the present Marquis Townshend, so as to prevent the bar by adverse possession: for the petitioner submitted that, according to the 14th section of the act, the acknowledgment, in order to preserve the right, must be an acknowledgment in writing under the hand of the party in possession given to the other party or his agent, which, it was further submitted by the petition, those deeds clearly were not; but, on the contrary, the recovery deed, so far as the present Marquis Townshend was concerned, was most cautiously worded to avoid even the imputation of any admission of the title; it being expressed to be made for barring all estates tail (if any) and all remainders dependent thereon: and it was further submitted, by the petition, that, if the said recovery deed was no acknowledgment of title, the enrolment of that deed in 1828, could not be so under the circumstances above stated.

The petition prayed that, under the circumstances above stated, it might be declared that a good title was deduced to Metlam farm.

The following are the enactments of the statute of limitations, [*138] 3 and 4 Will. 4, c. 27, which were referred *to in the petition and in the course of the argument: Sect. 2. "That after the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action, shall have first accrued to some person through whom he claims: or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." Sect. 3. "That when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or inte-

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rest in possession." Sect. 14. "That when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent, in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last mentioned person or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at, and not *before the [139] time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given." Sect. 21. "That when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited which shall be applicable in such case, no such entry, distress or action shall be made or brought by any person claiming any estate, interest or right which such tenant in tail might lawfully have barred."

Mr. *Jacob* and Mr. *Patch*, for the petitioners:—The case of *Hodson v. Sharpe*,^(a) shows that there is no weight in the objection that the deeds for making the tenants to the *præcipe*, were not registered at the respective times when the recoveries, were suffered; and, consequently, those recoveries, were effectual for the purposes for which they were suffered. But supposing that not to be so, there has been an adverse possession for a sufficient length of time to bar any title under the entail. The late Marquis died in 1811. His devisees then entered into possession; and, in 1816, they sold the farm to Gardner, under whom the vendors claim: so that, from 1811, that is, for more than twenty years, there has been a possession adverse to the entail. The consequence is that not only the estate tail is barred, but all the estates and interests which the tenant in tail might have barred by suffering a recovery, are destroyed.^(b) Therefore, the present Marquis and all persons claiming after his estate tail, are barred. Moreover, in 1815, the present Marquis joined in confirming the title of his father's devisees: so that, *quacunqve via*, the title is free from objection.

*Mr. *G. Richards*, for the purchaser.

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The eighth section of the Bedford Level act, first of all enacts that conveyances of any part of the 95,000 acres, entered with the registrar, shall be of equal force to convey the freehold and inheritance thereof, as if the same were for valuable consideration, enrolled, within six months, in one of the King's courts of record at Westminster; and then it enacts that no conveyance of any part of the 95,000 acres, except leases for seven years or un-

^(a) 10 East, 350.

^(b) See 3 and 4 Will. 4, c. 27, s. 2 and 21.

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der in possession, shall be of force but from the time it shall be entered with the registrar as aforesaid. Nothing can be more clear and positive than the language of this section. *Hodson v. Sharpe* was the case of an action brought by a landlord against his tenant; and all that it decides is that the act was not intended to operate as between parties standing in that relation to each other. It is a decision founded on the well known principle of law, that a tenant shall not be allowed to dispute his landlord's title. The language of Lord Ellenborough and of the other learned Judges implies that, as between strangers or persons between whom no privity exists, (as is the case here) the objection for want of registration of the deed, would be fatal.

Next, as to the point of adverse possession. Supposing that, in this case, there had been any adverse possession, the release of June, 1815, which the trustees accepted from the present Marquis, obviously alludes to the estates tail and remainders over as subsisting. The registration of that deed in 1828, was a sufficient acknowledgment to prevent the estates tail and the remainders over, from being barred by length of time.^(a) And, sup-
 [*141] posing that the conveyance of June, 1815, has "any operation, in can have no effect beyond the life of the present Marquis: and, therefore upon his death, either his issue or the persons entitled in remainder or reversion, may claim the farm.

I submit, therefore, that both upon the construction of the local act, and upon the point of length of time, the Master has come to the right conclusion.

Mr. Jacob in reply:—The release of June, 1815, does not contain an acknowledgment of any estate tail. The expression used in it, is: "all estates tail, *if any*." How can the registration of that deed be an acknowledgment sufficient to take the case out of the statute of limitations? In order to have that effect, it must be an acknowledgment in writing, signed by the person in possession, and given to the party entitled, or his agent. But, in this case, that which is said to have been acknowledgment, was given, not to the party entitled, but to the clerk of the Fen office. The deeds purporting to create the entail also, were not registered; if so, then according to the purchaser's own argument, no estate tail was ever created.

The main question is what is the meaning of those words in the local act, which say that no conveyance of any part of the 95,000 acres shall be of force until it shall be entered with the registrar? Does it mean that the conveyance shall not be of force for any purpose, or shall not be of force with reference to the purposes of the act? I apprehend that it means with reference to the purposes of the act. The owners of the 95,000 acres were to have
 votes in the election of the officers of the corporation, and were to be
 [*142] subject to rates and taxes; "and it was for those purposes and for those purposes alone, that it was necessary that the conveyances to them should be registered at the Fen office. The act does not alter the com-

(a) See 3 and 4 Will. 4, c. 17, s. 14.

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mon law or repeal any prior statute; consequently, the deeds were to be valid as between the parties to them; and the nullity was confined to the purposes of the act.

THE VICE-CHANCELLOR :—I wished to take a little time for consideration in this case, not for the purpose of satisfying any great doubt that I had as to the general principle, but for the purpose of reading over the whole of the Bedford Level act.

The case is a very simple one.

Upon the marriage of Charles Townshend, afterwards Viscount Townshend, with Awdry Harrison, articles were made, by virtue of which, in equity, there was a limitation in strict settlement created, which had the effect of making the eldest son of the marriage tenant in tail in equity. After the articles of agreement had been executed, a conveyance was made, by lease and release, of the 17th and 18th of March, 1726, which clothed the equitable interests with the legal estate, and, therefore, so far as it went, tended to make the eldest son of the marriage, tenant in tail. It seems that the eldest son of the marriage, was George Marquis Townshend, who died in 1807. By bargain and sale of the 22d of June, 1751, and a recovery, the estate tail and remainders over, so far as the bargain and sale and recovery had effect, were barred. Then instruments of lease and release and appointment of the 16th and 17th of December, 1751, were executed, which, so far as they went, had the effect of making the Marquis of Townshend tenant for life, and his eldest son, who afterwards became Lord de Ferrars, [*143] tenant in tail. Then there was a bargain and sale of the 13th of February, 1776, and a recovery, which were intended to have the effect of barring the estate tail that had been last created, and of reconveying the estate, subject to a joint power of appointment reserved to the Marquis and his son, Lord de Ferrars, and to a separate power of appointment reserved to the son in case he should survive his father, to the uses to which the estate previously stood limited. And then deeds of lease and release and appointment, of the 19th and 20th of March, 1777, were executed, which purported to settle the estate in strict settlement on the Marquis and his son Lord de Ferrars, subject, however, to the joint appointment of the Marquis and his son, and, in default of such joint appointment, subject, to the appointment of the son, if he survived his father. Then a deed of the 23d of December, 1777, was executed by Lord de Ferrars, which did not purport to convey any estate, but merely operated by way of covenant; and then there was the will of Lord de Ferrars, who had become the second Marquis of Townshend, by virtue of which he attempted to devise the estate in question, virtually upon trust to sell.

The second Marquis died in 1811.

Then certain deeds of the 12th and 13th of June, 1815, were executed by the present Marquis of Townshend, who was the eldest son of the late Marquis; and, under those deeds the vendors in this case claim as against the Townshend family. Now, the objection to the title is that the lease and

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release of the 17th and 18th of March, 1726, were not registered at [*144] the Fen office, till the 19th of December, 1828; that "the bargain and sale on the 22d of June, 1751, and the lease and release of the 16th and 17th December, 1751, and the bargain and sale of the 13th of February, 1776, were not registered till the 29th of March, 1815; and moreover, that it appears that the lease for a year, of March, 1777, was registered on the 14th of August, 1815; but the corresponding release never has been registered at all. The deeds which had the effect of conveying the estate from the Townshend family to the person under whom the purchaser claims, were registered on the 19th of December, 1828.

Now, but for the question which arises upon the Bedford Level act, there would be no objection at all to the title. That objection arises upon the language of the 8th section of the Bedford Level act, which enacts "that all conveyances, by indenture, of the 95,000 acres," (that is to say, of that portion of the great level consisting of 400,000 acres, which had been previously allotted to the Earl of Bedford and the co-adventurers with him in the work of draining the great level) "or any part thereof, entered with the said registrar, in a book to be kept for that purpose, shall be of equal force to convey the freehold and inheritance of the said 95,000 acres, or any part thereof, as if the same conveyances by indenture were for valuable considerations of money enrolled, within six months, in one of the King's courts of record at Westminster. That is a portion of the section which appears to me to convey a benefit, and was meant to convey a benefit, namely, by making all conveyances of the 95,000 acres or any part thereof, by indenture registered in the Fen office, to have the same force and effect as if they had been by bargain and sale enrolled under the statute of Hen. VIII. It was obviously meant [*145] to give an increased convenience to the owners of this land. Then come the following words: "And no lease, grant, or conveyance of, or charge out of or upon the said 95,000 acres or any part thereof, except leases for seven years or under in possession, shall be of force but from the time it shall be entered with the said registrar as aforesaid; the entry whereof, being endorsed by the said registrar, upon such lease, grant, conveyance or charge, shall be as good and effectual in the law as if the original book of entries were produced at any trial at law or otherwise." Now it is obvious that the latter part of this section is meant to confer a benefit, in this way, namely, by making an endorsement upon the deed proof of the registration, instead of putting the parties, who might wish to prove the registration, to the necessity of resorting to an authenticated copy of what had been done at the register office. Then the question is whether those words in the first part of the latter portion of this section, are to be taken as making any lease, grant or conveyance to be absolutely of no force except from the time when it should be entered with the registrar. I confess that, at the time when the question was argued before me (not having for some time, read over this act), it appeared to me that what was said, by Mr. Jacob, in answer to the ob-

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jection to the title, was the correct answer, namely, that the intention of the framers of this act was that no conveyance of any portion of the 95,000 acres, should be of force for the purposes of the act, until it should be registered; and, upon deliberately reading over the whole of this act of Parliament, I think that that is the true construction. It appears that, after a recital with which the act is introduced, speaking of the whole work together, that is the work which consisted not merely in draining the 95,000 acres but the whole of the district comprised in the act, it is recited: that "the [*146] same cannot be preserved without a perpetual, constant care, great charge and orderly government; which being represented to the King's most excellent Majesty that now is, he hath been graciously pleased to declare more than an ordinary willingness to promote and countenance a work of so public concernment and many ways advantageous to his kingdom: to the end, therefore, that a work of this nature may receive public support and encouragement:" then follow the enacting clauses. It appears, therefore, that it was an object of the framers of this act to form a particular mode of governing the property, and of determining who should be the members of the government constituted by the act, and in what manner taxes should be raised that were necessary for the purpose of keeping up the work which had been accomplished. Then, by the 12th section, it is provided that the corporation which was constituted by the act: "shall give public notice, from time to time, of the parts and proportions of the said 95,000 acres for which any tax or penalties is or shall be in arrear, by affixing openly at the shire house or market place in Ely aforesaid, a schedule in parchment under the seal of the said corporation, containing such parts and proportions of the said 95,000 acres for which any tax or penalty is or shall be in arrear, with the name and names of the respective owner or owners, entered upon the tax-roll with the said corporation, of the said parts and proportions of the said 95,000 acres so in arrear: and there is another provision in the act which directs that the persons who are to form the corporation, in order to be eligible for governors or bailiffs, shall have a certain number of acres; and, in order to be eligible as conservators, a certain other number of acres, and that the commonalty shall have another number of acres; and there are [*147] "throughout, a great variety of provisions, which depend upon the holding of different quantities of the 95,000 acres; and I cannot but think that the main object of the framers of this act was to give the benefit which I have mentioned; and, in the next place, to declare that no conveyance should be of force, for the purposes of the act, except it were registered: in order that, as much as possible, all dispute might be avoided as to what persons were at any time, owners of the land who were to be charged, and whose land was to be distrained upon and sold, in case the arrearages were not paid. To a certain extent, that view of the act is supported by the decision in *Hodson v. Sharpe*: but, I confess that I do not quite go along with the view of the act taken, by the Judges of the Court of Queen's Bench,

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in that case. It seems that the question, in that case, arose as follows. There had been a lease made, and the lease had not been registered; and it was insisted, by the lessee, that it was void, as against the landlord, merely because it had not been registered. Now, in the argument of the case, the counsel for the plaintiff said that the lease, though invalid, till registered, as against third persons claiming adversely, was yet binding between the parties themselves, notwithstanding the words of the act, that no lease, except leases for seven years or under in possession, should be of force but from the time it should be entered with the registrar; for that only means of no force *as against third persons*. This seems to have caught the attention of the court, for the following passage is introduced in a parenthesis: "The court then said they would hear what could be urged against that construction." It seems then that a stop was put to any general argument, and that that was the point upon which the court did hear counsel. Now Lord Ellenborough, in giving judgment, says: "The act no doubt meant, for the protection of titles, that leases and conveyances within this district, should be registered, that every person interested in the inquiry might know in whom the title to any such land, was." And then his Lordship goes on to say: "and, therefore, as against persons who have been deceived by the omission to register, or, even, as against those who, without being deceived, knew that the act had not been complied with and relied on it, the legal objection might prevail at law." Now I must protest against the adoption of that view of the act; because that is a view of the act which is directly at variance with all that has ever been held, in this court, with respect to the register acts. It was decided, by Lord Hardwicke, in *Le Neve v. Le Neve*,^(a) that where a person had notice of a non-registered incumbrance, and, with such notice, took a subsequent conveyance and caused that to be registered, he should be postponed, in equity, to that incumbrancer of whose incumbrance he himself had notice: and, in the case of *Davis v. Lord Strathmore*,^(b) which I very well remember, my Lord Eldon held precisely in accordance with the doctrine laid down by Lord Hardwicke in *Le Neve v. Le Neve*: and therefore, though I quite agree with what Lord Ellenborough says with regard to the object of the legislature being that persons interested in the inquiry might know who the owners of the land were, yet I must protest against that latter part of his Lordship's doctrine which would go to extend it to a case to which, I apprehend, by the law of the land, as administered in this court, it would not extend. Mr. Justice Le Blanc and Mr. Justice Bayley seem to agree in the notion that this act was made for the purpose of giving general notice: but still both of those learned

[*149] *Judges; and especially Mr. Justice Bayley, intimate that there was another ground on which the action might be maintained, which has nothing to do with the present question. The Court of King's Bench, however, have, to a certain extent, put a construction upon the act which

^(a) 3 Atk. 646.^(b) 16 Ves. 419.

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goes to mitigate the general effect of the words, in the 8th section : "shall be of force but from the time it shall be entered with the registrar." And I wish it to be most distinctly understood that I am of opinion that the meaning of those words, is not that conveyances of parts of the 95,000 acres shall not have any force at all, but that they shall have no force for the purposes of the act, except from the time of their being entered with the registrar. That being my opinion, it is not necessary for me to advert to any other ground upon which the title to the farm may be supported ; though I must say that, it appears, from what is stated on the face of this petition, that the possession has always gone with the apparent title under the deeds. The persons have uniformly taken as tenants for life and tenants in tail in succession, according to the import of the deeds : and the very last conveyance was made by the present Marquis of Townshend for the purpose, in fact, of confirming his father's will ; and the possession appears uniformly to have gone, since that time, according to the intent of the parties : therefore, in that way, the title would be perfectly good. But my opinion is that, independently of that fact, the title is good, upon the true and sound construction of the Bedford Level act.

 *JONES v. WINWOOD.

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1841 ; 16th and 24th February.—Power.

In 1819, an estate was settled to such uses as W. T. D. and F. his wife should, during their joint lives, appoint, and, in default of appointment, to the use of W. T. D. for life, with remainder to trustees to preserve, &c., with remainder to the use of the wife for life, with remainder to trustees to preserve, &c., with remainder to the use of the sons of W. T. D. and his wife, successively in tail, with remainder to the use of their daughters as tenants in common in tail, with cross-remainders in tail, with remainder to W. T. D. in fee. In 1824, W. T. D. took the benefit of the insolvent debtors' act, and conveyed all his estate to the provisional assignee. In 1828, W. T. D. and F. his wife, in execution of their joint power, appointed the estate to trustees in fee, in trust to sell. The trustees afterwards sold the estate. Held that the power of appointment was not destroyed by the conveyance to the provisional assignee ; and that the appointment of 1828, vested in the trustees the whole inheritance in fee, except that portion of it which was vested in the provisional assignee.

The decision in *Bedham v. Mee*, 9 Bing. 695, and 1 Myl. & Keen, 32, dissented from.

THE bill was filed for the specific performance of an agreement entered into, on the 15th of November, 1833, by the plaintiffs Isaac Jones, Patrick Brown and William Thomas Davies, for the sale of an estate, in the parish of Kilie Ayron in Cardiganshire, to Henry Q. Winwood, for 3901l. Some time after the agreement was made, Henry Q. Winwood assigned the benefit of it, to his brother, the defendant John Winwood. The purchaser's counsel having perused the abstract of title to the property, and being of opinion that the exercise of a power of appointment by Davies, by an indenture of the 17th of September, 1828, was invalid at law, and, therefore, that the plaintiffs could not make a good title to the estate, the parties agreed, on the 1st

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of July, 1835, that a suit should be instituted for the specific performance of the agreement of 1833, and that the purchaser should not, either in the Master's office or before the court, take any objection to the title except the one before alluded to ; and, if a specific performance should be decreed, [*151] that he would consent to its being "decreed with costs ; and, if the bill should be dismissed, that he would pay the plaintiff's costs as well as his own.

The defendant's answer contained the following statements with respect to the title to the estate.

That it appeared, by the abstract, that the hereditaments and premises were, under and by virtue of indentures of lease and release of the 27th and 28th of December, 1819, and a fine and recovery levied and suffered in pursuance thereof, settled (after certain uses which had since determined) to such uses, upon such trusts and, generally, in such manner as the plaintiff W. T. Davies and Frances his wife should, from time to time during their joint lives, by any deed or deeds, instrument or instruments in writing to be by them jointly sealed and delivered in the presence of and attested by two or more credible witnesses, appoint, and, in default of such appointment, and, in the mean time, subject thereto, to the use of W. T. Davies and his assigns for his life with remainder to the use of a trustee and his heirs, for the life of W. T. Davies, upon trust to preserve contingent remainders, with remainder to the use of Frances the wife of W. T. Davies and her assigns, for her life, with remainder to the use of the trustee and his assigns, during the life of Frances Davies, upon trust to preserve contingent remainders, with remainder to the use of the first and other sons of W. T. Davies and Frances his wife successively in tail general, with remainder to the use of the daughters of W. T. Davies and Frances his wife, as tenants in common in tail general, with cross remainders between and among them in tail general, with remainder to the use of W. T. Davies, his heirs and assigns : that, by indentures of [*152] "lease and release of the 26th and 27th of March, 1823, the hereditaments and premises were, in exercise of the joint power of appointment reserved to W. T. Davies and Frances his wife by the indenture of the 28th of December, 1819, appointed and conveyed by them unto and to the use of John Herbert, Esq. his heirs and assigns, subject to a proviso, whereby it was declared that, upon payment by W. T. Davies to Herbert of 1400*l.* with lawful interest, at the time therein mentioned, Herbert, his heirs or assigns, would reconvey and assure the hereditaments to the uses and upon and for the trusts, intents and purposes and with under and subject to the powers, provisoes, declarations, and agreements expressed and declared, concerning the same, in and by the indenture of the 28th of December, 1819, or as near thereto as might be and circumstances would permit : that W. T. Davies, in August, 1824, was discharged from prison under the provisions of the insolvent debtors' act : and thereupon, by an indenture of bargain and sale of the 6th of August, 1824, he, pursuant to the directions of the act, bargained and sold

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all his estate in the hereditaments(a) to the provisional assignee of the estates and effects of insolvent debtors in England, who, by an indenture of bargain and sale of the 18th of April, 1825, conveyed the same to the plaintiff Isaac Jones (the assignee appointed by the creditors of W. T. *Davies :) that after the discharge of W. T. Davies under the insolvent act and the execution of the indentures of bargain and sale as aforesaid, W. T. Davies and Frances, his wife, by an indenture of appointment of the 17th of September, 1828, in exercise of the power of appointment to them reserved or given by the indenture of release of the 28th of December, 1819, and the fine and recovery levied and suffered in pursuance thereof, appointed the hereditaments and premises, subject to the mortgage in fee to Herbert, unto and to the use of the plaintiff Patrick Brown and Jenkin Beynon (the latter of whom never acted under, and afterwards duly disclaimed the trusts of the deed of appointment,) their heirs and assigns, upon trust for sale; and, under which indenture of appointment, the plaintiff P. Brown, as the acting trustee, claimed to be seised of the equity of redemption in fee simple of the hereditaments and premises, or, at all events, to have full power, in conjunction with the mortgagee of the hereditaments and premises and Isaac Jones, to make a title to the fee simple of the hereditaments and premises, discharged from the uses and limitations of the indenture of the 28th of December, 1819: but that he, the defendant, was advised and submitted that W. T. Davies had no power or right: after his insolvency and the execution by him of the bargain and sale of his real estate to the provisional assignee of the insolvent debtors' court, to concur with Frances his wife in the execution of the power of appointment reserved to them by the indenture of the 28th of December, 1819; and that no estate was vested in P. Brown under such appointment; inasmuch as the power of appointment was destroyed by the insolvency of W. T. Davies and the execution of such bargain and sale as aforesaid. [*153]

*At the hearing of the cause on the 7th of April, 1837, it was ordered that a case should be made for the opinion of the Barons of the Exchequer on the following questions. [*154]

First, whether the power of appointment contained in the indenture of release of the 28th of December, 1819, in the pleadings mentioned, was or was not destroyed by the conveyance of the 6th of August, 1824, by the insolvent William Thomas Davies, of all his estate to the provisional assignee in the pleadings mentioned?

Second, if the power was not destroyed, what estate passed under the appointment made by the indenture of the 17th of September, 1828, in the pleadings mentioned?

(a) According to the case made for the opinion of the Barons of the Exchequer, as after mentioned, all the estate, right, title, interest and trust of W. T. Davies, to all his real and personal estate and effects, in possession, reversion, remainder or expectancy, except the wearing apparel and other such necessities of the insolvent and his family not exceeding, in the whole, the value of 20*l.*, were conveyed and assigned to the provisional assignee, his successors and assigns.

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The case having been argued, the Barons of the Exchequer returned a certificate in favor of the title,^(a) accompanied by the following reasons.

"In this case we propose to give the reasons which have induced us to give our certificate to the Lord Chancellor in favor of the plaintiff.

"By the original conveyance, dated the 27th and 28th of December, 1819, certain lands were settled to such uses as William Thomas Davies and his wife should, at any time or times, and from time to time, during their joint lives, by deed or other instrument in writing, duly executed, direct and appoint, and, in default of and until such appointment, to the use of [*155] William Thomas Davies "for life, with remainder to trustees to preserve, &c., and, then, to the use of his wife for life, and, then, in like manner, to the use of his sons, in succession, in tail general, and then to the use of the daughters in tail general, with cross-remainders, and with remainder in fee to William Thomas Davies himself. In 1824, William Thomas Davies took the benefit of the insolvent act, and conveyed, to the provisional assignee, on the 6th of August, 1824, all his interest in the premises, which was subsequently transferred, by the provisional assignee, to Isaac Jones, the assignee of the estate, in the usual way. Under these circumstances, William Thomas Davies and his wife, in execution of their joint power of appointment, conveyed, on the 16th and 17th of September, 1828, by lease and release, the premises to Patrick Brown and Jenkin Beynon, in fee, upon trust for the creditors of William Thomas Davies. And the point to be considered, is whether, by this appointment, any estate passed, and what estate, to the trustees.

"The first question is whether the power was revoked by the conveyance to the provisional assignee: and we are of opinion that it was not. Indeed, on this part of the case, there seems to be little difficulty. No authority was cited for the proposition, contended for by the defendant's counsel, that where, by previous conveyance, a party has prevented himself from executing a power as fully as he could have originally executed it, the power is at an end. Nor can any such proposition be maintained. Even upon the authority of the decision of *Badham v. Mee*, as explained by Sir John Leach, this question may be answered in the negative. For he considered the power as not well executed in that case, because the particular limitations made by [*156] the appointment "under it, could not have been valid, if introduced into the original deed creating the power. But, if the previous conveyance had altogether put an end to the power, such reasons would have been wholly unnecessary.

"Now it is obvious, as was indeed pointed out by the court in the course of the argument, that limitations might have been made, subsequently to the conveyance in 1824, which would apply to the life estate of the wife and the estates tail of the children, and which might have been legally introduced

(a) See the certificate, post, 158. See also 3 Mee. & Wels. 653.

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into the original deed, and, consequently, upon the principles stated in *Badham v. Mee*, such an execution of the power would have been valid; and, if any valid execution of the power could have been made, the first of the Lord Chancellor's questions must be answered in the negative.

"But, in truth, the whole case turns upon the answer to be given to the second question. For, if the execution of this power by the deed of September, 1828, be invalid, then no estate passed by it; and the original limitations contained in the deed of 1819, remain still in force.

"We think, after full consideration, this power was well executed, so as to convey the estate for life of the wife and the estates tail of the children, to the trustees under the deed of 1828.

"We cannot adopt the principle laid down, by Sir J. Leach, in affirming the certificate sent by the Court of Common Pleas in *Badham v. Mee*. It is not clear that such was the ground on which that court made their certificate, the reasons for which were not given by them.

"We do not think it is right to translate, into words, the effect [*157] of the appointment under the power, taken in conjunction with the other circumstances, and then to consider whether such limitations could, according to the peculiar rules affecting the transmission of landed property, have been legally inserted in the original deed.

"The utmost extent to which the principle could be carried (and, looking at the principles which govern the execution of these powers, which were originally mere modifications of equitable uses, taking effect as directions to trustees, which bound their conscience, and which a court of equity would compel them to perform, it may be questionable whether even this ought to be done) would be to insert, the limitations actually contained in the appointment itself, in the original deed, and then to examine whether such limitations would be repugnant to any known rule of law. Now, if we do that in this case, no difficulty will be produced. Here, if the limitation of the estate made by the appointment under this power, had been inserted in the original deed, there would have been no incongruity upon the face of that instrument. A fee would have been given to Brown and Beynon, the trustees, and no more. But then, in considering what operation such a deed, good in point of form, will have, the court looks at the other circumstances; and, finding that the insolvent had, previously, by an innocent conveyance, (for such the assignment under the insolvent act must, we think, be considered to be) conveyed away his life estate and his remainder in fee, it adjudges that he cannot, by executing the power, derogate from his own previous conveyance, and concludes, therefore, that the deed does not operate on the estates previously assigned.

"The result, therefore, is that, by executing the power, the insol- [*158] vent conveys, to the trustees, all that had not been previously assigned, under the insolvent act, to his assignees. In conformity with this opinion, we shall send our certificate to the Lord Chancellor.

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"We have, however, to observe that no notice was taken, in the argument, of the previous mortgage for 1400*l.*, with a power of sale, to John Herbert. Our opinion, therefore, is given on the supposition that that deed forms no part of the case. If it does, we are not prepared to say that, at law, the execution of the power was not inconsistent with that conveyance."

The following certificate was returned by the Barons of the Exchequer.

"We have heard this case argued by counsel and have considered it, and are of opinion, first, that the power of appointment contained in the indenture of release of the 28th of December, 1819, was not destroyed by the conveyance, bearing date the 6th of August, 1824, by the insolvent W. T. Davies, of all his estate, to the provisional assignee:

"And, secondly, that, by the indenture of the 17th of September, 1828, an estate in fee simple was conveyed, to the trustees therein named, subject, however, to the estate for the life of the insolvent, and (on failure of the intermediate estates) to the remainder in fee to the insolvent, which had been, prior thereto, conveyed to the assignees of the insolvent's estate.(a)

"ABINGER.

W. BOLLAND

J. PARKE.

E. H. ALDERSON."

[*159] "The cause now came on to be heard on the equity reserved.

Mr. *Wigram*, Mr. *G. Richards* and Mr. *Walford*, for the plaintiffs, said that, as the purchaser had consented to a case being sent to law, which he was not bound to do, he was compellable to complete his purchase, provided the court confirmed the certificate.

Mr. *Knight Bruce*, Mr. *Jacob* and Mr. *Rudall*, for the purchaser: There are two questions in this case. First, whether the joint power of appointment given to Davies and his wife, existed after the assignment to the provisional assignee: Second, if it did, whether it was well exercised by the deed of the 17th of September, 1828.

First: the power, in this case, is a general one; and there is no authority for saying that when such a power is annexed to a life estate vested in the donee, and that estate is transferred by him to another person, the power is, any longer, capable of being exercised by him. The cases of *Badham v. Mee*(b) and *Hole v. Escott*(c) are direct authorities against the power existing under such circumstances. Indeed, there is a stronger ground for holding that the powers in those cases, were destroyed: for, there, the powers were merely powers of selection amongst certain specified objects, namely, the children of the donees; but, here, the power is a general one;

[*160] and, therefore, the donee might "have exercised it by appointing the estate to himself. There the appointment was in favor of the children; but, here, the appointment is against the children.

(a) The above was correctly taken from the copy of the certificate with which the reporter was furnished.

(b) 7 Bing. 695, and 1 Myl. & Keen, 32.

(c) 2 Keen, 444, and 4 Myl. & Cr. 187.

1841.—Jones v. Winwood.

Secondly: The interest attempted to be created by the deed of the 17th of September, 1828, is illegal. It is a base fee with a remainder over: and, as no estate tail has been converted into a base fee, the estate to take effect on the determination of the base fee, cannot be barred.(a)

Jones and Brown are united with each other in the contract for sale. They are trustees for different classes of creditors and for different purposes. Who is to give a receipt for the purchase money: and who is to apportion the purchase money between them?

The Court of Exchequer cannot overrule the decisions in the Court of Common Pleas and in this court. Where there are conflicting decisions upon a point affecting the title to an estate, this court never compels the purchaser to complete his purchase.

Mr. Rudall referred to Co. Litt. 265, a; *Albany's Case*,(b) *Edwards v. Slater*,(c) *Clerk v. Pywell*,(d) *Penne v. Peacock*,(e) *Doe v. Britain*,(f) *Fearne Cont. Rem.* 74, *Price v. Strange*,(g) *Willcox v. Bellaers*,(h) *Sharpe v. Adcock*,(i) and *Blosse v. Lord Clanmorris*.(k)

*Mr. Wigram in reply:—The conveyance to the provisional as- [*161] signee, being an innocent conveyance, did not destroy the power in gross. The case of *Badham v. Mee* is no authority against the certificate of the Barons of the Exchequer; for that case was decided merely on the ground that the appointment, being an appointment of an estate in fee, would not have been good if it had been contained in the deed creating the power. All that the court decided in *Doe v. Britain*, was that the donee of the power could not derogate from his own grant. In *Hole v. Escott*, the contingent remainders to the children had failed for want of a freehold to support them; and then the case became just the same as if there never had been any such contingent remainders. The Lord Chancellor commences his judgment by saying that he does not mean to discuss the question in *Badham v. Mee*: and his Lordship held the appointment, in the case before him, to be bad, because, the contingent remainders having failed, the father was exercising the power so as to take effect out of the fee, that is, to defeat his own grant. That case was decided solely on the ground that the contingent remainders had failed for want of a freehold to support them. The judgment does not at all proceed upon the assumption that the decision in *Badham v. Mee*, was right; and it has never been spoken of as a decision that can be supported.

It was said that the appointment made by the deed of the 17th of September, 1828, was bad, because, by it, a fee was mounted on a fee; but it has been settled, for a series of years, that a base fee may exist in one person, and a remainder in fee, in another, to take effect on the determination of the base fee.(l)

(a) See 3 & 4 Will. 4, c. 74, s. 19. (b) 1 Rep. 111. (c) Hard. 410. (d) 2 Keb. 555.

(e) Ca. Temp. Talb. 41.

(f) 2 Barn. & Ald. 93.

(g) Madd. & Geld. 159.

(h) Turn. & Russ. 491.

(i) 4 Russ. 374.

(k) 3 Bligh. 62.

(l) Mr. Wigram, in the course of his reply, referred to 1 Sugd. Pow. 44, 45, and 72; and to the observations on *Badham v. Mee*, in p. 80; and also to *Rattle v. Popham*, Str. 922.

 1841.—*Jones v. Winwood.*

[*162] *THE VICE-CHANCELLOR :—I shall take time to consider the questions which have been discussed in this case : as a great deal has been said which requires much consideration.

18th Feb.—THE VICE-CHANCELLOR :—The first question before me is whether the certificate of the learned Judges of the Court of Exchequer, shall be confirmed.

I am clearly of opinion that it ought to be confirmed.

They have thought fit to give the reasons for their opinion, and, with those reasons, I, in substance, coincide.

It is impossible to read the report of *Badham v. Mee*, in 7 Bing. 704, without supposing that the ground upon which the Judges of the Court of Common Pleas, in 1831, rested their opinion, was really that which Sir J. Leach, according to the report in 1 Mylne & Keen, p. 54, assumed to be their ground for giving the certificate, and made his ground for confirming it in 1832.

That ground plainly admitted that, notwithstanding the bankruptcy of Richard Mee, his power of appointment among his sons, subsisted, as unquestionably it did, subject only to this restriction, that he could not

[*163] exercise it to the prejudice of his assignees, who were *entitled to the fee in remainder after the estates in tail general limited to the sons in succession. That remainder in fee the assignees took under the limitation in default of and subject to any appointment under the power, whether any prior estate tail might or might not be enlarged into a base fee. Moreover, the bankrupt, Richard Mee, did not, in execution of his power, appoint a base fee, so as to give ground for the objection that Sir J. Leach assumed. But the bankrupt appointed, in fee simple, to his son ; and the law provided that the appointment should not affect the remainder in fee, which the assignees had, previously, acquired by virtue of the limitation in default of appointment. The remainder in fee, therefore, which the assignees took at first, continued in them unaffected by the exercise of the power.

The case of *Thorpe v. Goodall*, 17 Ves. 388, 460, 1 Rose, 40, 270, and the act, 6 Geo. 4, c. 16, s. 65, 77, prove that, even in a case where a bankrupt, but for the execution of a power by him, would be tenant in tail, the power, as well as the estate tail is vested in the assignees.

In the present case, subject to the joint power of appointment given to the husband and wife, the estate for life and the ultimate remainder in fee limited to the husband, passed, under the indentures of 6 August, 1824, and 18 April, 1825, to Isaac Jones, the insolvent's assignee ; and the appointment of September, 1828, was an appointment in fee, which, by operation of law, vested the whole inheritance in fee simple in Brown and Beynon, except only that portion of it which was already vested in Isaac Jones, and which, by law, could not be affected by the appointment. The whole inheritance,

[*164] except *that portion, was then vested in the trustee to preserve contingent remainders, in the wife for her life, and comprehended the con-

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tingent remainders to the children. The joint power of appointment might have been exercised, in various ways, without injuring the estate of Isaac Jones. It might have made his estate neither better nor worse by appointing that the daughters should take, in tail general, before the sons. It might have made his estate better, by appointing the fee, at once, to him.

I give my opinion upon this part of the case, as it would have stood if the mortgage of 1823 had not been executed.

The mortgage, certainly, does not make the title worse, but rather better; as, under it, the legal estate in fee may be acquired.

The next question is, if the certificate be confirmed, ought the court to decree the defendant to take the title.

And I am of opinion that the court ought to do so.

Though I am clear in opinion that the certificate is substantially right, I am free to admit that, in the abstract, the certificate of the Court of Common Pleas confirmed by Sir J. Leach, must create a doubt, when there is only opposed to it the certificate of the Court of Exchequer.

But it is impossible to read the pleadings in this cause, and not to see that the real intention of the plaintiffs and the defendant was to call in question, as Sir William Follett, according to the report in 3 *Meeson [*165] & Wilsby, is stated to have said, the authority of the decision in *Badham v. Mee*; and that, if it should be held that the decision in *Badham v. Mee* was not law, the defendant should take the title. It would have been absurd to have made the agreement of the 1st of July, 1835, upon the supposition that, if a decision were made against *Badham v. Mee*, the defendant should still not take the title, on the ground that decision against decision left the matter in doubt. The utmost that could have been expected in favor of the title, was that a decision might be obtained in opposition to that in *Badham v. Mee*.

And, as I understand the agreement of the 1st of July, 1835, the objection to the agreement of the 15th November, 1833, in respect of its having been made, by Isaac Jones and Patrick Brown, for a sale at one entire sum, is one that cannot now be taken.

The decree must therefore be to confirm the certificate, and order a specific performance with costs to be paid by the defendant.[1]

[1] The above case is referred to, and a point deduced from it, stated 4 Russ. 375, n. 1; but the note is printed in such a manner that the reader would be at a loss to discover the connection between the case cited and the position stated: or rather, it would be inferred, that the editor, after stating a point in a case, forgot to refer to the case itself.

*EASTON.—The certificate in *Spry v. Bromfield*, ante, p. 97, was correctly copied from [*166] the certificate returned by the Barons of the Exchequer. But it seems to be clear that, by Jno. A. Bromfield, the learned Barons meant William A. Bromfield. [And see post 224.]

CASES IN CHANCERY

BEFORE

THE VICE-CHANCELLOR.

BAILIE v. JACKSON.

1839; 11th June.—Creditors' Suit: Infant; Defendant; Decree.

After a decree and order on further directions in a suit by creditors, the plaintiffs discovered that there was an infant tenant in tail of the deceased's real estates in existence, who was born prior to the filing of the bill. On the hearing of a supplemental suit, by which the infant was first brought before the court, the accounts were directed to be taken over again as against the infant, with liberty to the Master to adopt any of the accounts before taken, if he should find it beneficial to the infant so to do.

In a suit for administering the property of a person deceased, if an infant defendant is interested in the real estates, the court will not direct those estates to be sold, until the accounts of the personal estate have been taken and the cause heard for further directions.

JOSIAS JACKSON, the testator in the cause, devised his plantations and estates in the Island of St. Vincent, to trustees, in trust for his eldest son, the defendant Josias Jackson, for life, and, after his decease, in trust for his children as tenants in common in tail. After the testator's death, the plaintiffs, Messrs. Bailie & Sons, of Bristol, merchants, being mortgage and judgment creditors of the testator, filed a bill against Josias Jackson, the son, Jennetta Jackson, the widow and executrix of the testator, the trustees, and the testator's younger children, who were interested in his estates under the trusts of his will, praying that the sums due to the plaintiffs might be raised and [*168] paid out of the testator's real and personal estates, and that a manager, receiver and consignee might be appointed of the real estate.

By the decree in the cause, made on the 13th of March, 1828, it was referred to the Master, to inquire and state what estate and interest the testator had, in the plantations and the live stock and utensils upon or belonging thereto, at the execution of the mortgage deed under which the plaintiffs claimed, and what other mortgages, charges and encumbrances there were affecting plantations, and what was due thereon, and to whom; and what person or persons was or were entitled to the rents, of the plantations, either in priority or subject to such mortgages, charges and encumbrances.

On the 3d of May, 1832, the Master made his general report in pursuance of the decree: and, that report having been confirmed, the cause came on for further directions on the 21st of July, 1832, when it was referred back to

1839.—Baillie v. Jackson.

the Master to take an account of what was due, to the plaintiffs and the several other parties in the pleadings named, in respect of the several charges and encumbrances affecting the estates in the cause, and to ascertain their priorities.

The Master having made his report in pursuance of the order on further directions, and that report having been confirmed, the cause came on again for further directions on the 20th of July, 1836; and the plaintiffs were then informed, for the first time, that the defendant Josias Jackson, the testator's son, was married and had issue a son, Henry Barnewall Jackson, born in November, 1822, which was more than two years before *the bill [*169] was filed; and, in consequence of that information, the cause was ordered to stand over for the purpose of bringing Henry Barnewall Jackson before the court.

The plaintiffs, accordingly, filed a supplemental bill against Henry B. Jackson, and the defendants in the original suit, stating that H. B. Jackson alleged that, having been born before the filing of the original bill, he was not bound by any of the proceedings in the suit; and that the other defendants alleged that, the original suit having been imperfect by reason of H. B. Jackson not having been a defendant thereto, all the proceedings in it were irregular, and they were not bound thereby; but the plaintiffs charged that all the defendants, except H. B. Jackson, were bound by the decree, orders and other proceedings in the original suit. The supplemental bill further stated, that H. B. Jackson then alleged that, not only as between himself and the plaintiffs, but as between himself and the other defendants, the decree, order and other proceedings, were not binding upon him; and the plaintiffs charged that, under the circumstances aforesaid, the defendants to the original bill, were necessary parties to the supplemental bill; and that the plaintiffs were entitled to the benefit of the original suit and the proceedings therein as against all the defendants except H. B. Jackson; and that they were entitled to the same or the like relief against H. B. Jackson, as by the original bill, was prayed against the defendant thereto. The supplemental bill prayed that the plaintiff might have the benefit of the suit and proceedings against the defendants, (other than H. B. Jackson,) and might have the same or the like relief, as against H. B. Jackson, in respect of the matters therein stated and charged, *as, by the original bill was prayed against the [*170] defendants thereto in respect of the matters therein mentioned; and that the bill might be deemed and taken to be a supplemental bill to the original bill.

The original suit now came on again to be heard for further directions, and the supplemental suit came on to be heard at the same time.

Mr. *Knight Erwe* and Mr. *Heathfield*, for the plaintiffs, said that the question was whether the accounts which had been taken in the original suit, were not conclusive upon the infant defendant Henry Barnewell Jackson; or, whether liberty ought to be given to the Master, to adopt such of the

 1839.—Baillie v. Jackson.

accounts as he might think proper ; or whether all the accounts ought to be taken over again. They cited *Brookfield v. Bradley*.^(a)

Mr. *Wakefield* and Mr. *Wray*, for Henry B. Jackson, said that it could not be for the benefit of the infant defendant, to be bound by any thing that had been done in his absence.

Mr. *Turner* and Mr. *Bigg*, for Warner Ottley, a defendant to both suits, said that the question was what was most for the infant's benefit : that, if all the accounts were directed to be taken over again, and the plaintiffs succeeded in establishing their claim (as they had done in the original suit,) the costs of the two suits would fall upon the infant's estate : and that the infant's father had been a party to everything that had been done in the original suit.

[*171] *Mr. *Anderdon* and Mr. *E. F. Moore*, appeared for the other defendants.

The Vice-Chancellor said that, the defendant to the supplemental suit being an infant, all the accounts must, in the first instance, be directed to be taken again ; but that the decree ought to be so constructed as not to bind the Master to put the infant's estate to the expense of taking the whole of the accounts, unless he should find that it would be beneficial to the infant so to do.

The decree which was drawn up was, in substance, as follows.—Declare the plaintiffs entitled to the benefit of the decree of the 13th of March, 1828, and the several proceedings under the same and subsequent or previous thereto, against all the defendants to the supplemental suit, except the infant defendant Henry Barnewall Jackson, the only son of the defendant Josias Jackson and the first tenant in tail *in esse* under the testator's will : and declare the said decree and orders, and the accounts taken under the same, not binding on the said defendant, the infant H. B. Jackson ; and refer it to the Master to take an account of the personal estate and effects (not specifically bequeathed) of the said testator Josias Jackson, come to the hands of the defendant Jennetta Jackson, his widow and executrix, or to the hands of any other person or persons by her order or for her use : and let the said Master also take an account of what is due to the plaintiffs and all other the creditors of the said testator ; and also an account of the testator's funeral expenses and legacies : interest to be computed on debts and legacies, and advertise-

[*172] ments to be published for creditors : and, as to the debt claimed *by the plaintiffs to be due to them from the testator's estate, if the said Master shall find any accounts settled in the said testator's lifetime and signed by the said testator, he is not to disturb the same ; and, if the said Master shall consider it to be for the benefit of the infant defendant Henry Barnewall Jackson, to adopt any of the accounts already taken under the decree and orders in the original cause, he is to be at liberty to adopt the same to any extent or

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in any respect he shall think for the benefit of the said infant defendant, and to state any special circumstances at the request of any of the parties: and let the said testator's personal estate (not specifically bequeathed) be applied in payment of his funeral expenses and debts in a due course of administration, and then in payment of the legacies given by his will; and let the said Master inquire and state what charges or incumbrances there were affecting the testator's estates at his death, and what charges and incumbrances there are now affecting the same, and what is due and to whom in respect thereof respectively; and let the Master state their priorities: and let the said Master inquire and state, to the court, what real estates the said testator was seised of or entitled to at the time of his death: and let the said Master inquire and state by whom and in what character the rents and profits of the real estates which the said testator died seised of or to which he was entitled at the time of his death, have, from the death of the said testator up to the time when the plaintiffs were appointed consignees in the original cause, been received, and how the same have been applied; and, for the better taking the said accounts and discovery of the matters aforesaid, the parties are to produce, before the said Master, upon oath, all deeds, &c., and are to be examined upon interrogatories, &c., &c.: and let the consignees and managers appointed in these causes, be continued; and this decree is to be [*173] without prejudice, as between the plaintiffs and all the defendants except the said infant defendant Henry Barnewall Jackson, to any of the decrees and orders, proceedings and arrangements made prior to the date hereof: and reserve further directions and costs; and any of the parties are to be at liberty to apply to this court as they may be advised.

Mr. *Knight Bruce* suggested that a direction for the sale of the testator's real estates, ought to be inserted in the decree, the whole amount of the testator's personal estate being only 1600*l.*, and the sum due to the plaintiffs being 29,000*l.* He said that it was now the constant practice of the court to direct, by the decree at the hearing of a cause, the testator's real estates to be sold in case his personal estate should appear to be insufficient for payment of his debts. *Lloyd v. Johnes.*(a)

The Vice-Chancellor said that he was aware that what was asked, was frequently done; but the impression on his mind was that it was done because the parties desired it: and that the defendant H. B. Jackson, the tenant in tail of the real estates, being an infant, it would be improper to direct the real estates to be sold, until the accounts of the testator's personal estate and debts had been taken by the Master; and then, if it appeared, from the Master's report, that the personal estate was insufficient to pay the testator's debts, the court, on hearing the cause for further directions, would direct the real estates to be sold.

1839.—Clough v. Lambert.

[174] *ELIZABETH CLOUGH, WIDOW, v. LAMBERT and Others.

1839: 21st June.—Husband and Wife; Separation; Deed.

A separation deed recited that divers unhappy differences subsisted between the husband and wife, in consequence of which they had agreed to live separate. The husband then covenanted to pay an annuity to a trustee for the wife, during her life; but there was no covenant on the part of the trustee or any other person, to indemnify the husband against the debts of the wife. The husband died, and the annuity became in arrear. Held that the covenant might be enforced against the husband's executors; for there being no evidence to the contrary, there might have been circumstances, alluded to by the recital, which would have warranted a divorce *a mensa et thoro*; but that the covenant, being voluntary, could not be enforced against the husband's creditors.

By a deed bearing date the 23d of May, 1817, and made between Henry Gore Clough of the first part, the plaintiff, his then wife, of the second part, and Cayley Johnson, of the third part, after reciting that divers unhappy differences had subsisted and did still subsist between Henry Gore Clough and his wife, and that, in consequence thereof, they had mutually agreed, and did thereby agree, from thenceforth for and during their respective natural lives, to live separate and apart on the terms and conditions thereafter mentioned. H. G. Clough, for himself, his heirs, executors and administrators, in pursuance of such agreement, covenanted, with Johnson, his executors and administrators (amongst other things) that he would, from thenceforth during his natural life, live separate and apart from the plaintiff, and would not thereafter cohabit, abide, or dwell with her as his wife, nor use or frequent her company or conversation at any time or times thereafter, otherwise than as he might lawfully do with a stranger; and further, that H. G. Clough, his executors, administrators or assigns, should not nor would, at any time or times thereafter, claim or demand any of the jewels, plate, moneys, clothes, linen, plate, wearing apparel, or other goods, property or effects whatsoever which the plaintiff then had, or, at any time during such

[175] separation, should or might purchase or by any other means have, acquire, or become possessed of; but that the plaintiff should and might, from time to time and at all times, peaceably and quietly retain, use and enjoy the same; and moreover that H. G. Clough, his heirs, executors or administrators should and would, yearly during the natural life of the plaintiff, pay, to Johnson, his executors or administrators, the sum of 100*l.* by quarterly payments, the first payment to be made on the 23d of August then next; and it was thereby agreed and declared that Johnson, his executors, administrators and assigns should stand possessed of the yearly sum of 100*l.*, in trust to apply and dispose of the same in and towards the maintenance and support of the plaintiff: provided that if Henry Gore Clough should, by any action, suit or prosecution at law or in equity, which should or might be brought or commenced against him for the recovery of any debt or debts incurred and contracted by the plaintiff after the date of the deed, be compelled to pay the same, then and in such case, and from time to time as often as the

1839.—Clough v. Lambert.

same should happen, it should be lawful for Henry Gore Clough, his executors and administrators to retain, out of the next and every succeeding payment of the yearly sum of 100*l.*, all such sum and sums of money, costs, charges, and expenses as he, his executors and administrators should, at any time thereafter, be lawfully charged with or compelled to pay, or should be put unto or sustain for or in respect of any and every of such debt, action, suit, or prosecution as aforesaid.

Mr. and Mrs. Clough continued to live separate from each other until Mr. Clough's death; and he paid the annuity of 100*l.* down to the last day of payment previous to his death; and was never called upon to pay any debt incurred by his wife.

*Johnson left this country several years ago, and had ever since [*176] resided abroad. After Johnson's departure, Clough paid the annuity to the plaintiff.

Clough by his will dated the 20th of January, 1837, gave all his personal estate and effects, after payment of his debts and funeral and testamentary expenses, to the defendants Lambert and Harrison, in trust for his reputed son Frederick Gore, if he should live to attain the age of twenty-five; with a limitation over, in case of the death of his son under that age, in favor of the defendants: and he appointed them the executors of his will.

Clough died on the 20th of April, 1838. No part of the annuity was paid, to the plaintiff, after her husband's death.

The bill, after stating as above, prayed that the defendants might account for Clough's personal estate, and that the same might be applied in a course of administration, and that thereout the plaintiff might be paid the arrears of her annuity; and that a sufficient sum might be set apart and invested for securing the future payments thereof.

The answer submitted whether the plaintiff's demand, founded on the covenant, was a valid and legal claim against Clough's estate, the same *not being supported by any consideration, and having been entered into with a view to a separation between the plaintiff and her husband*; and whether, if legal, the satisfaction of the claim must not be postponed until after Clough's simple contract creditors had been paid.

*Mr. Knight Bruce and Mr. Moore, for the plaintiff. [*177]

Mr. Girdlestone and Mr. Elmsley, for the defendants:—*Prima facie* deeds of separation between husband and wife, are contrary to the policy of the law, and, therefore, void. There are, however, two classes of cases in which they are upheld: first, where the separation has taken place on grounds which would justify an application, to the Ecclesiastical Court, for a divorce *a mensa et toro*, such as adultery or cruelty. In such a case the deed is good; because it is only an agreement, by the husband, to do that which the law would have compelled him to do. The other class of cases in which such deeds have been supported, is where there is a covenant, by the wife's trustee, to indemnify the husband against any debts that the wife may con-

1839.—Clough v. Lambert.

tract. In that case there is a consideration for the deed; and therefore it is held to be good. But, in the deed now sought to be enforced, it does not appear that the separation took place on any of the grounds on which the Ecclesiastical Court would have decreed a divorce *a mensa et toro*. All that the deed recites, as to the cause of the separation, is that divers unhappy differences had subsisted and continued to subsist between the parties. Nor is there any covenant, on the part of the trustee, to indemnify the husband against the future debts of the wife, or any other consideration on which the deed can be supported. No action could have been maintained, at law, on the covenant to pay the annuity to the wife; and, that being so, a court of equity cannot enforce it. *Jones v. Waite*.(a)—[The Vice-Chancellor: That was the case of an action brought upon a simple contract; not on a [178] deed. There must be a consideration to support a simple contract: but an instrument under seal, is good without any consideration.]

The case of *Westmeath v. Westmeath*,(b) also was referred to in the course of the argument.

THE VICE-CHANCELLOR:—The question which I am called upon to decide in this case, is, in fact, whether, as against the executors of the husband, the wife, if she were to sue in the name of her trustee, could enforce, at law, her husband's covenant to pay the annuity. Now no circumstances have been stated which tend to show that the foundation of the deed is such as that it cannot be enforced at law. There is no illegality on the face of the deed. The circumstances under which the separation took place, are not stated, distinctly, in the deed; nor is there any evidence to show what those circumstances were. All that appears upon that part of the case, is the recital in the deed, that various unhappy differences had subsisted and did still subsist between the husband and wife, in consequence of which they had agreed to live separate during their lives. For anything that appears to the contrary, there may have been circumstances, alluded to under that recital, which would have justified the wife in applying, to the Ecclesiastical Court, for a divorce *a mensa et toro*.

The covenant, being under seal, requires no consideration to make it binding; and, being good *prima facie*, it lies on those who assert the contrary to prove it;[1] for, as was laid down by Mr. Justice Patteson, in the case cited by Mr. Girdlestone, the court cannot presume illegality.(c)

(a) 5 Bing. N. C. 341.

(b) Jac. 126; see 140, 141.

(c) See 5 Bing. N. C. 352.

[1] Vide *Bunn v. Winthrop*, 1 Johns. Ch. Rep. 336. *Page v. Trufant*, 2 Mass. Rep. 162. By the Revised Statutes of New York, (vol. 2, 2d ed., p. 329, § 97,) "In every action upon a sealed instrument, and where a set-off is founded upon a sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner, and to the same extent, as if such instrument were not sealed." And by § 98: "The defense allowed by the last section, shall not be made, unless the defendant shall have pleaded the same, or shall have given notice thereof, at the time of pleading the general issue, or some other plea denying the contract on which the action is brought." *Case v. Boughton*, 11 Wend. 106. There seems to be some similar statutory provision in the state of Indiana. 2 Kent's Comm. 464, n. b.

1839.—*Keymer v. Pering.*

Then, as nothing appears 'on the face of the deed, and as no evidence [*179] has been adduced of extrinsic circumstances tending to show that the deed is invalid, I am bound to hold that it is good. The consequence is that the wife may enforce the covenant against the executors of her husband; but, there being no consideration for it, she cannot enforce it against his creditors.[1]

KEYMER v. PERING.

1839; 22d June and 8th July.—Practice; Cross-examination; Witness.

A party who intends to cross-examine a witness, must, himself, make an appointment for that purpose, with the examiner, and give notice of the time appointed, to the witness and the solicitor of the opposite party.

MOTION, by plaintiff, after publication passed, to suppress the deposition of a London witness, named Bromley, who had been examined for the defendant.

On the 11th of April, the plaintiff gave notice to Mr. Villiers, one of the examiners, that, in the event of Bromley being examined for the defendant, the plaintiff intended to cross examine him. On the following day, Bromley was examined in chief, and, on that day, Mr. Villiers gave notice, to the defendant's clerk in court, that he had been so examined. In consequence of the notice given to Mr. Villiers, the witness, as soon as his examination was finished, was taken to the office of Mr. Plumer, the other examiner, to be cross examined; but no cross interrogatories had been then left. On the 13th of April, the cross interrogatories were left in Mr. Plumer's office; and the defendant served Bromley with notice to that effect. Bromley, however, never attended to be cross examined.

On the 15th of April, the plaintiff, who was under an undertaking to speed, gave rules to pass publication: and, on the 22d, publication passed.

*Mr. *Knight Bruce* and Mr. *G. Richards*, in support of the [*180] motion:—When the plaintiff had filed the cross interrogatories, he had done all that it was his duty to do. As those interrogatories were filed within forty-eight hours from the time when the witness was produced for examination in chief, the defendant was bound to produce the witness again, to be cross examined. 1 Smith's Practice, 359: *Whittuck v. Lysaght*.(a)

Mr. *Jacob* and Mr. *Bethell*, for the defendant:—The plaintiff ought to

(a) 1 Sim. & Sta. 446.

[1] It is singular that the case of *Elworthy v. Bird*, 2 Sim. & Sta. 372, was not noticed either by court or counsel in the above case. Some valuable extracts, relating to the subject of separation deeds, from the decisions of Mr. Chancellor Walworth in *Rogers v. Rogers*, 4 Paige, 516 and *Cerson v. Murray*, 3 Paige, 500 will be found in the editor's notes, 1 Sim. & Sta. 382, n. 1.; Jac. 143, n. 1. The validity of such agreements was long since, (1806,) recognized by the Supreme Court of Mass. *Page v. Trefont*, 2 Mass. Rep. 159.

 1839.—*Keymer v. Poring*.

have given the defendant notice that the cross interrogatories had been left, and that he wished an appointment to be made, with Mr. Plumer, for cross examining the witness; but he did not give any notice at all, either to the defendant or his solicitor. In consequence of the notice given to Mr. Villiers, the witness was taken to Mr. Plumer's office, but no cross interrogatories had been then filed.

If there has been any irregularity, the plaintiff has waived it by giving the rules to pass publication.

Mr. *Knight Bruce* in reply :—The party who wishes to cross examine a witness, has no means of compelling the witness to attend for that purpose. There is no process to enforce the witness' attendance, except the subpoena for his examination in chief. All that the opposite party can be required to do, is to exhibit his intention of cross examining the witness, by filing cross interrogatories; and the party who has examined the witness in chief, is bound to keep his control over the witness, and to search for [*181] *cross interrogatories, until the last moment of the forty-eight hours has expired. If he finds that cross interrogatories have been filed, it is his duty to make the appointment for the cross examination of the witness: the party who seeks to cross examine the witness, never makes the appointment. Notice was given to Mr. Villiers. Notice to the defendant or his solicitor, was not necessary; when the plaintiff had filed his cross interrogatories, he had done all that he was bound to do.

THE VICE-CHANCELLOR :—The notice that the plaintiff intended to cross-examine the witness, was not given to the defendant's solicitor, but only to Mr. Villiers who was to examine the witness in chief. As the defendant's solicitor had no notice that the plaintiff intended to cross examine the witness, I doubt whether it was his duty to search for cross interrogatories: I will, however, consult the examiners on the subject.

8th January.—THE VICE-CHANCELLOR :—I have seen Mr. Plumer and Mr. Villiers; and have ascertained from them, that the practice of the examiner's office is that where a party produces a witness to be examined by one of the examiners, the opposite party having notice and intending to cross examine the witness, makes an appointment with the other examiner for that purpose; and then gives notice of the time appointed, to the witness, and also to the solicitor of the party producing the witness.

The notice served by the plaintiff on Mr. Villiers, was a mere nullity; for Mr. Villiers was not the examiner who was to cross examine the witness.

[*182] *Not only the practice of the examiner's office, but the course which convenience obviously requires, is, that the party who intends to cross examine a witness, should himself make the appointment for that purpose.

Motion refused with costs.

1839.—Askew v. Peddle.

ASKEW v. PEDDLE.

1839; 22d June.—Practice; Four day Order.

It is not irregular to obtain the four day order for production of deeds, before the certificate of the defendant's default has been filed.

MOTION to discharge the four day order for production of deeds, &c., under a decree, (a) on the ground that the Master's certificate that the defendant had made default in producing the deeds, &c., was not filed until after the order was obtained.

The order was made on the 8th of May, and the certificate was not filed until the 11th of that month; but the order was not delivered out until after the certificate had been filed.

Mr. Jacob, Mr. Stuart and Mr. Hislop Clarke, for the defendant, in support of the motion relied on, *Frisby v. Stafford*. (b) They cited also *Harris v. Cotter*, (c) and *Rushton v. Troughton*. (d)

Mr. Knight Bruce and Mr. Wood, for the plaintiff, relied on *Harris v. De Tastet*, (e) as precisely in point. They cited also *Eyles v. Ward*, (f) and said that the orders obtained in *Harris v. Cotter* and *Rushton v. Troughton*, were acted upon before the reports on which they [*183] were obtained, were filed: that, in *Frisby v. Stafford*, the object of the order was to enforce the filing of an examination, not the production of deeds: that the case of *Harris v. De Tastet* was not cited in any of those three cases: and that the general order of 1692, (g) had been overruled by the practice which had prevailed, for a long series of years, inconsistent with it: that, in this case, the certificate was filed within four days after it was signed; and the order was not acted upon until after the filing of the certificate.

THE VICE-CHANCELLOR: (h)—The cases of *Harris v. Cotter* and *Rushton v. Troughton* are totally different from the present. The question there was whether an adverse order could be sustained, the certificate not being filed. The order in the present case, is the four day order; and it directs that, in default only of compliance with the order, there shall be a serjeant at arms.

Now this very question, on the production of documents under a decree, was decided in *Harris v. De Tastet*; and the order was held good, though the certificate had not been filed. Mr. Hussey (the registrar) assures me that he has no doubt as to the regularity of the order. In *Harris v. De Tastet*, Mr. Walker (the late registrar) stated what the practice was, and Mr. Hussey confirms that statement. The result is that, if there be any apparent inconsistency with *Frisby v. Stafford*, it must be taken that the different practice

(a) See Seton on Dec. 421.

(d) Ante, vol. 2, p. 33.

(g) Beam. Ord. 292.

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(b) Ante, vol. 7, p. 365.

(e) 1 Sim. & Stu. 263.

(h) *Ex relations*, Mr. Wood.

(c) 1 Myl. & Keen. 568.

(f) 2 P. W. 517.

 1839.—*Shadforth v. Temple.*

in the case of production of documents, has sanctioned a departure from the general order of 1692. Lord Eldon has said that long continued practice governs the court.[1]

[*184] *Cases of this description must be determined, not so much by absolute principle, as by a course of decision; and *Harris v. De Tastet* is an authority expressly in point, the authority of which is confirmed by the present registrar's statement as to the practice since that case was decided.

Motion refused without costs.

SHADFORTH v. TEMPLE.

1839: 23d June.—Heir and Administrator; Rent; Conversion; Agreement.

By a contract for the sale of an estate, it was agreed that the purchase should be completed on a certain day, but that all rent to accrue in the interim, should belong to the vendor, *his heirs*, executors, and administrators. The vendor died intestate before the day appointed for completing the purchase. Held that rent accrued between that day and the vendor's death, belonged to his heir.

THIS was a suit by the widow and administratrix of a vendor, against the purchaser and the vendor's heir, for the specific performance of a contract for the sale of an estate.

By the terms of the contract, which was dated the 3d of September, 1838, the purchase was to be completed by payment of the purchase money, execution of the conveyance and delivery of possession on the 13th of May then next; but all rent and other profits of the estate, to accrue in the meantime, were to belong to the vendor, *his heirs*, executors and administrators.

The vendor died intestate in January, 1839.

The question at the hearing of the cause was whether the rent which accrued between the vendor's death and the day appointed for completing the purchase, belonged to the administratrix, or to the heir of the vendor.

Mr. *Smythe*, for the plaintiff, referred to *Townley v. Bedwell*.(a)

[*185] *Mr. *Morley* and Mr. *Prior* appeared for the defendants.

THE VICE-CHANCELLOR:—From the words of the contract, I infer that it was the vendor's intention that the estate should be kept as realty up to the time when it was to be converted, absolutely, into personal estate; and, therefore, I think that the intermediate rent belongs to the heir.[2]

(a) 14 Ves. 591.

[1] So, in *Rushton v. Troughton*, 2 Sim. 33, the Vice-Chancellor, said; "I cannot alter the practice of the court. All that I have to do is to inform myself of the practice, and to adhere to it."

[2] Vide *Bourne v. Bourne*, 2 Hare, 35, 39. *Roberts v. Marchant*, 1 Hare, 547.

1839.—Paton v. Sheppard.

WROE v. CLAYTON.

1839 ; 25th June.—Practice ; Injunction ; Plea.

An order *nisi* for dissolving an injunction, cannot be obtained on putting in a plea.

AFTER the plaintiff had obtained the common injunction, the defendant put in a plea to the bill, and then obtained an order *nisi* for dissolving the injunction.

Mr. Knight Bruce and Mr. Martindale, for the plaintiff, now moved to discharge the order for irregularity.

A plea is not an answer for all purposes. A plaintiff is entitled to have a full answer, before an injunction can be dissolved.

Mr. G. Richards, for the defendant:—A plea, for the purpose of obtaining the order *nisi*, must be deemed to be an answer. It is defined, by Lord Redesdale, to be a special answer ; and it concludes with asking the court whether the defendant ought to be compelled to put in any further or other answer to the bill. It is dealt with as an answer : for, if it is not set down for argument, or if it is allowed on argument, it *may be re- [*186] plied to, and then it becomes an answer to all intents and purposes. If a replication is filed to it, is not the defendant to be then at liberty to obtain the order *nisi* ?

THE VICE-CHANCELLOR:—It occurred to me that an order *nisi* was never made on a plea being filed ; and Mr. Walker (the registrar) is astonished at such an order having been drawn up : it cannot stand for a moment.

The order *nisi* begins with a recital that the defendant has put in a full answer and thereby denied the plaintiff's equity.

The order *nisi* must be discharged.

PATON v. SHEPPARD.

1839 ; 28th June.—Will ; Construction ; Household Furniture ; Fixtures ; Dividends ; Tenant for Life of Stock.

Under a bequest of household furniture, fixtures, belonging to the testator, in a leasehold house, occupied by him, will pass.

A tenant for life of stock died on the day on which a half year's dividends became due. Held that they belonged to his personal estate.

IN contemplation of the marriage of Mr. and Mrs. Paton, a leasehold messuage in Gower street, Bedford square, of which Mr. Paton was the assignee, and 10,000*l.* consols, and 5549*l.* 16*s.* 6*d.* South Sea stock were assigned and transferred to trustees, in trust for Mr. and Mrs. Paton for their lives successively, and, subject thereto, in trust for their issue. Mr. and Mrs. Paton, soon after their marriage, went to reside in the house in Gower street, and continued to reside there until Mr. Paton's death. By his will, he left

 1839.—Paton v. Sheppard.

[*187] all his *household furniture*, linen, plate and wines, to his wife, "for her use so long as she remained unmarried; but, in the event of her marrying again, he desired that the whole of the furniture, linen, plate and wines should be sold, and the proceeds divided amongst his children. Mr. Paton died on the 5th of July, 1837. After his death, the trustees of the settlement, under a power therein contained, sold the house to Sir James Leighton for 1900*l.*, and the fixtures therein, consisting of stoves, blinds, bell pulls and other articles generally considered as tenant's fixtures, to the same gentleman, for 150*l.* On the 5th of July, 1837, the day of Mr. Paton's death, a half yearly dividend, amounting to 247*l.* 2*s.* 5*d.*, became due on the stock comprised in the settlement.

A petition in the cause, presented by three of the children and residuary legatees under the will of Mr. Paton, alleged that Mrs. Paton (who had consented to be bound by the decision of the court on the petition,) claimed to be absolutely entitled to the 247*l.* 2*s.* 5*d.*; and that she also claimed to be entitled, either absolutely or for her life, to the 150*l.*, the proceeds of the fixtures, some of which were alleged to have been in or about the house in Gower street at the date and execution of the settlement; but that the petitioners were advised that both those sums belonged to their late father's residuary estate. The petition prayed that the 247*l.* 2*s.* 5*d.* and 150*l.* might be declared to belong to Mr. Paton's residuary estate, and might be disposed of accordingly.

Mr. *Turner*, for the petitioners:—The first question is whether Mrs. Paton takes a life interest, in the fixtures, under the settlement, or whether [*188] she is entitled to them, absolutely, under the will; that "is whether they are to be considered as part of the testator's furniture.

The language of the settlement shows that the fixtures were not intended to be included in it. It recites the original lease by which the owner of the fee demised, to the lessee, all that piece or parcel of ground situate, &c., together with the messuage or tenement erected thereon. It next recites that, by divers mesne assignments, &c., the piece or parcel of ground, messuage or tenement and premises became vested, in Mr. Paton, for the residue of the term created by the lease: and then it assigns the piece or parcel of ground, messuage or tenement and premises which were demised by the lease, to the trustees, to hold to them their executors, &c., for the residue of the term. If Mr. Paton had intended to pass the fixtures as well as the leasehold premises, that intention would have appeared from the recitals and he would have assigned the fixtures to the trustees, to hold to them, their executors, &c., absolutely. It is plain, therefore, that the settlement does not include the fixtures. The remaining question, upon this part of the case, is whether the fixtures are household furniture within the meaning of the will. It is observable that the testator, in the bequest to his wife, couples his household furniture with his plate, linen and wines, which are all of them moveable articles: consequently, the fair inference is that he did not intend to give to her any part

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of his household furniture except such as was moveable. In *Slanning v. Style*, (a) the testator bequeathed, to his wife, his tea table, tea kettle and all his pewter, brass, linen and woollen, with all his household goods and 'implements of husbandry whatsoever in or about his dwelling [*189] house: and Lord Talbot, Chancellor, held that a clock in the house would not pass by the words, "household goods," if it were fixed to the house.

The next question relates to the dividends of the stock which became due on the day of Mr. Paton's death; that is, whether those dividends are part of his personal estate, or whether they belong to his widow under the trusts of the settlement. (b) As Mr. Paton lived up to the day on which the dividends became due and payable, I submit that they form part of his personal estate. I admit that rent reserved on a lease, cannot be distrained for until the expiration of the day on which it is made payable. But there is this distinction between rent and dividends of stock; there is a mutual contract between the lessor and the lessee, which is not complete unless the lessee has had the enjoyment of the demised premises up to the last moment of the day on which his rent is reserved: but the holders of stock are annuitants: and an annuitant is entitled to receive his annuity on the morning of the day on which it is payable. The act of Parliament relating to the stock in question, directs the dividends to be paid, half yearly, on the 5th of January and the 5th of July. (c)

(a) 3 P. W. 334.

(b) The settlement was dated long before the passing of the apportionment act, 4 and 5 Will. 4, c. 22.

(c) The following sections of the 25 Geo. 2 (for converting the several annuities therein mentioned into several joint stocks of annuities, transferrable at the Bank of England, to be charged on the sinking fund, and also for consolidating the several other annuities therein mentioned into several joint stocks of annuities transferrable at the South Sea House) were referred to by Mr. Turner. "And be it further enacted that, from and after the said 24th day of June, 1752, all the said several and respective principal sums transferrable at the Bank of England as aforesaid, amounting, in the whole, to the sum of 8,200,000*l.*, as also such sum or sums of money as shall or may be made payable, to the Governor and Company of the Bank of England, for the charges of management, shall be and are hereby charged and chargeable upon the said sinking fund, and shall be issued and paid, half yearly, on the 5th day of January and the 5th day of July in every year, out of the surplus funds and other duties and revenues composing the said sinking fund, and shall be deemed and taken to be charges and incumbrances thereupon until redemption thereof by Parliament, subject, nevertheless, to such charges and incumbrances as are already made thereupon by Parliament; and the Commissioners of the Treasury, or any three or more of them now being, or the High Treasurer or Commissioners of the Treasury of His Majesty, his heirs, or successors for the time being, without any further or other warrant to be sued for, had or obtained in that behalf, shall and may, from time to time, *issue the same at the respective half yearly or other days of payment*, whereon the same shall become due and payable at the said receipt of Exchequer, to the first or chief cashier or cashiers of the Governor and Company of the Bank of England, and their successors for the time being, by way of impress and upon account, for the purposes above mentioned; and that all and every such cashier or cashiers to whom the said money shall from time to time be issued, shall, *without delay*, apply and pay the same accordingly, and render his account thereof according to the due course of the Exchequer. And be it further enacted that, from and after the said 10th day of October, 1752, all the said several and respective annuities

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[*190] *Mr. *Knight Bruce* for Mrs. Paton, said that it was clear that, as
 [*191] against the trustees of the settlement, Mr. *Paton might have removed the fixtures from the house: that stoves, &c. were a very important part of the furniture of every house; and that a person taking a ready furnished house, would be much surprised to find it unprovided with those articles: that rent and other periodical payments were not fully due until the end of the day which the party liable had to pay them in, *Norris v. Harrison*.(a)

THE VICE-CHANCELLOR:—If Mr. Paton had thought fit to say that he would remove the stoves, &c. from the house, the trustees of the settlement could not have obtained an injunction to prevent him from removing
 [*192] them. They were fixed to the house in this sense, namely, that it was at his option to remove them if he thought proper so to do: but they are not the less furniture because they were fixed to the house.(b)

With respect to the dividends of the stock which became due on the 5th of July, 1837, the day of Mr. Paton's death, I am of opinion that as he might have received those dividends, on applying to the bank, at any time on that day, they now form part of his personal estate.

Declare that Mrs. Paton is entitled to the income of the fixture fund

transferrable at the Bank of England, amounting, in the whole, to the sum of 17,571,573*l.* 16*s.* 4*d.* as, also, such sum or sums of money as shall or may be made payable to the Governor and Company of the Bank of England for the charges of management of the said annuities, shall be and they are hereby charged and chargeable upon the said sinking fund, and shall be issued and paid, half yearly, on the 5th day of April, and the 10th day of October in every year, out of the surplus funds and the other duties and revenues composing the said sinking fund, and shall be deemed and taken to be charges and incumbrances thereupon until redemption thereof by Parliament, subject, nevertheless, to such charges and incumbrances as are already made thereupon by Parliament; and the Commissioners of the Treasury, or any three or more of them now being, or the High Treasurer or Commissioners of the Treasury of His Majesty, his heirs or successors for the time being, without any further or other warrant to be sued for, had or obtained in that behalf, shall and may, from time to time, issue the same at the respective half yearly or other days of payment whereon the same shall become due or payable, at the said receipt of Exchequer, to the first or chief cashier or cashiers of the Governor and Company of the Bank of England, and their successors for the time being, by way of impress and upon account, for the purposes aforementioned; and that all and every such cashier or cashiers to whom the said moneys shall be issued shall, from time to time, without delay, apply and pay the same accordingly, and render his account thereof according to the due course of the Exchequer."

(a) 2 Madd. 268.

(b) In *Kelly v. Powlet*, Amb. 605, the Master of the Rolls said: "the word 'household furniture' has as general a meaning as possible. It is incapable of a definition. It is capable only of a description. It comprises everything that contributes to the use or convenience of the householder, or ornament of the house." See also *Cole v. Fitzgerald*, 1 Sim. & Stu. 189; and 3 Russ. 301. [Plate, in family use, falls within the denomination of "household furniture," *Bunn v. Winthrop*, 1 Johns. Ch. Rep. 338. As to what is included under a gift of "farming stock," see *Vaisey v. Reynolds*, 5 Russ. 12. In *Attorney General v. Harley*, 5 id. 173, it became necessary to inquire into the meaning of certain articles of female ornament, as jewels, trinkets, necklaces, pearls, &c. in the construction of certain testamentary papers, in which the testatrix disposed of numerous articles of such and similar descriptions.]

1839.—*Bickford v. Skewes.*

during her widowhood; and that the dividends of the stock which became due on the day of Mr. Paton's decease, belong to his residuary personal estate.

*BICKFORD v. SKEWES.

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1839; 29th June.—Contempt; Trial.

The plaintiff obtained an injunction, with a direction to try his right in an action. A year afterwards and shortly before the spring assizes, the defendant moved that the plaintiff might proceed to trial at those assizes, or that the injunction might be dissolved. The court refused the motion, with costs, but intimated that it expected the plaintiff to go to trial at the next summer assizes. The defendant being in contempt for non-payment of the costs of the motion, the plaintiff, shortly before summer assizes, moved to defer the trial until the defendant should have to clear his contempt. Motion refused.

THIS was a suit to restrain the infringement of a patent; and the plaintiff had obtained an injunction for that purpose, subject to his bringing an action to try the validity of his patent. The plaintiff accordingly commenced his action; but suffered more than a year to elapse without going to trial: in consequence of which the defendant shortly before the last spring assizes, moved the Vice-Chancellor, and afterwards the Lord Chancellor, that the plaintiff might be compelled to go to trial at the then ensuing assizes, or that the injunction might be dissolved. But those learned Judges successively refused the motion, with costs, on the ground that the defendant himself had been guilty of laches, in not applying earlier to the court. The Lord Chancellor, however, intimated that the court would expect the plaintiff to try his action at the next summer assizes.

The defendant being in contempt for the non-payment of the costs of that motion, the plaintiff now moved that all proceedings in the action might be stayed, or that he might be at liberty to defer proceeding to trial, until the defendant should have paid the costs.

Mr. *Knight Bruce* and Mr. *Roupell*, in support of the motion:—

In *Wilson v. Bates*,^(a) the Lord Chancellor says: "the question has [*194 also been raised, indirectly, in other cases: in those cases, I mean, in which, the plaintiff being in contempt, the defendant has applied to the court to stay further proceedings until the costs of the contempt shall have been paid. If the circumstance of a plaintiff being in contempt, of itself, puts an end to his power of proceeding, that would be an unnecessary and useless step on the defendant's part. Instead of that, the defendant would be content to remain passive and quiescent. Such, however, is not the course taken by parties litigant, or sanctioned by the practice of the court: the course is for the court, upon a motion for that purpose, and not before, to make an order staying the proceedings until the plaintiff has paid the prior costs; that is to

(a) 3 Myl. & Cr. 203.

1839.—Bickford v. Skewes.

say, it makes a special order." Here the party moving, is the plaintiff: but it is immaterial whether the motion is made by the plaintiff or by the defendant. We contend, that what is laid down by the Lord Chancellor, in *Wilson v. Bates*, and in the cases of *Eddowes v. Neville* and *Price v. Dalton*,^(a) which his Lordship proceeds to cite, are express authorities for granting the present application. The plaintiff is bound to go to trial at the next assizes: and is it right that the defendant should have the benefit of the obligation imposed on the plaintiff, by the Lord Chancellor's order, before he has obeyed that order, on his [part, by paying the plaintiff the costs of the motion?

Mr. *Jacob* and Mr. *Bethell*, for the defendant:—Lord Bacon's order directing that they that are in contempt, are not to be here,^(b) has been [*195] considerably modified in modern times. In *King v. Bryant*^(c) *the Lord Chancellor says: "the court will not hear a party in contempt, coming himself into court to take any advantage of proceedings in the cause; but such a party is entitled to appear notwithstanding, and resist any proceedings taken against him: and it would be a very easy way of evading that rule, if his adversary, instead of giving him notice, were to avoid serving him, and then to say that he could not take advantage of the rule in order to impeach the previous proceedings. However, there is no such practice." In *Wilson v. Bates*, it was decided that a plaintiff is entitled to sue out an attachment against a defendant for want of answer, although he is himself, in custody for a contempt in non-payment of costs. In *Eddowes v. Neville* and *Price v. Dalton*, the proceedings sought to be stayed, were proceedings against the parties making the applications. Here the proceeding sought to be stayed, is a proceeding commenced by the party making the application, and which, consequently, is under his control. This court has no jurisdiction to grant the application. The proceeding to which it relates, is not a proceeding in equity; nor is it an action or an issue directed by the court: the court could not commit the defendant, if he were to nonpros the action or carry the record down to trial. There is no authority or precedent for the motion.

Mr. *Knight Bruce*, in reply:—If a party is in contempt for disobeying an order of the court, he cannot do any act to compel his adversary to proceed. If the defendant, when he moved to dissolve the injunction, had been in contempt, he could not have been heard. The refusal of his motion was clogged with a condition which he could not have obtained, had he been in [*196] contempt. As he is now in contempt, is he in a *situation to enforce the performance of that condition? The court having said that it expects the plaintiff to go to trial at the next assizes, it is necessary for him to obtain the sanction of the court for postponing the trial. The jurisdiction of the court over the action, is as complete as if it had been an action or an issue

^(a) 3 Myl. & Cr. 203 and 204.^(b) Beam. Ord. 35.^(c) 3 Myl. & Cr. 195.

1839.—*Woods v. Woods.*

directed by the court; and, if the defendant clears his contempt, the court may reimpose the condition.

THE VICE-CHANCELLOR:—The motion now before me, is one of the first impression.

A party who is in contempt, may, at any time, clear his contempt.[1] At the time when the Lord Chancellor's order was made, the defendant was not in contempt. That order is still in full force; and I cannot understand how the circumstance that the defendant has subsequently come into contempt, can give, to the plaintiff, the right to postpone the trial of his action, which to a certain extent, he is under an obligation to try. The defendant may, perhaps, clear his contempt before the trial: but whatever may be the circumstances of the defendant, the order of the court must remain as it is.

Although the cases cited afford some countenance for this application, I cannot think that they warrant it; and therefore, I shall refuse the motion without costs.

*WOODS v. WOODS.

[*197]

1839; 2d and 6th July.—Impertinence; Pleading; Supplemental Bill; Exception; Report; Impertinence.

A bill was filed against A., to set aside a purchase made by him, on the ground of fraud. A. died after filing his answer. The plaintiff then filed a supplemental bill against A.'s devisees, stating the allegations in the original bill, and several passages in the answer, some of which were stated by way of pretence, and charges were founded upon them. Held that the supplemental bill was not impertinent.

The Master having allowed all the exceptions taken to a bill for impertinence, the plaintiff took one general exception to the report, alleging that the Master ought not to have found the bill impertinent in all the points excepted to. The exception will be supported, if the court thinks that the Master ought to have allowed one of the exceptions.

THIS case came before the court upon an exception, taken by the plaintiffs, to a report of Master Doudeswell, finding that the bill in this cause was, impertinent in all the points excepted to by the defendants.

The plaintiffs were the children of Robert Woods deceased. In October, 1835, they filed a bill against Elizabeth Hulme, the trustee for sale of their late father's real estates under his will, and against Thomas Woods, the purchaser of those estates, for the purpose of setting aside the purchase on the ground of fraud. Thomas Woods put in his answer to the bill; and, shortly afterwards, the plaintiffs served a notice of motion for the production of certain deeds and other documents admitted by him to be in his custody; but, before the motion was made, Thomas Woods died. Upon his death the children of Robert Woods filed a bill against the devisees and executors of

[1] Though an outlaw cannot come into court to establish a demand, yet he may apply to the court to set aside an attachment which has been irregularly issued against him. *Haseltine v. Hall*, 1 Beav. 73.

1839.—*Woods v. Woods.*

Thomas Woods, and also against Elizabeth Hulme, stating that, in or about the month of October, 1835, the plaintiffs exhibited their original bill against Thomas Woods and Elizabeth Hulme, which stated, as the facts were, that &c. The bill then set forth the whole, or nearly so, of the con-
 [*198] tents(a) of the original bill, the proceedings which had taken place in the original suit, and the will and death of Thomas Woods. It then alleged as follows: "and your orators and oratrixes are advised that the said suit having so become defective and abated by the death of the said defendant, Thomas Woods, they are entitled to have the same or the like relief, in respect of the several matters in the said original bill mentioned, as against the several defendants hereto, as the personal and real representatives of the said Thomas Woods, entitled to or interested in his real and personal estate under his will, by means of a bill of supplement in the nature of a bill of revivor, or otherwise, as they would have been entitled to have as against the said Thomas Woods himself if living; and that they are entitled to the benefit of the discovery, disclosures and admissions made by the said answer of the said defendant Thomas Woods, and to have relief, in respect of such several matters and things so disclosed and stated, as if the same had been originally known to your orators and oratrixes, and had been inserted in the said original bill, originally or by way of amendment thereof; and they claim the full benefit of the said answer, whereunto, in case of need, reference is hereby made; and your orators and oratrixes show that, in and by the said answer, are set forth divers matters and things of which they were, at the time of the filing of their said original bill, altogether ignorant, and in respect of which, but for the death of the said Thomas Woods, they would, upon a production and inspection of the documents relating thereto, have amended their said bill, and, amongst others, the matters and things hereinafter set forth, and which are herein stated and set forth for the purposes of this suit, subject, however, to the verification thereof, upon production and
 [*199] inspection of the said deeds and documents relating thereto, when obtained from the said defendants."

The bill then stated as follows: "That, by the said answer of the said Thomas Woods, it is stated that the said Robert Woods, by an indenture bearing date the 5th day of January, 1781, conveyed certain parts of his real estates to William Burton and his heirs, for securing the sum of 1000*l.* and interest: and that it is thereby further stated that certain other parts of the real estates of the said Robert Woods were purchased by him of George Nicholl and Phillipa his wife: and further that it is, by the said answer, alleged that, for the purpose of enabling the said Robert Woods to complete the said purchase, he was desirous of raising the sum of 1500*l.* upon the security of the said premises so by him purchased of George Nicholl and Phillipa his wife; and further that, in consequence, indentures of lease and release,

(a) The contents so set forth filled seven brief sheets, and were the subject of the six first exceptions in the Master's office. The supplemental bill occupied thirty-nine brief sheets.

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bearing date respectively the 21st and 22d days of June, 1786, were duly made and executed between and by, &c." The bill then set forth the names of the parties to the recitals and the operative part of the release, by which the premises purchased by Robert Woods of Nicholl and wife, were conveyed to Elizabeth Clabon for the term of 1000 years, for securing the repayment of the 1500*l.* which Robert Woods had borrowed of her, and, subject thereto, to Robert Woods in fee. The bill then proceeded as follows: "And further that it is, by the said answer, alleged that, in the month of November, 1785, the said Robert Woods borrowed the further sum of 1000*l.* from Richard Purvis, and, for securing the same sum and interest, indentures of lease and release, bearing date respectively the 1st and 2d days of July, 1786, were duly made and executed, the said indenture *of release being [*200] made and executed between and by, &c." The bill then set forth the names of the parties to, the recitals and the operative part of the release, by which Robert Woods conveyed certain parts of his real estates which he had purchased of William Lark, to Purvis in fee, by way of mortgage for securing the repayment of the 1000*l.* and interest. The bill then proceeded thus: "And further that it is, by the said answer, stated that the said sums of 1000*l.*, 1500*l.*, and 1000*l.*, remained, at the time of the death of the said Robert Woods, due upon the security of the said hereditaments charged therewith; and further that it is, by the said answer, admitted that the said Robert Woods died on the 14th day of November, 1788, and that he left his said widow and children him surviving, as in the said original bill mentioned; and that he duly made and published his last will and testament of such date, and in such words and figures as in the said original bill set forth; and that the said will was duly proved in the court of the Archdeaconry of Suffolk by him the said defendant Thomas Woods and the said Elizabeth Hulme; and that he did take upon himself the execution, and that he did, accordingly, together with the said Elizabeth Hulme, act in the execution of the trusts of the said will; but it is thereby denied that he acted principally or, in any respect, exclusively of the said defendant Elizabeth Hulme, in the execution of the trusts thereof: and further that it is, by the said answer, alleged and pretended that the debts of the said Robert Woods, at the time of his death, amounted to the sum of 5262*l.* 16*s.* 11½ so far as the said defendant had been able to ascertain the same, exclusive of the said sum of 1500*l.* due to the said Elizabeth Clabon; and that the value of his property applicable to pay such debts, did not exceed the sum of 3665*l.*: and further that it is, by the said *an- [*201] swer, alleged and pretended that the said Elizabeth Hulme was, in the year 1789, desirous that the said defendant Thomas Woods should purchase the real estates of the said Robert Woods, and that he should have the same conveyed to him at a fair value, in order that the purchase money should be applied towards payment of the said testator's debts; and further that it is, by the said answer, alleged and pretended that it was settled that the said defendant should pay for the said estates the sum of 6580*l.* subject

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nevertheless to the deduction, out of such purchase money, of the amount of the said mortgages: and further that it is, by the said answer, alleged that a conveyance of the said estates was thereupon made and executed to the said defendant Thomas Woods in the manner next hereinafter set forth, that is to say, that such conveyance was made by indentures of lease and release, the said indenture of release bearing date the 10th day of October, 1789, and being duly made and executed between and by the said Elizabeth Hulme therein described as of, &c." The bill then set forth the names and descriptions of the other parties to, and the recitals and the operative part of the release: and then followed these words: "However although the said indenture of release is stated to bear date the 10th day of October, 1789, yet it is, by the said answer, admitted that such conveyance was not, in fact, executed by the said Elizabeth Hulme until the 17th day of February, 1791: and your orators and oratrixes charge ha t the contents of the said indenture of release of the 10th day of October, 1789, are imperfectly and insufficiently and also delusively set forth in the said answer; neither did the said Thomas Woods thereby account for the same; and your orators and oratrixes expressly crave reference thereto when discovered and produced by the defendants,

[*202] in the possession or power of whom, *or some of whom, the said indenture of release or, if not, some copy thereof now is or ought to be: and your orators and oratrixes further show that it is, by the said answer, alleged that the said Thomas Woods had, since the month of October, 1789, been in possession, by himself and his tenants, of the said hereditaments and premises, with the exception of certain particulars therein mentioned to have been since sold by the said defendant Thomas Woods, and such parts of the old inclosed lands as were exchanged for other lands under an award made in the year 1805, pursuant to the provisions of the inclosure act therein mentioned, and with the exception also of certain other hereditaments, part of the real estates of Robert Woods (which, it is thereby alleged, were not included in the said purchase made by the said defendant Thomas Woods, although the same were included in the said conveyance to him, and which, it is thereby alleged and pretended, were sold by the said Elizabeth Hulme, and that she received the purchase money for the same,) and that the said defendant Thomas Woods claimed to be absolutely entitled to the said hereditaments and premises save as before mentioned." (a)

"However your orators and oratrixes hereby charge and humbly submit that the said indentures of lease and release dated October, 1789, under which the said defendant Thomas Woods so claimed to be entitled as aforesaid, were and are, under the circumstances and for the reason in the said original bill and herein appearing, fraudulent; and that the same ought to be held and treated as fraudulent, null and void to all intents and purposes."

(a) The above allegations from the answer of Thomas Woods, were the subject of eight of the exceptions before the Master, beginning with the 7th and ending with the 14th.

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*The bill then set forth various other allegations, in Thomas [*203] Woods' answer, as pretences made by him and the defendants; and those allegations were followed by charges contradicting or invalidating them. The charges related to matters prior to the filing of the original bill, and formed the subject of the 15th and ten following exception in the Master's office.

The bill then asked that the defendants might answer all and singular the matters thereinbefore contained and set forth; and it interrogated, particularly, to all the allegations and charges, except those taken from the original bill, as to which it asked, merely, whether that bill did not contain such statements, charges and prayer as thereinbefore mentioned.

The prayer of the bill was as follows: "that the said defendants may answer the premises and that it may be declared, by and under the decree of this honorable court, that your orators and oratrixes are entitled to the full benefit and advantage of the said original bill and suit against the said Thomas Woods deceased, and to have the same or the like relief, in respect of the several matters and things in the said original bill and hereinbefore contained, as against the said several defendants as claiming or entitled under the said will of the said Thomas Woods, or otherwise as representing him and his real and personal estate, as your orators and oratrixes would have been entitled to, under the said original bill, against the said Thomas Woods, if he had been living; and that this bill may be taken as a bill of revivor, and as a supplemental bill in the nature of a bill of revivor, to the said original bill, or otherwise together with the said original bill; and that such relief may be given thereupon as may be *necessary for the in- [*204] terest of your orators and oratrixes; and that your orators and oratrixes may accordingly have such relief, in respect of the said fraudulent and pretended purchase of the said hereditaments and premises by the said Thomas Woods, as is prayed by the said original bill; and, in particular, that the said indenture of the 10th of October, 1789, may be decreed to be delivered up, by the said defendants, to be cancelled; and that the defendants may be decreed to produce and deliver up all title deeds belonging to the said hereditaments and premises in their possession or power, and also to concur in all such conveyances as may be necessary for the purposes of the relief by the said original bill and hereby prayed; and that all such accounts as are, by the said original bill, prayed to be taken as against the said Thomas Woods, and all such further and other accounts as may be necessary for the full compensation and relief of your orators and oratrixes in the premises, may be directed to be taken against the said defendants respectively, as the case may require:" that the personal estate of Thomas Woods might be applied in payment of what should be found due to the plaintiffs: that the defendants might admit assets of Thomas Woods, or that the usual accounts might be taken of his personal estate; that, if necessary, his real estates might be applied in payment of what should be found due to the plaintiffs; that an

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account might be taken of the rents of the hereditaments and premises to which the bill related, which had been received by the defendants since the death of Thomas Woods; that the defendants might be restrained from selling, mortgaging, &c. those hereditaments; that a receiver might be appointed of the rents thereof; and that the trusts of Robert Woods' will might be carried into execution.

[*205] "The bill then prayed for the injunction, and for a subpoena commanding all the defendants to appear to and answer the bill, and to abide by and perform such order and decree as the court should make in the premises: but it did not pray for a subpoena to revive the original suit.

The defendants, except Elizabeth Hulme, took twenty-five exceptions, to the bill for impertinence: and the Master allowed all the exceptions.

The following reasons were assigned by the Master for his report:—"It is contended, in this case, that a considerable part of the bill is impertinent, inasmuch as it unnecessarily states various parts of the original bill and of the answer that has been filed by the deceased defendant; and inasmuch as it also states various matters which are not matters of supplement, and which, if stated at all, ought to have been stated by amendment to the original bill.

"The six first exceptions relate to what are considered the unnecessary statements of the original bill; and the eight next relate to the statements of the answer; and the rest, to what is contended not to be matter of supplement. Some discussion took place as to what is the proper designation of of the bill in question: but, whether it is to be considered as a bill of revivor and supplement, or as an original bill in the nature of a bill of revivor and supplement, or as a supplemental bill in the nature of an original bill, I am of opinion that it was not necessary to set out the statements contained in the original bill and answer. The facts stated in the original bill, are, [*206] indeed, put in issue; but the plaintiff *has not thought it necessary to interrogate as to those facts; nor does he pray that the defendants may answer the original bill; but he claims to be entitled, as I conceive he is, to have the benefit of the former proceedings and of the admissions contained in the answer of the deceased defendant.

"If the bill is to be considered as a supplemental bill, the case alluded to by Sir A. Hart, in *Molloy's Reports*, (a) is an authority that the statements of the bill and answer which have been excepted to, are impertinent. But, without relying upon that authority, I am of opinion that, as the plaintiff is entitled to the benefit of the former proceedings, it was unnecessary to set forth the statements, in the original bill and in the answer, which have been excepted to; and that they are, therefore, impertinent.

"With respect to the remaining exceptions, I have had some doubt; for though, in *Seeley v. Boehm* (b) it was held that a plaintiff may state, by

(a) Vol. 2, p. 39.

(b) 2 Madd. 176.

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way of amendment, part of the answer by way of pretences, yet I was inclined to think that he might, when the facts were not known to him at the time when he filed his original bill, set out the statements of the answer, in a supplemental bill, as pretences, and charge such matters as he might think necessary, for the purpose of invalidating such statements. Lord Redesdale, in folio 263, (edit. 3,) says that, if any event happens which alters the interest of any party or gives any interest to any person not a party, the plaintiff may file a supplemental bill or bill of revivor, as the case may require; and, if he thinks some discovery necessary to support his case, he may file a supplemental bill to obtain that discovery. The [*207] present bill is not a bill of discovery merely, but is one for relief also. Lord Redesdale adds that he may also file a supplemental bill to put in issue some matter necessary for his case, when he can not obtain permission to alter his original bill by way of amendment: and, in page 49, Lord Redesdale says that, whenever the same end may be obtained by amendment, the court will not permit a supplemental bill to be filed. If this bill can be amended, as I am of opinion it can, the plaintiff may state the defences set up by the answer, by way of amendment, and controvert them: *Seeley v. Boehm*. It is stated that the matters introduced into the bill and to which the latter exceptions refer, were unknown to the plaintiff until the putting in of Thomas Woods' answer; but, in *Colclough v. Evans*,^(a) the Vice-Chancellor said that such a statement will not make the bill supplemental or show that it is improper. I am, therefore, of opinion that the whole of these exceptions must be allowed."

The exception taken to the Master's report was in the following terms: "For that the said Master hath, in and by his said report, certified that the said plaintiffs' bill in the said report mentioned, is impertinent in all the points excepted to by the said defendants. Whereas the said Master ought not to have certified that the said bill is impertinent in all such points."

Mr *Knight Bruce* and Mr. *Anderdon*, for the plaintiffs, in support of the exception to the report:—If a suit becomes abated, the plaintiff may, if he pleases, abandon his original bill and file an entirely "new bill. [*208] There is no case in which it has been held that a bill can be amended as against the devisee of the original defendant. The proceeding against the devisee, is supplemental: he cannot be compelled to answer to any matters in the original bill, to which his testator has not fully answered. In this case, a new bill was absolutely necessary; and nothing has been inserted in it which was not necessary to make the matter intelligible. It is taken for granted that the plaintiffs might have amended their original bill: if that be so, what difference can it make to the defendants, if the plaintiffs, instead of amending their bill, introduce the same matter into their supplemental bill. The Master has applied a rule, applicable to one state of circumstances, to a

(a) *Ante*, vol. 4, p. 76.

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totally different state of circumstances. Mitford on Pleadings, third edit. pages 55 and 77. *Backhouse v. Middleton*.(a)

Mr. Jacob and Mr. Koe, in support of the Masters' report:—A plaintiff who files a supplemental bill, is not at liberty to insert in it all the allegations of the original bill; but ought to introduce so much only of that bill, as is necessary to show his right to carry on the suit against the new defendant. What the Master has expunged in this case, does not go to the right of the plaintiffs to carry on the original suit against the devisees and executors of Thomas Woods: it is unnecessary for connecting the new defendants with Thomas Woods. The plaintiffs here seek not only to carry on the old suit, but to institute a new, concurrent suit: so that there will be two suits going on, concurrently, for the same purpose: with the additional advantage of examining witnesses in the second suit, after they have *been examined in the first. *Devaynes v. Morris* ;(b) *Wagstaff v. Bryan* ;(c) *Onge v. Truelock*.(d)

We now come to that part of the supplemental bill which relates to statements introduced from the answer of Thomas Woods. The only legitimate purpose of a supplemental bill, is to bring new defendants before the court. It was not necessary to introduce the allegations in the answer, any more than the allegations in the original bill, for that purpose. The original suit determines what the rights of the parties were at the time of filing the original bill. No new matter can be introduced, unless it can be done by way of amendment. *Colclough v. Evans* ;(e) Mitf. on Plead. 53, 55.

As the exception to the report is worded, it cannot be sustained, if the court shall be of opinion that the Master ought to have allowed any one of the exceptions. *Pearson v. Knapp* ;(f) *Moore v. Langford*.(g)

Mr. Knight Bruce, in reply:—*Colclough v. Evans* was decided on the ground that the issue was sought to be varied after replication filed. The case of *Crompton v. Wombwell*.(h) decides that a supplemental bill may be filed for the purpose of putting newly discovered matter in issue. That case is not at variance with *Colclough v. Evans*.—[The Vice-Chancellor:—In *Colclough v. Evans* the supplemental bill was filed for the purpose of putting in issue matter contradictory to the statements in the original bill.]—*Wagstaff v. Bryan* decides, merely, that no new *defence can be made where no new fact is stated. *Devaynes v. Morris* shows only that new facts cannot be put in issue, where the rights of the parties have been decided upon. Mitf. on. Plead. 27, 48, 59, 77.

THE VICE-CHANCELLOR:—I will read over the whole of this bill before I decide upon the exception.

6th July.—THE VICE-CHANCELLOR:—In this case the plaintiffs filed

(a) 2 Freem. 132. S. C. Ch. Ca. 173.

(b) 1 Myl. & Cr. 313.

(c) 1 Russ. & Myl. 28.

(d) 2 Molloy's Rep. 31; see 39.

(e) Ante, vol. 4 p. 76.

(f) 1 Myl. & Keen, 312.

(g) Ante, vol. 6. p. 323.

(h) Ante, vol. 4. 628.

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their bill as parties claiming under Robert Woods, and they made a person of the name of Thomas Woods a party, and also a person of the name of Elizabeth Hulme. An answer to the bill was put in by Thomas Woods, and then Thomas Woods died, having made his will, under which those persons claim, who referred the supplemental bill for impertinence. Upon the death of Thomas Woods, the plaintiffs filed the bill in question; which is, properly speaking, an original bill as against those persons on whose application it was referred; but with respect to Elizabeth Hulme, it is not an original bill, because she was a party to the original bill; but as to the other defendants, the bill is an original bill; and it is in the nature of a supplemental bill: because it is filed for the purpose of carrying on the suit against those defendants who took, by transmission of interest, from Thomas Woods, by means of his devise. I mention that, because reference was made to several passages in Lord Redesdale's treatise. Since the case was argued, I have looked over every portion of that work which seems to have any relation to the case.

In page 61 of the 4th edition, (3d edition, p. 48,) his Lordship says: "Where the imperfection of a suit arises *from a defect in the original bill or in some of the proceedings upon it, and not from any event subsequent to the institution of the suit, it may be added to by a supplemental bill merely."^(a) In page 63, (3d edition, p. 49,) his Lordship says: "When any event happens subsequent to the time of filing an original bill, which gives a new interest in the matter in dispute to any person not a party to the bill, as the birth of a tenant in tail, or a new interest to a party, as the happening of some other contingency, the defect may be supplied by a bill which is usually called a supplemental bill, and is, in fact, merely so with respect to the rest of the suit, though, with respect to its immediate object, and against any new party, it has, in some degree, the effect of an original bill." Then in page 68, (3d edition, p. 52,) he says: "But if the interest of a defendant is not determined, and only becomes vested in another by an event subsequent to the institution of a suit, as in the case of alienation by deed or devise, or by bankruptcy or insolvency, the defect in the suit may be supplied by a supplemental bill, whether the suit is become defective, merely, or abated as well as become defective." Then in pages 70 and 71 (3d edition, p. 55, 56,) he says: "If a suit becomes abated, and, by any act besides the event by which the abatement happens, the rights of the parties are affected, as by a settlement or a devise under certain circumstances, though a bill of revivor merely may continue the suit so as to enable the parties to prosecute it, yet, to bring before the court the whole matter necessary for its consideration, the parties must by supplemental bill, added to and made part of the bill of revivor, show the settlement, or devise, or other act by which their rights are affected. And in the same manner if any other event which occasions an abate-

(a) His Honor referred also to Mr. Jeremy's Note (c) in p. 61.

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[*212] ment is accompanied or followed by any matter *necessary to be stated to the court, either to show the rights of the parties, or to obtain the full benefit of the suit, beyond what is merely necessary to show by or against whom the cause is to be revived, that matter must be set forth by way of supplemental bill; added to the bill of revivor.[1]—If the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in the Court of Chancery, as in the case of a devise of a real estate, the suit is not permitted to be continued by a bill of revivor. An original bill, upon which the title may be litigated, must be filed; and this bill will have so far the effect of a bill of revivor, that if the title of the representatives substituted by the act of the deceased party, is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by a bill of revivor.”

Then he says, in page 75 (3d edition, p. 58): “A supplemental bill must state the original bill, and the proceedings thereon; and, if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration with respect to the parties; and, in general, the supplemental bill must pray that all the defendants may appear and answer to the charges it contains. For if the supplemental bill is not for a discovery merely, the cause must be heard upon the supplemental bill at the same time that it is heard upon the original bill, if it has not been before heard: and, if the cause has been before heard, it must be further heard upon the supplemental matter. If indeed the alteration or acquisition of interest happens to a defendant, or a person necessary to be made a defendant, the supplemental bill may be exhibited by the plaintiff in the original suit against such person alone, *and may pray a decree upon the particular supplemental matter alleged against that person only: unless, which is frequently the case, the interests of the other defendants may be affected by that decree.”

And then he says, in pages 97 and 98 (3d edition, 76, 77): “It has been already mentioned that, when the interest of a party dying is transmitted to another in such a manner that the transmission may be litigated in this court, as in the case of a devise, the suit cannot be revived by or against the person to whom the interest is so transmitted; but that such person, if he succeeds to the interest of a plaintiff, is entitled to the benefit of the former suit; and, if he succeeds to the interest of a defendant, the plaintiff is entitled to the benefit of the former suit against him; and that this benefit is to be obtained by an original bill in nature of a bill of revivor.” “When the validity of the alleged transmission of interest is established, the party to the new bill shall be equally bound by or have advantage of the proceedings on the original

[1] As to supplemental bill, in the nature of bill of revivor, see *The Farmers Loan and Trust Co. v. Seymour*, 9 Paige, 538, 543. *Day v. Potter*, id. 645. *Hodson v. Ball*, 1 Phillips, 177.

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bill, as if there had been such a privity between him and the party to the original bill claiming the same interest."

It is obvious that, in these passages, there is a good deal of repetition: but I think the substance of them is that, where a bill is filed asking for relief against a given individual, and he dies, and, by any act of his own, as by a devise, his interest in the estate which is the subject of the suit, is transmitted to other persons, those other persons are to be made parties to the suit by means of a bill which, with respect to them, is an original bill, but which, with respect to the original bill, is a bill of supplement. Lord Redesdale says that such a bill must state the original bill and the proceedings had upon it.[1]

*Now, in this case, it is to be observed that the persons who re- [*214]ferred the bill for impertinence, were none of them parties to the original bill. It does not appear that they have office copies, or that they will be ever compelled to take office copies of the original bill, or that they know anything of its contents. Now, the bill which has been filed against them is a bill which is framed in compliance with the rule laid down by Lord Redesdale. It begins by stating, to some extent, certain matters which are contained in the original bill. It then states that the answer of Thomas Woods was put in, and then the devolution of his interest to the other defendants, by means of the will which it sets forth. Then it reverts back to certain portions of the answer of Thomas Woods: and then it proceeds to make certain charges with respect to those matters of fact which appear to have been brought forward as a defence to the original bill, by means of those portions of the answer which are stated.

It is observable that the answer of Thomas Woods has set forth certain deeds of the 5th of January, 1781, of the 21st and 22d of June, 1786, of the 1st and 2d of July, 1786, and of the 10th of October, 1789; none of which were at all noticed in the original bill. Now, where a defendant has put in an answer to the original bill, and has set up certain matters as a defence, it is competent, to the plaintiff, to amend his bill, and to state, by way of pretence, that the defendant alleges so and so, and then to charge certain circumstances to meet those allegations. If that might be done in the case of an original bill against the original defendant, it is obvious that the same thing,

[1] When a supplemental bill is necessary, see 3 Myl. & Cr. 257, n. 2, and cases there cited; *Sheppard v. Merrill*, 3 Johns. Ch. Rep. 423; *Semple v. Price*, post, 238. As to the right of a person not party to the original suit, to intervene by filing a supplemental bill, see *Hallet v. Hallet*, 2 Paige, 15; *Judson v. Rossie Galena Co.*, 9 Paige, 601; *Phillips v. Clark*, 7 Sim. 231; *Cattell v. Corall*, 1 Hare, 216. When supplemental matter should be introduced by way of amendment, and not by a new bill; *The Fulton Bank v. The New York, &c., Canal Company*, 4 Paige, 127; *The North American Coal Co. v. Dyett*, 2 Edw. Ch. Rep. 115. As to the form of a supplemental bill, see *Vigers v. Lord Audley*, 9 Sim. 77. As to the necessity of obtaining permission from the court to file a supplemental bill, see 1 Hoff. Ch. Pract. 403; *Hodson v. Ball*, 1 Phillips, 177; S. C. 11 Sim. 456; *Daniell v. Mitchell*, 1 Story's Rep. 196; *The Attorney General v. The Fishmongers Co.* 4 Myl. & Cr. 9.

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in form, cannot be done with respect to those persons who, for the first time, are made parties to the suit by an original bill in the nature of a supplemental bill: but it is not pretended to be said that the plaintiff may not [*215] have the same advantage against "them, as he might have had if they had been defendants to the original bill? He cannot amend, because they were not parties to the original bill: but, I apprehend, it is perfectly competent to the plaintiff, when he files the bill for the purpose of bringing the new defendants before the court, to take notice of the circumstances which are set up, by way of defence, in the answer of the deceased defendant, and then to charge such matters, and put such interrogatories, as he thinks proper, in order to see how the case will stand when they have answered his supplemental bill in the nature of an original bill.

Having stated this with regard to the general question, I come to the first six exceptions, which relate to those portions of the original bill which are set forth, certainly at some length, in the supplemental bill. But I must say that, knowing nothing of the matter myself, I should not have comprehended what the case was about, if I had not read those passages, excepting one passage which, it appears to me, was not necessary, that is, the passage which is the subject of the third exception. Referring to the will of Robert Woods, it is said that it was: "in the words and figures hereinafter set forth, the inditing and spelling thereof being set forth with the greatest accuracy."^(a) I can easily conceive that the learned author of this bill may have thought that some preface was necessary for the purpose of introducing the document which follows; but, still, if it was necessary to set out the will with all its errors, it would have been sufficient to allege that the testator made [*216] his will as follows, and then to have set out the will. Therefore, if we are to proceed rigidly, I think that those who referred the bill for impertinence, are entitled to the benefit of the third exception.

But, with respect to all the other exceptions, I think that the bill is incapable of being understood, unless you see the case which was made out by the principal facts stated in the original bill. I must assume that the defendants know nothing of the original bill. Why, then, are they not to be informed by this bill (which is the first and only bill with respect to them) what are the contents of the original bill? My opinion therefore is that the matters which form the subject of the first six exceptions, omitting the third, are properly introduced into the bill.

I feel it painful to differ from one for whom I have so great a respect as I have for Master Dowdeswell; but I confess that I am not swayed by the reasons which he has given for allowing all the exceptions. He says, &c.^(b) Why, of course, the original bill having been answered, the plaintiffs could

(a) Several words in the will were mis-spelt. It was not thought necessary to notice this part of the case, in the statement, as it did not seem to be of any importance.

(b) His Honor here read the Master's reasons down to the words, "original bill:" see ante, pp. 205, 206.

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not compel the new defendants to answer it, unless they had thought proper to state the whole of that bill and put interrogatories, and require them to be answered. Then he says, &c.(a) Now adverting to the fact that these persons are, for the first time, brought into court as defendants, and are no parties to the original bill, and cannot be made to answer any of its contents, except by means of the supplemental bill, my opinion is that it was necessary, in order to show what the nature of the case was *be- [*217] tween the plaintiffs and the original defendant, Thomas Woods, that those passages should be set forth which are set forth from the original bill, with the exception which I have stated.

Then, as I understand this record, after setting forth, at some length, those passages in the answer of Thomas Woods which relate to the deeds, it proceeds to introduce several other passages from that answer, and to charge new matter for the purpose of obviating the effect of them. With respect to the deeds it is alleged that they are now in the custody of the defendants, which, being clearly supplemental matter, is properly inserted in the bill; and, that being so, surely the plaintiffs must have an opportunity of stating the matters in respect of which the production of those documents is material. Take for instance, the deed of October, 1789. With respect to that, the supplemental bill states that it is imperfectly and insufficiently and also delusively set forth. That allegation would not have been intelligible unless so much of the answer had been set forth as showed the way in which Thomas Woods had set out the deed, and the way in which he had spoken of it, in his answer, by way of defence. The same observation appears to me to apply to the other matters.

I think, therefore, that this bill, in substance, is not impertinent. I do not mean to say that if more leisure had been allowed and more attention bestowed upon it, some of the passages might not have been stated more briefly; but I cannot think that the proper course is to call the attention of this court to the question whether matter which has been stated in a certain number of words, might not have been stated in fewer; [1] *or that [*218] that is the question which I have to decide. The real question is

(a) His Honor here read the third paragraph of the Master's reasons.

[1] Where exceptions to an answer for impertinence were unnecessarily prolix in setting out the matter excepted to, at length, the Chancellor, although the plaintiff succeeded on all the exceptions referred, refused the costs of the reference; observing that, "all the exceptions to the answer were in themselves impertinent, or more properly, unnecessarily prolix, in setting out the impertinent matter of the answer at length, instead of referring to it by line and page; and thereby these exceptions, which might have been embraced in two or three folios at most, are extended to fifteen or twenty folios. The complainant's solicitor was also wrong, in taking separate and distinct exceptions where the subject matter of each exception depended on the same principle, and might have been embraced in a single exception. And as thirteen distinct exceptions were taken to this answer, when three only were necessary, I shall refuse to allow any costs upon the reference of the exceptions; and the exceptions themselves are not to be taxed at more than three folios." *German v. Machin*, 6 Paige, 289, 294.

 1839.—*Jennings v. Newman*.

whether the matter objected to is pertinent to the case; and I think it is pertinent, with the exception I have mentioned.

The Master has reported that, in his opinion, the bill is impertinent in all the points excepted to; and the exception to the report is in this form—that the Master ought not to have certified that the bill is impertinent in all such points. Therefore if I were of opinion that the greatest portion of the passages excepted to were impertinent, and that only a few of them were pertinent, still I must have decided that the report is wrong; for the Master has certified that all the passages objected to are impertinent.[1] However, I think that the justice of the case will be best attained by allowing the exception of the plaintiffs so far as it extends to all the original exceptions except the third.

As one of the twenty-five exceptions has been sustained, the deposit must be divided between the parties in the proportion of one to twenty-five.[2]

[*219]

*JENNINGS v. NEWMAN.

1839; 4th and 8th July.—Will; Construction.

Testator gave 2000*l.* to his daughter, Martha, for life, with a testamentary power to her to appoint that sum amongst her children; but if she should die without leaving a child, then he gave it to such of his children as should be living at his decease; and, if either of his said children should die before they should be entitled to receive a share, leaving issue, their shares should be distributed amongst their children. The testator left Martha and four other children living at his decease. Two of them died leaving issue, and two, without issue; and, afterwards, Martha died without issue. Held that her personal representatives were entitled to one-fifth of the fund.

WILLIAM NEWMAN, by his will dated the 11th of September, 1802, gave 2000*l.* to trustees, in trust to pay the interest thereof to his daughter Martha Monk, for her separate use, for her life; and he empowered her to appoint the capital, by her will, unto and amongst her children: but, if she should happen to die without leaving any child or children lawfully begotten, then the testator gave the 2000*l.* unto and amongst *such of his children as should be living at the time of his decease*, in equal shares and proportions: “*And if it shall happen that either of my said children shall die before they shall*

[1] Where several exceptions are taken to an answer, some of which are allowed by the Master, and others not, and one exception is taken to the Master's report, if the court decides, that any of the exceptions taken to the answer were properly allowed by the Master, the exception to his report will be overruled. *Buloid v. Miller*, 4 Paige, 123.

[2] That an exception must not cover too much, see further 1 Russ. & M. 31, n. 1. 1 Sim. 434. n. 2. An exception for impertinence fails, if any part of the passage included in it be not impertinent. *Wagstaff v. Bryan*, 1 Russ. & M. 28. But where that which is impertinent, is so mixed up with that which is pertinent, that the one cannot be separated from the other, the whole must be treated as impertinent. *Byde v. Masterman*, Cr. & Ph. 372. A part of an exception may be allowed, unless it be so specially framed as to prevent such partial allowance. *Hoare v. Johnstons*, 4 Myl. & Cr. 127. See further *Cotham v. West*, 1 Beav. 380. *Ballard v. White*, 2 Harv. 158.

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*be entitled to receive a share or proportion of the said 2000*l.* leaving issue,* then I will and direct that the share of such of my deceased child or children, of and in the said sum of 2000*l.*, and the stocks or funds in which the same shall or may be invested, shall be distributed equally amongst such of my grandchildren as are the children of my said deceased child; or, if there be only one such grandchild, then to such only grandchild."

The testator died shortly after the date of his will, leaving Martha Monk and four other children him surviving. In February, 1839, Martha Monk died without issue, having survived her brothers and sisters, two of whom died without issue, and two, leaving issue. The "2000*l.* hav- [*220] ing been paid into court, and invested in stock under an order in the cause made in 1805, a petition was presented, on Mrs. Monk's death, by her personal representatives, praying that the stock might be sold, and one-fifth of the proceeds paid to the petitioners.

Mr. *Knight Bruce* and Mr. *James Parker*, for the petitioners:—The representatives of Mrs. Monk, are entitled to a share of the fund, under the bequest to such of the testator's children as should be living at the time of his decease. It is suggested, however, that Mrs. Monk and her representatives are excluded from participating in the fund, by reason of the words: "And if it shall happen that either of my said children shall happen to die before they shall be entitled to receive a share or proportion of the said 2000*l.*, then I will and direct, &c." But, in order to have that effect, the words: "other than and except my said daughter Martha Monk," must be inserted after the words: "such of my children as shall be living at the time of my decease." The court, in construing a will, never supplies words, or limits the operation of plain words by inference or conjecture. The testator having, in a certain event, given the 2000*l.* unto and amongst such of his children as should be living at his decease, proceeds to point out how the shares of certain of those children shall be subdivided on the happening of another event totally distinct from the former. That further event, it is true, could not happen with respect to Mrs. Monk, one of the children: but is that any ground for inferring that the testator intended to exclude her from taking any share in the 2000*l.*; and that, too, after he had given her a share, in the plainest terms? Suppose that Mrs. Monk "had left grandchildren only; they, [*221] according to the construction contended for on the other side, would have been excluded. But what reason is there for saying that the testator did not intend to benefit them, as well as his other grandchildren for whom he has expressly provided? The representatives of each of the testator's other children who died without issue, are entitled to a share; why then should the representatives of Mrs. Monk alone be excluded from participating in the fund? *Smither v. Willock*; (a) *Holloway v. Holloway*; (b) *Harrison v. Foreman*; (c) *Elmsley v. Young*; (d) *Pearce v. Vincent*. (e)

(a) 9 Ves. 233.

(b) 5 Ves. 399.

(c) Ibid. 207.

(d) 2 Myl. & Keen, 82, and 780.

(e) 2 Keen, 230; and 2 Bing. N. C. 328.

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Mr. *Jacob* and Mr. *Tennant* appeared for the testator's grandchildren and the representatives of his children who died without issue, except Mrs. Monk. But,

The Vice-Chancellor, without hearing them, said:—*Prima facie*, the words: "Such of my children as shall be living at the time of my decease," will include Mrs. Monk: and the sole question is whether the meaning of those words is not, of necessity, controlled by the subsequent words: "but if the said Martha Monk shall happen to die without leaving any child or children lawfully begotten, then I give and bequeath the said principal sum of 2000*l.* and the stocks or funds on which the same shall or may be invested, together with the interest and dividends then due thereon, unto and amongst such of my children as shall be living at the time of my [*222] decease, in equal shares and *proportions: and, if it shall happen that either of my said children shall die before they shall be entitled to receive a share or proportion of the said 2000*l.* leaving issue, then I will and direct that the share of such my deceased child or children of and in the said sum of 2000*l.* and the stocks or funds in which the same shall or may be invested, shall be distributed, equally, amongst such of my grandchildren as are the children of my said deceased child, and, if there be only one such grandchild, then to such only grandchild." It seems to me, from those words, that the persons who are intended, by the testator, to take, are such as may, by possibility, die leaving issue. The word "issue" must here mean child or children; for, in the subsequent part of the sentence, the testator speaks of grandchildren as the issue of a child; and, in my opinion the testator is speaking of those children as a class, with regard to whom it may be predicated that any one or more of them may, by possibility, die leaving a child or children; which is utterly inconsistent with Mrs. Monk's taking under the gift over: for that gift over was to take effect only on the contingency of Mrs. Monk dying without leaving a child. In my opinion, therefore, the personal representatives of Mrs. Monk are not entitled to any portion of the fund in question, the contingency on which the gift over was to take effect (with reference to which the preceding words must be interpreted,) being plainly inapplicable to her.

The petitioners presented a petition, to the Lord Chancellor, praying that the Vice-Chancellor's order might be varied, and that the petitioners, as the personal representatives of Mrs. Monk, might be declared to be entitled to a share of the fund. On the hearing *of that petition *Butler v. Bushnell*,^(a) and *Bird v. Wood*,^(b) were cited for the respondents.

The Lord Chancellor said that there could be no doubt that the bequest to such of the children of the testator as should be living at his decease, would include Mrs. Monk; and the only question was whether the words

(a) 3 Myl. & Keen, 232.

(b) 2 Sim. & Stu. 400.

1841.—*Spry v. Bromfield.*

that followed, were of sufficient force to control the effect of that bequest and exclude Mrs. Monk. The persons who were to take under the gift over, were, in the first instance, the children of the testator who should be living at his decease: but, as that gift over could not take effect until Mrs. Monk's death, it occurred to the testator that some of those persons might die, in the mean time, leaving children; and, therefore, he provided that the shares of those who might be dead when the gift over should take effect, should go to their children. That provision was applicable to some of the children, but was not strictly applicable to Mrs. Monk: but why should it have the effect of restraining the prior gift under which she was plainly entitled to take a share of the fund? The court was bound to give full effect, if possible, to every part of a will; and, therefore, the first rule of construction was to strive to make all the provisions in it consistent with one another.[1] The court was not at liberty, by conjecture or inference from some of the words in a will, to limit the operation of other words, the meaning and effect of which, when taken by themselves, did not admit of doubt.[2] The will contained a gift plainly applicable to Mrs. Monk, followed by a provision which, though not strictly applicable to her, was not necessarily inconsistent with the plain and positive terms of the prior gift; and, consequently, the court ought not to restrict, in any degree, the operation of that prior gift.

*His Lordship's order was that the Vice-Chancellor's order should [*224] be varied: that it should be referred to the Master to divide the residue of the proceeds of the stock after payment of costs, into fifths, and that one of those fifths should be paid to the petitioners as the representatives of Mrs. Monk.

SPRY *v.* BROMFIELD.1841: 12th March.—*See ante vol. 9, p. 534; and ante p. 94.*

ON this day the demurrer came on to be further argued, on the return of the certificate.(a)

On pursuing the report, ante, p. 94, it will be observed that the case made for the opinion of the Barons of the Exchequer, stated that a disposition had been made, by Eliza Bromfield and W. A. Bromfield, under the act for abolishing fines and recoveries, and that it contained some other particulars which were not mentioned in the bill owing to the same having been unknown to the plaintiff when the bill was filed.

(a) By a mistake in the certificate, William Arnold Bromfield, was called John Arnold Bromfield.

[1] Vide 3 Myl. & Cr. 614, n. 2. *Dover v. Gregory*, post, 399.

[2] Acc. Ld. Brougham, in *Campbell v. Harding*, 2 Rusa. & Myl. 409; and see 3 Myl. & Cr. 614, n. 2.

 1839.—Wallis v. Freestone.

Mr. *Knight Bruce* and Mr. *Malins*, for the plaintiff, argued against the certificate, and asked for another case to be sent to the Court of Queen's Bench.

Mr. *Jacob*, Mr. *Wilbraham*, and Mr. *Hodgson*, for the defendant, supported the certificate.

The Vice-Chancellor said that, as the case stated the above mentioned disposition to have been made by the *defendants, and the question to be: "what estate do the defendants *take*, &c.:" it was not framed so as to obtain the opinion of the Barons upon the effect of the limitation, in the will, to the children of John Bromfield. His Honor then observed upon the inartificial language of the will, and added that the question seemed to be so doubtful, that, as the heir asked it, he must send a case for the opinion of the Judges of the Queen's Bench, in which the statement as to the before mentioned disposition, should be omitted, and the question should be, what estate did the defendants take, at the death of their mother, in the lands at Boldre devised by the will.

 WALLIS v. FREESTONE.

1839; 28th June.—Power; Perpetuity; Remoteness.

An estate was devised to O. W. for life, with remainder to trustees to preserve, &c., with remainder to O. W.'s first and other sons successively, in tail, with remainder to the trustees and their heirs, in trust for the separate use of the testator's niece, for her life, with remainder to the use of her children, in tail, with remainder to the testator's right heirs.[1] Held that, though the power was given for an indefinite period, yet, as either of the tenants for life might concur with his or her children, in destroying it, it was not void.

THIS suit was instituted for the purpose of obtaining the opinion of the court as to the validity of a power contained in the will of Thomas Clark, Esq., in pursuance of which, the surviving trustee of the will, with the concurrence of the tenant for life, and all the other parties beneficially interested under the will, who were of age, had agreed to grant, to the defendant Ward, a lease of the testator's estate at Stow Lawn, in the county of Stafford, and of the mines under it.

The testator devised the estate in question, consisting of a messuage, barn and other buildings and certain *pieces of land to the use of the plaintiff, Owen Wallis, during his life, without impeachment of waste, with remainder to the use of trustees and their heirs during the life of Owen Wallis, in trust to preserve contingent remainders, with remainder to

[1] The reader will perceive by a comparison of the synopsis, with the statement of the case given in the report, that there is a material omission. It is supplied by the reporter in his index. The following words should be introduced at this place:—"and power to lease the estate, was given to the tenants for life, and during the minorities of the issue in tail, to the trustees." And see 2 Kean, 671, n. 1.

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the use of the first and other sons of Owen Wallis, successively in tail, with remainder to the use of the daughters of Owen Wallis, as tenants in common in tail, with cross remainders amongst them in tail, with remainder to the use of the trustees and their heirs, upon trust for the testator's nieces, Mary Morton, Ann Hayes and Eliza Wallis, as tenants in common, and to pay the rents in equal shares, as the same should be received during their respective natural lives, either into their several hands or to such other persons, as each of his said nieces should, from time to time as the same should become due, and not by way of charge or anticipation, appoint to receive her share of the same, to the intent that the same might be for her separate use; and, in case any one or more of his said nieces should die without leaving issue, then the testator directed that her or their share or shares, should be upon such trust for the survivors or survivor of them as were therein expressed of their respective original shares; and that, from and after the decease of any one or more of his said nieces leaving such issue, then the one-third or other greater part or share of the said hereditaments, to the rents, profits and produce whereof she should be entitled at the time of her death, and every other contingent share, interest or estate therein, should be to the use of all and every such one or more, exclusively, of the others or other of her children or remoter issue, for such estates, &c., as such niece or nieces so leaving issue, should, by her will appoint, and, in default of such appointment, to the use of all and every the children or child of *such [*227] his niece, equally as tenants in common in tail, with cross remainders between them in tail; and, in default of all such issue of all the testator's said nieces, then to the use of his own right heirs: provided that it should be lawful for every person and persons, who, by virtue of the will, should be tenant or tenants for life in possession, or entitled to the rents and profits of the hereditaments, and also for the trustees and the survivor of them, his executors or administrators, from time to time, and at all times during the minority of any child or children, who, by virtue of any of the limitations aforesaid, should be entitled to the possession of the hereditaments, to lease all or any part or parts thereof, for any term not exceeding twenty-one years from the making thereof, at the best yearly rent, &c.: and also that it should be lawful for such person or persons, or trustees or trustee as aforesaid, in like manner from time to time, to lease to any person or persons, for any term or terms of years not exceeding ten years, for such price or other consideration in rent or money or otherwise, as by the trustees or trustee for the time being should be deemed reasonable, any part or parts of the lands that might appear to them or him proper to be let, for the purpose of getting clay, brick-earth, marl, sand or gravel: and the testator declared that every lease to be made pursuant to either of the powers aforesaid, should contain a proviso for determining the term of years thereby demised, upon granting any lease for getting the mines and minerals under the lands, by virtue of the power thereafter contained: provided that it should be lawful, for

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the trustees or trustee for the time being, to grant, demise and lease all or any part of the messuages, lands and hereditaments for any term or terms of years, not exceeding thirty years in possession, and all or any of the mines [*228] of coal, clay and ironstone, or other mines and minerals which were then known or should thereafter be discovered to be in and under all or any parts of the hereditaments, together with full power for the lessee or lessees to use all lawful means for finding, working and getting any coal, ironstone, or other mines or minerals, and for carrying away the same, so as, upon every such lease, there should be reserved the then annual surface rent at the least, and such consideration for the mines and liberties aforesaid, whether by royalties or instalments of money in gross, to be incident to the immediate reversion, as the trustees or trustee for the time being should consider to be a fair equivalent for the same; and so as there should be contained powers of distress and re-entry, and all other clauses, covenants and agreements usual or necessary in leases of mines, and so as the lessee or lessees should execute and deliver to the lessors a duplicate or counterpart of every such lease.

At the time when the bill was filed, Owen Wallis was adult and a bachelor: Mary Morton was dead without issue; Eliza Wallis was married to Henry Barrett, but had no issue; and Ann Hayes was married, and had issue two infant children, who were made defendants.

The bill stated that the defendant Ward alleged, that the power in pursuance of which the agreement between him and the surviving trustee was made, was given, by the testator's will for an indefinite or unlimited space of time, and, therefore, was void at law: but the plaintiffs charged that, according to the true intent and meaning of the will, the power would cease so soon as the hereditaments should vest in any person or persons, for any estate of inheritance in possession, and such person or persons should attain twenty-one, and that, therefore, the power was good and valid.

[*229] "The bill prayed that the power to lease the hereditaments for any term not exceeding thirty years in possession, and all or any of the mines and minerals in and under the same, might be declared to be good and valid, and that the agreement might be specifically performed.

Mr. *Treslove* and Mr. *Simons*, for the plaintiffs.

Mr. *Rogers*, for some of the defendants.

Mr. *Amphlett*, for the defendants, the infant children of Mr. and Mrs. Hayes, contended that the power to lease the Stow Lawn estates, and the mines and minerals under it, being wholly unrestricted as to the time during which it was to remain in force and capable of being exercised, was void; and he referred to *Ware v. Polhill*.^(a)

The Vice-Chancellor, after stating the limitations of the estate contained in the will, said that, if Owen Wallis should have a son who should attain

(a) 11 Ves. 257.

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twenty-one, he and his son might suffer a recovery which would get rid of the estate vested in the trustees; or, if the testator's nieces should have issue who should attain twenty-one, they also might suffer a recovery, which would entitle them to have their equitable interests clothed with the legal estate; and that, in either case, the power would be destroyed; and, consequently, that the objection to the power on the ground of perpetuity, could not be sustained.^(a)

His Honor declared the power to be good, and decreed a specific performance of the agreement.[1]

**BANNATYNE v. LEADER.*

[*230]

1839: 6th and 8th July.—Production of Documents; Defendant.

If a defendant denies the plaintiff's title, and says, positively, that the documents, in his custody, relating to the matters in the bill, will not show the plaintiff's title, the court will not order him to produce them; but if he says merely that he *believes* that they will not show the plaintiff's title, the court will order him to produce them.

THE plaintiffs were the assignees of John Maberly, a bankrupt, who, prior to his bankruptcy, had carried on the business of a linen manufacturer, in co-partnership with John Baker Richards, since deceased. On the 9th of May, 1831, Maberly sold his share of the business and the property belonging thereto, to the defendant Leader; but the dissolution of the partnership between Maberly and Richards, and the formation of the new partnership between Richards and Leader, was not advertised, in the Gazette, until the 3d of January, 1832. The advertisement, however, was dated on the 9th of May, 1831. On the 26th of January, 1832, the fiat issued under which Maberly was declared a bankrupt. The object of the bill was to set aside the sale on the ground that the property sold was allowed, by Leader, to remain in the order and disposition of Maberly at the time of his bankruptcy. The bill alleged that, from and after the 9th of May, 1831, and thenceforward, up to, and from and after the 1st day of July, 1831, when an indenture of assignment therein set forth, was executed by Maberly, and when he committed an act of bankruptcy by executing the same, the linen manufactories and business, by the consent and permission of Leader, were and continued to be carried on, by Maberly and Richards, in the same manner as the same had been before carried on; and that, by the consent and permission of Leader, the same continued to be carried on under the old style or firm of Maberly & Co.; and that, by the consent and permission of Leader, the same were so carried on, until the 3d day of January, 1832, as thereafter [*231] mentioned, and as if Leader had no share or interest in the same.

(a) See *Waring v. Coventry*, 1 Myl. & Keen, 249; and *Biddle v. Perkins*, ante, vol. 4, p. 135.

[1] Vide *Wood v. White*, 4 Myl. & Cr. 460. S. C. 2 Keen, 664.

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The bill charged, in the usual manner, that the defendant had, in his custody, divers books of account, books, ledgers, &c, relating to the matters contained in the bill, and whereby the truth of them, or some of them, would appear; and, particularly, whereby it would appear that Maberly had committed, on the 9th of May, 1831, and on the 1st of July, 1831, and on other days, acts of bankruptcy, prior to the 31st of December, 1831; and that Leader ought to set forth a list of all such documents, &c.

Leader, in his answer, positively denied all the allegations and charges in the bill, upon which the plaintiffs founded their title to the relief prayed. He said that, during the treaty for the purchase and when the agreement for the same was come to, it was proposed, by Maberly, to the defendant and John Baker Richards, that the name or style of the firm of Maberly & Co., under which the linen manufactories and the establishments therewith connected had been carried on should not be changed, or the retirement of Maberly from the business, be publicly announced or published in the Gazette, until after the 31st of December, 1831, and that the defendant and J. B. Richards acquiesced in such proposal by reason of Maberly stating that an earlier publication of the dissolution of the partnership, would be prejudicial to his return, on the then expected dissolution of Parliament, for the borough of Abingdon, which he then represented, and that it might cause a run upon his banks in Scotland before he got the necessary funds to meet it, and which he should be enabled to do by means of the securities proposed to be released and [*232] the money to be paid by the defendant; but that, "on the 9th of May, 1831, Maberly and Richards signed their names to the following memorandum at the foot of the agreement of the 9th of May, 1831; "The partnership hitherto subsisting between the undersigned, as linen manufacturers, under the firm of Maberly & Co., is dissolved by mutual consent:" that the plaintiffs, as Maberly's assignees, brought an action of *trover*, in the Court of Common Pleas, against the assignees under the indenture of the 1st of July, 1831, for the purpose of trying the validity of the assignment: that, at the trial of the action in July, 1833, a verdict was found for the defendants, and thereby the validity of the indenture was established as against Maberly's creditors and assignees; and it was also established that the making of the indenture, was not an act of bankruptcy, and that it was not executed in contemplation of bankruptcy. Leader, in his answer, further stated that there were, in the joint custody of himself and of the other defendants (who had become entitled to Richards' share in the partnership,) several documents, &c. relating to the matters mentioned in the bill; but that the truth of such matters, *as he believed*, did not thereby appear, further or otherwise than as they were therein stated: and that *he believed* that it did not appear, by such documents or any of them, that Maberly had committed, on the 9th of May, 1831, and on the 1st of July, 1831, or on either of such days, or on any other days, any acts of bankruptcy, prior to the 1st of January, 1832;

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and that he had set forth a list of such documents in the second schedule to his answer.

Mr. *Jacob* and Mr. *G. Richards*, for the plaintiffs, now moved that those documents might be produced. They said that the books and other documents moved for, were connected with the trade from 1825 down to 1837; that the production of them was essential to the purposes *of the [*233] suit, in order to show what the trade was, and how it was carried on, and particularly to show what was done between the date of the agreement and the time when the dissolution of the partnership between *Maberly* and *Richards*, and the formation of the partnership between *Richards* and *Leader* was announced, to the world, by the advertisement in the *Gazette*.

Mr. *Knight Bruce*, Mr. *Barber*, and Mr. *Walford* appeared for *Leader*; and Mr. *Wigram* and Mr. *Reynolds* for the other defendants who claimed under *Richards*:—The question is whether a person claiming to be a partner, is entitled to see the books of the partnership, before it has been determined whether he is a partner or not.

If the title of the plaintiff is denied by the answer, that denial gives the plaintiff the same benefit, with respect to all subordinate matters, as he would have had if he had pleaded to the bill. The allegation that the assignment of the 1st July, 1831, was an act of bankruptcy, and all the other statements and charges on which the plaintiffs found their title to the relief asked, are expressly denied by the answer. Besides, all question as to the assignment having been an act of bankruptcy, was set at rest by the verdict in the action of *trover*. If the title of the plaintiff is denied by the answer, he is not entitled to the production of any of the documents in the defendant's custody, except such as will show his title. The Lord Chancellor so decided in — *v. Flint*:(a) but a still more important case, on the same subject, has been lately decided by the same learned Judge: *Adams v. Fisher*.(b) If it had been *alleged that the documents to which the motion relates, [*234] proved the act of bankruptcy, then the plaintiffs might have been entitled to see them: but, what the documents are wanted for, is to show that the property sold to *Leader*, was in the order and disposition of *Maberly*, on the 3d of January, 1832: but until the plaintiffs have shown that *Maberly* was a bankrupt on that day, they have no right whatever to question the transaction between him and *Leader*.

If a person claiming to be a creditor of a testator, files a bill against the executor, for the purpose of obtaining payment of his debt, and the executor, in his answer, denies the debt, can the plaintiff move to have money belonging to the testator's estate, admitted, by the executor, to be in his hands, paid into court?

The documents sought to be produced, are in the joint custody of *Leader* and the other defendants: consequently no order can be made on the motion,

(a) Not reported.

(b) 3 Myl. & Cr. 526; see p. 542, *et seq.*

1839.—*Bannatyne v. Leader.*

which will not affect those other defendants as well as *Leader* : but there is no privity, whatever, between the plaintiffs and those defendants who claim under *Richards*.

The case of *Taylor v. Milner*,^(a) *Atkyns v. Wright*,^(b) and *Fenwick v. Reed*,^(c) were referred to by Mr. Reynolds.

Mr. *Jacob* in reply, said that, in *Adams v. Fisher*, the Lord Chancellor proceeded on the ground that the documents were not material to be produced, in order to enable the plaintiff to get a decree ; that they were not material to show the connection which existed between *Adams v. Fisher* : and he referred to the last paragraph of the judgment, in page 546 of the report.

[*235] The Vice-Chancellor, in the course of the argument, said :—I do not see any sort of admission, in the answer, that the documents, if they were produced, would prove one single allegation in the bill.

Let me put this case. Suppose that a person claiming to be a creditor of a testator, had filed a bill against the executor, and said that he was a creditor, and that the executor had got, in his possession, all the papers and writings that ever belonged to the testator, and, if they were produced, it would appear that he was a creditor : and that the executor, by his answer, denied the assertion that the plaintiff was a creditor, and, moreover, went on to state that he had all the papers of the testator in his possession, but denied that any of them would make out the fact that the plaintiff was a creditor ; could this court order all or any of those papers to be produced ? And yet it is perfectly possible that it might be all fallacious, and that the documents, if they were produced, would prove the plaintiff's case.

8th July.—THE VICE-CHANCELLOR :—What influences my mind most, is that passage in the answer in which the defendant has not, in my opinion, averred, with sufficient positiveness, that the documents would not make out the plaintiff's case. I confess that though, for many purposes, what a defendant states on his belief, is considered as substantially putting the fact in issue ;[1] yet, where the question depends on the materiality of the documents with respect to their contents, if the defendant does not choose

[*236] to swear, positively, as he might and as he would be perfectly "justified in doing if he had read them through and was satisfied, in his own mind, that they did not contain that which would make out the plaintiff's case, but thinks proper to admit the documents to be in his possession, and then to state (in the manner in which this defendant has done) that he merely believes that they will not make out the plaintiff's case, I cannot but think that the defendant does place the matter in such a situation as to make it

(a) 11 Ves. 41.

(b) 14 Ves. 211.

(c) 1 Mer. 114.

[1] That a defendant's statement on his belief, may amount to an admission of the fact, see *Brooks v. Byam*, 1 Story's Rep. 301. When a defendant need not, or must, answer as to his belief, see *Woods v. Morrell*, 1 Johns. Ch. Rep. 103. *Sloan v. Little*, 3 Paige, 103. *The Utica Ins. Co. v. Lynch*, id. 210. *Norton v. Warner*, 3 Edw. Ch. Rep. 106.

 1839.—*Nettleship v. Nettleship*.

consistent with the fair investigation of the truth and justice of the case that the documents should be produced. And it is, therefore, on account of the particular mode in which this answer is framed, that I think the books ought to be produced.[1]

 NETTLESHIP v. NETTLESHIP.

1839; 5th and 12th July.—Husband and Wife; Separate Property; Lunatic.

A married lady, who was entitled to an income of 500*l.* a year out of the property in the cause, being of unsound mind, the court ordered the whole of the 500*l.* to be paid to her husband; but directed the arrears and future payments of an annuity of 100*l.*, to which she was entitled for her separate use, to be carried to her separate account, notwithstanding the husband deposed that the expenses incurred by him in her care and maintenance exceeded 500*l.* a year.

THE defendant Mary, the wife of the defendant William Cator, was entitled, under the settlement on her marriage with her first husband, who was the testator in the cause, to an annuity of 400*l.*, and to the dividends of a sum of stock, amounting to 108*l.*, for her life; and, under the testator's will, she was entitled to an annuity of 100*l.* for her separate use. After her second marriage, she became of unsound mind.

On the hearing of the cause for further directions, Mr. *Monro*, for Mr. Cator, submitted that, under the *circumstances, the whole of [*237] Mrs. Cator's income, including the annuity of 100*l.*, ought to be paid to her husband. *Brodie v. Barry*.(a)

The Vice-Chancellor ordered the annuity of 400*l.* and the dividends of the stock to be paid to Mr. Cator, but directed that the arrears and future payments of the annuity of 100*l.*, should be carried to Mrs. Cator's separate account, and accumulated.

12th July.—On this day Mr. *Monro* renewed his application with respect to the annuity of 100*l.*, and read an affidavit, made by Mr. Cator, stating that he had agreed, with a physician at Southall in Middlesex, to take the custody of and to maintain Mrs. Cator, for the annual sum of 500*l.*; and that he was liable to the payment of such further sums as might be required for providing her with clothes and other necessities; that he was frequently required to visit his wife, and was put to further expense in travelling to and

(a) 2 Ves. & Bea. 36.

[1] When a defendant will be ordered to produce documents, &c., see further, editor's notes, 3 Myl. & Cr. 546, 549, where some more recent decisions are stated or referred to. Where certain documents are set forth, historically, in the stating part of the bill, the defendant must answer to the fact of the existence of such documents, according to his knowledge, or his information and belief; but he is not bound to answer to the facts contained, or stated in such documents, unless particularly stated *distinct* from the documents. *Morris v. Parker*, 3 Johns. Ch. Rep. 297.

1839.—*Sample v. Price.*

from his residence at Woolwich on those occasions; that he had been advised, by the physician, that it would benefit Mrs. Cator's health to remove her, occasionally, to the sea side, which would put him to further expense: that, save as aforesaid, he was not entitled to any fortune in right of his wife, and, unless the annuity of 100*l.* was allowed to him, he might be unable to pay the annual sums chargeable to him on her account, and consequently might be under the necessity of removing her from the custody of the physician, and such removal would, as he believed, diminish her comforts, materially increase her malady, and retard her recovery.

[*238] *The Vice-Chancellor said that, at any rate, before he could make any order as to the annuity of 100*l.*, he must have a more positive affidavit, from Mr. Cator, as to his own means.(a)[1]

Mr. *Bacon* and Mr. *Lambert* were the other counsel in the cause.

SEMPLE v. PRICE.

1839; 19th July.—Pleading; Supplemental Bill; Practice.

A necessary party may be brought before the court by supplemental bill, where the cause is in such a stage that the original bill cannot be amended.

THE object of the original bill in this case, was to charge Gibson, who was the surviving trustee of the plaintiff's marriage settlement, with a breach of trust in selling out a sum of stock, part of the settled property. Gibson, by his answer, submitted that the personal representative of W. Price, his late co-trustee, was a necessary party to the suit. The plaintiff, however, did not amend her bill: but, after the cause was at issue and a commission had issued for the examination of witnesses, she filed a supplemental bill against Mary Price, the personal representative of W. Price, stating that she had lately discovered that the breach of trust was committed in Price's lifetime, and praying that his estate might be made responsible for it.

Mary Price demurred to the supplemental bill, on the following, amongst other grounds; namely, that she was not a party to the original bill, and that no new matter was alleged, in the supplemental bill, to have arisen since the filing of the original bill.

[*239] *Mr. *Koe*, in support of the demurrer, referred to Lord Lyndhurst's 15th order, and said that the filing of the supplemental bill, was an attempt to evade that order. He also cited *Baldwin v. Mackown*.(b)

(a) It did not appear that any further affidavit was made. (b) 3 Atk. 817.

[1] A wife's separate estate, in general, is not liable for the expenses of herself and family. The husband, if he be of ability, is bound to support his family, and if he contracts a debt for the support of his wife and children, and the credit is given to him, neither the separate estate of the wife nor the remainder to the children is liable for such debts, although the husband should prove insolvent. *Magwood v. Johnson*, 1 Hill's (So. Ca.) Rep. 234, and upon the same principle, while the parent is able to maintain his infant children, he is not allowed to draw upon their separate estate for their support. *Wellesley v. The Duke of Beaufort*, 2 Russ. 28.

1839.—*Blanshard v. Drew.*

Mr. Coleridge, in support of the supplemental bill, said that it was laid down, by Lord Redesdale, that a supplemental bill may be filed to put a new matter in issue or to add parties, where the proceedings are in such a state that the original bill cannot be amended for the purpose.^(a) He referred also to *Colclough v. Evans*,^(b) *Crompton v. Wombwell*,^(c) and *Goodwin v. Goodwin*.^(d)

THE VICE-CHANCELLOR:—In *Colclough v. Evans*, the supplemental bill sought to change the issue raised by the original bill, and the demurrer to it was allowed on that ground.

But, in all cases, where, by inadvertence, a necessary party has not been brought before the court, and the suit has got to that stage that the plaintiff cannot amend his bill, the court will allow him to file a supplemental bill for the purpose of supplying the defect. All that the 15th order prescribes, is that the new party shall not be brought before the court by amendment.[1]

*BLANSARD V. DREW.^(e)

[*240]

1839; 20th July.—Practice; Dismissal; Costs.

After the filing of the bill, the defendant took the benefit of the insolvent debtors' act, and, in his schedule, admitted the plaintiff to be a creditor for the subject matter of the suit. The defendant afterwards moved to dismiss the bill for want of prosecution, with costs. The court ordered the bill to be dismissed, but without costs, the defendant having, by his own act, destroyed the subject matter of the suit.

MR. HETHERINGTON, for the defendant, moved to dismiss the bill, for want of prosecution, with costs. He insisted that although the defendant

^(a) Treat. on Plead. 48, and 49.^(b) Ante, vol. 4, p. 75.^(c) Ibid, 628; see ante, 209.^(d) 3 Atk. 370.^(e) *Ex relations*.

[1] Vide *Vigers v. Lord Audley*, 9 Sim. 72. *Woods v. Woods*, ante, 197. Where a supplemental bill is filed for the mere purpose of bringing a new party before the court, upon the original facts, before appearing upon the record, it is only necessary to make him a defendant in such bill: but, if a supplemental bill is filed for the purpose of bringing new facts before the court, all the other parties to the original bill should be parties to the supplemental bill; *The Farmers Loan and Trust Co. v. Seymour*, 9 Paige, 539. So, the defendants to an original bill were held to be necessary parties to a supplemental bill against a new defendant, where the interests of such original defendants, as well as those of the new defendant required that the new defendant should be a party to the suit: *Jones v. Howells*, 2 Hare, 342. Where there had been a change of parties, having no beneficial interest, as of one set of trustees for another, during the pendency of the suit, and after proofs taken, *McCoun, V. C.*, allowed a supplemental bill to be filed for the mere purpose of introducing the substituted trustees; observing, in regard to the bill of supplement proposed to be filed, that, "all other parts of such bill," beyond that particular purpose, "alleged by way of supplement and calling for a discovery, must first be expunged, and the original defendants stricken out, so as not to be obliged to answer. It is sufficient to exhibit it against the new trustees only. They will then answer, admitting themselves to be trustees; and the cause will stand for hearing upon the original pleadings and proofs, and upon the supplemental bill and answer only." *The North American Coal Co. v. Dyett*, 2 Edw. Ch. Rep. 115.

 1839.—*Matchitt v. Palmer.*

had, since the institution of the suit, become insolvent, the usual motion could be made to dismiss for want of prosecution with costs, on the authority of *Monteith v. Taylor*.(a)

Mr. *Cooke*, for the plaintiff, said that, since the bill was filed, the defendant had taken the benefit of the insolvent debtors' act: that he had, in his schedule, admitted the plaintiff to be a creditor in respect of the subject matter of this suit, and that he had no assets; and, therefore, that the defendant having, by his own act, destroyed the subject of the suit, the bill ought to be dismissed without costs: and he cited *Knox v. Brown*.(b)

The Vice-Chancellor, under the above circumstances, ordered the bill to be dismissed without costs.

[*241]

*MATCHITT v. PALMER.(c)

1839; 20th July.—Practice; Amendment.

Where an order to amend may be made, by the Master, as against some of the defendants, but must be made, by the court, as against another of them, the plaintiff may obtain the order, from the court, as against all the defendants.

IN this case, the bill was filed against Palmer, as sole defendant, the personal representative of the testator in the cause, for payment of a legacy. Palmer put in a full answer, from which it appeared that the defendant had applied the whole of the assets in payment of debts. The plaintiffs, being advised that, upon the true construction of the will, the debts were charged on the real estate, and that they would have a right to have the assets marshalled, obtained an order *from the court* (the time within which it could have been obtained from the Master having long previously expired,) giving them liberty to amend: and they, accordingly, amended their bill, by setting out the whole of the will, and making the heir at law and the several persons interested in the real estate, parties defendants, and praying that the assets might be marshalled in favor of their legacy.

The several defendants having put in sufficient answers to the amended bill, the plaintiffs now applied, specially, to the court, for leave to make further amendments, (amending the defendants' office copies of the bill,) on the usual affidavit that the amendments had been settled by counsel, and were not vexatious or for the purpose of delay.

Mr. *Mylne*, for the motion, submitted that he was right in coming [*242] to the court, and not going to the *Master; inasmuch as the former amendment, as against Palmer, was necessarily obtained by an application to the court; and that, having once come to the court as against him, it was not afterwards competent, to the plaintiffs, to go to the Master for any further leave to amend. *Attorney General v. Nethercoat*.(d)

Mr. *James Parker*, contra, contended that, as against the other defendants,

(a) 9 Vea. 615. (b) 2 Bro. C. C. 186. (c) *Ex relatione*, Mr. *Mylne*. (d) 2 *Myl. & Craig*, 604.

1839.—Woodroffe v. Daniel.

this was an original bill, and the plaintiffs, under the strict terms of the 13th order might and were, indeed, bound to apply to the discretion of the Master; the six weeks after the answers were to be deemed sufficient, not having yet expired.

The Vice-Chancellor said that the order sought to be obtained, was to be made, not only against those parties who had been made defendants by amendment, but also against Palmer, the original defendant; and, therefore, if, as he thought, the application ought to be made to the court so far as Palmer was concerned, no distinction could be made as to the other defendants. The motion must, therefore, be granted.

*WOODROFFE v. DANIEL.

[*243]

1839; 22d July.—Defendant; Exception; Insufficiency.

A bill interrogated to all the statements and charges except one, and, the defendant having omitted to answer it, the plaintiff excepted; but in his exception, he set forth the statement shortly, and in the form of a question. Held, that the statement being material, ought to have been answered, and that the exception was sufficient, as it plainly pointed out the passage to which it applied.

THE bill interrogated to all the allegations and charges contained in it, except one. The answer having been put in, the plaintiff took several exceptions to it for insufficiency. One of the exceptions related to the allegation which was not interrogated to, and set it forth shortly, and in the form of a question. The Master having allowed the exceptions, the defendant excepted to his report.

Mr. *Knight Bruce*, for the defendant, said that a plaintiff had no right to complain that a statement in his bill, which he had not thought proper to interrogate to, and, therefore, had treated as immaterial, was not answered: that, at all events, he was not at liberty to abbreviate the statement, or to turn it into a question; or, in any manner to alter the language of the bill; but that he ought to have framed his exception thus: "for that the said defendant hath not answered according to the best of his knowledge, remembrance, information and belief, the following charge, that is to say, &c." *Hodgson v. Butterfield*.(a)

THE VICE-CHANCELLOR:—The allegation to which the exception relates, seems to be material; and I have always understood the practice to be, that every material allegation and charge in a bill, must be answered, whether it is interrogated to or not.[1]

(a) 2 Sim. & Stu. 236.

[1] The general interrogatory is usually sufficient to call forth a full answer: so Kent, Ch. says; "I apprehend the rule on this subject to be, that it is sufficient to make this general requisition on the defendant to answer the contents of the bill, and that the interrogating part of the bill, by a

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[*244] *With respect to the other objection, namely, that the plaintiff has not sufficiently pointed out the passage in the bill, which he contends is not answered, my opinion is, that the plaintiff is not bound to set out in his exception, every word of the passage, which he alleges is not answered; but that he does enough if he sufficiently manifests what part of the bill his exception applies to.[1]

I think, therefore, that the exception in question was properly allowed by the Master.

repetition of the several matters, is not necessary. The defendant is bound to deny or admit all the facts stated in the bill, with all their material circumstances, without special interrogatories for that purpose. They are only useful to probe more effectually the conscience of the party, and to prevent evasion or omission as to circumstances which may be deemed important; but it is no excuse for the defendant in avoiding to answer fully to the subject matter of the bill, that there were no special interrogatories applicable to the case. Plain sense and a good conscience, will, without any difficulty, in most cases teach a defendant how far it is requisite to answer to the contents of the bill, and to meet the *gravamen* alleged; and it is certainly desirable to avoid, if possible, the expense and the prolixity of repeating in the same bill, every material fact. It is well understood, that if the defendant be specially interrogated, it can only be to the facts alleged and charged in the bill. The one cannot be more extensive than the other." *The Trustees of the Methodist Episcopal Church v. Jacques*, 1 John. Ch. Rep. 65, 75. And see *Mechanics Bank v. Levy*, 3 Paige, 606. *Grim v. Wheeler*, 3 Edw. Ch. Rep. 334. But where a fact is stated in the bill by way of recital merely, without any interrogatory calling for an answer as to that fact, the defendant is not bound either to admit or deny the same. *Mechanics Bank v. Levy*, *ubi supra*. And interrogatories need not be answered, where they are not based upon a distinct allegation, but on mere intimations. *Grim v. Wheeler*, *ubi supra*.

[1] In excepting to an answer for insufficiency, the plaintiff must state what parts of the bill he conceives not properly answered; setting forth the particular points wherein the answer is defective, and praying that the defendant may in these respects put in a full and perfect answer. *Buloid v. Miller*, 4 Paige, 474. *Stafford v. Brown*, *id.* 88. So, Story, J., in *Brooks v. Byam*, 1 Story's Rep. 300, says: "certainly, this exception is taken in a form and manner too general to be upheld by the court. The exception should have stated the charges in the bill, and the interrogatory applicable thereto, to which the answer is addressed, and then have stated the terms of the answer verbatim, so that the court without searching the bill and answer throughout, might at once have perceived the ground of the exception, and ascertained its sufficiency." Mr Justice Story refers to *Hodgson v. Butterfield*, (*ubi supra*,) as a direct authority to the point; in which the language of Leach, V. C. cannot easily be reconciled with that of his successor. If, however, exceptions be extended to unnecessary prolixity, it becomes a matter of consideration in the taxation of costs. Ante, 217, n. Am. ed. Exceptions to an answer for insufficiency, will not fail, on account of their not following literally, the words of the interrogatory, provided the variation be not important. 2 Beav. 581. According to the well established rules of pleading, both at law and in equity, exceptions must not be argumentative. So, speaking of the form of the exceptions in the case before him, Walworth, Ch., says; "the form of the exceptions which have been taken to the answer, in this case, is very objectionable; and, if they had been referred for impertinence, the greater part of each exception would probably have been rejected on that ground. The complainant should state clearly and distinctly those charges in his bill, which are not sufficiently answered, and leave the arguments in favor of the exceptions for an oral discussion before the Master on the reference." *Sloan v. Little*, 3 Paige, 115. As to the form of exceptions for impertinence, see *Wagstaff v. Bryan*, 1 Russ. & M. 29, 30, ante, 217, note.

1839.—Reddel v. Dobree.

CHARLOTTE REDDEL v. DOBREE.

1839; 22d July.—Donatio mortis causa.

A. being in a declining state of health, delivered to B. a locked cash box, and told her, to go at his death to his son for the key; and that the box contained money for herself, and entirely at her disposal after he was gone; but that he should want it every three months, whilst he lived. The box was twice delivered to A. by his desire, and he delivered it again to B., and it was in her possession at his death. The box was broken open by B. after A.'s death, and contained a check for 500*l.* drawn by C. in favor of A., and enclosed in a cover endorsed with B.'s name; and the key (which A.'s son had refused to deliver to B.) had a piece of bone attached to it with B.'s name written on it. Held, that there was no *donatio mortis causa*.

THE bill stated, amongst other things, that some years previously to the death of John Dobree, a considerable intimacy subsisted between him and the plaintiff; and that she was in the habit of frequently residing at his house at Brixton; and that such intimacy continued up to the time of his death; and that J. Dobree had great confidence in the plaintiff, and always treated her with much kindness and attention, and expressed great regard for her, and frequently stated to her, and also to other persons, that he intended to make some pecuniary *provision for her in the event of his death: [*245] that John Dobree was considerably advanced in years, and was possessed of a large fortune: that, in August, 1837, John Dobree, whose health had been for some time previously, and then was in an infirm and declining condition, was induced, at the instance and by the recommendation of the plaintiff, to consult a physician; shortly after, or about which time, he was desirous of making some provision or gift for the plaintiff, and also for her sister, Allison Kyle Reddel, to take effect upon the event of his death; and, in September, 1837, he procured a cash box, with a patent lock thereto, which was opened by a key, to which was attached a small piece of bone, on which the plaintiff's name was engraved or written; that the defendant Vaughan, who had succeeded John Dobree in his business of a silversmith, was, at the time before mentioned, indebted to John Dobree in a very large sum of money; that John Dobree, about the same time, obtained from Vaughan, two checks drawn by him on Ransom & Co., his bankers, payable to John Dobree, or bearer, one for 500*l.*, and the other for 200*l.*; the first of which was intended for the benefit of the plaintiff, and the other for her sister: that John Dobree deposited the two checks in the cash box, and, on or about the 10th of September, 1837, *delivered the box locked up with the two checks therein, to the plaintiff*, and, at the same time, said to the plaintiff: "at my death, go to my son and ask him for the key, which will be found in the iron chest. If he will not give up the key, take the box to Vaughan, and he will break it open. It contains money: take care of it: it will make hundreds difference to you: *it is for yourself and sister, and entirely at your own disposal after I am gone; but I shall want it from you every three months while I live*: that, at the same time, John Dobree showed the plaintiff

1839.—Raddel v. Dobree.

[*246] the *envelopes containing the checks with the addresses thereon; but the plaintiff was, at that time, unacquainted with the particular contents of the box, or the particulars relating thereto, except so far as she was enabled to collect from what was so said to her by John Dobree: that the box having from that time remained in the plaintiff's possession, John Dobree, some time in December, 1837, called upon her and requested to have the box delivered to him, but without stating any object or purpose in that behalf; and the box was accordingly delivered to him in the same state as when originally delivered by him to the plaintiff; and the same was carried away by him, and, on the same day, he delivered back the box, locked as before, to the plaintiff, but, without saying anything whatever on the subject; that, at the latter end of March, 1838, John Dobree again called upon the plaintiff, and left a message for her to go to his house with the box; and she, accordingly, on the following day, took and delivered the box to him; when he informed her that he expected the defendant Vaughan down on that or the following day, but did not make any other statement or give any explanation to the plaintiff, on the subject of the box or its contents; and the plaintiff thereupon, left the box in his possession: that Vaughan, about this time, came to visit the testator; and that it was alleged by the defendants, that it was at that time that the two checks after mentioned, were, together with several others made by Vaughan: that John Dobree having then obtained from Vaughan the two checks after described, the same were, at the same time, by John Dobree, or by Vaughan, by his direction, inclosed in covers, the check for 500*l.* in a cover with the plaintiff's name thereon, and the check for 200*l.* in a cover with her sister's name thereon; and that the two envelopes with the

[*247] checks *inclosed therein respectively, were then, either by John Dobree, or by Vaughan, by his direction, deposited in the box; and such two checks were in the place of or in substitution for the two before mentioned checks, or two other checks of the same amount, and which had, up to that time, continued in the box, and which were then withdrawn: that, a day or two afterwards, John Dobree called at the plaintiff's residence, and, she being absent, left the box with her sister, with directions that the same should be delivered to the plaintiff; which was accordingly done, and the same, together with the two checks deposited and locked up therein, remained in the possession of the plaintiff until the death of John Dobree: that the key of the box, with the label thereto, was, at or about the time aforesaid, sealed up, by the direction of John Dobree, in a paper, on which was written, at his request, some direction to the effect that the key should, at his death, be delivered to the person whose name was engraved or written upon the label attached to it: that John Dobree, at the time of the last mentioned deposit and delivery of the box, was in a state of complete blindness and in a weak and languishing condition, and afflicted with the malady of which he afterwards died, and was in a dying state, and was well aware of his approaching death; and he departed this life on the 1st of June, 1838: that he

1839.—Reddel v. Dobree.

made his will with a codicil thereto, dated respectively the 1st of March and the 23d of May, 1838, but did not, thereby, make any bequest or provision in favor of the plaintiff, and, by his will, he bequeathed to his son, the defendant Robert John Dobree, amongst other things, his iron chest; and he appointed executors of his will, who renounced the probate thereof, and administration to his effects was, on the 1st of September, 1838, granted to R. J. Dobree: that R. J. Dobree, upon his father's death, "possessed [*248] himself of the paper containing the key of the box, to which key was then attached the piece of bone with the name of the plaintiff engraved or written thereon: that the plaintiff, after the death of John Dobree, applied to Robert John Dobree, and requested him, according to the directions of the testator, to deliver to her the key of the box, but he refused to comply with such request, saying that the checks were of no use to her and that she could break open the box: that the box having been opened by the direction of the plaintiff, there were found therein two covers with the names of the plaintiff and her sister written on the same, and, in each of the two covers, was contained a check, of the defendant Vaughan, in favor of John Dobree; the check in the plaintiff's cover being for 500*l.*, and the check in the other, being for 200*l.*: that the check for 500*l.* was as follows: "2d April, 1838. Messrs. Ransom & Co.: pay Mr. Dobree or bearer 500*l.*—C. Vaughan:" that the checks having been presented at the bankers, payment of the same was refused: that the plaintiff was advised that John Dobree intended to make, and did, by the means and in the manner before mentioned, make a valid and effectual disposition or gift, to or in favor of the plaintiff, of the sum of 500*l.*, to take effect upon the event of his death, which he, at the time, contemplated as an event likely soon or shortly to take place, in case he should not, at any time before his death, do any act to recall or defeat the gift.

The bill prayed that it might be declared that John Dobree had made a valid gift in contemplation of death, to or in favor of the plaintiff, to take effect upon the event of his death, of the sum of 500*l.*; and that Robert John Dobree, as his father's personal representative, was bound to give effect to that gift; and that he "might be decreed to pay, to the plain- [*249] tiff, the sum of 500*l.*, out of his late father's personal estate, or out of the amount due to his late father, at his death, from Vaughan.

Robert John Dobree demurred to the bill for want of equity.

Mr. Jacob and Mr. Swinburne, in support of the demurrer.—The facts stated in the bill, do not amount to a *donatio mortis causa*. The testator, when he first delivered the box to the plaintiff, did not do it in contemplation of death, but spoke of living from three months to three months. Secondly: there was no absolute delivery of the box: for the testator reserved to himself the right of reclaiming it; and, when he exercised that right, he wholly put an end to the gift, if there was any. Nothing was said by him on any subsequent delivery; and, as the testator resumed possession of the box after the first delivery, the words used by him on that occasion, cannot be applied

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to any subsequent delivery. Besides, the check which was found in the box after the testator's death, was dated the 2d of April, 1838, and therefore, was not in existence at the time of the first delivery: and, consequently, the first delivery could not be a gift of that check. By retaining possession of the key, the testator showed that he intended to reserve to himself the dominion over the contents of the box. *Tate v. Hilbert*,^(a) *v. Bunns v. Markham*,^(b)

Hawkins v. Blewitt.^(c)

[*250] *Mr. Knight Bruce and Mr. Anderdon, supported the bill on the allegations of fraudulent conduct on the part of the defendants, which were contained in it, but which it was thought unnecessary to notice in the report.

THE VICE-CHANCELLOR:—It seems to me that there is quite a mistake in this case: for I do not think that, as the matter is stated on the face of this bill, there was any *donatio mortis causa*, or any thing like a *donatio mortis causa*: but, in my opinion, it was nothing more than a gift of that which might happen, at any time, to be in the box; and which gift was always liable, during the lifetime of the testator, to be recalled by him; and, therefore, the very essence of a *donatio mortis causa* is wanting in this case.

It is stated that, in September, 1837, John Dobree deposited the two checks or drafts in the cash box, and that, on or about the 10th of that month, he delivered the box locked up, with the two checks or drafts enclosed therein, to the plaintiff, and at the time of his so delivering the same, he said to her: "At my death go to my son and ask him for the key, which will be found in the iron chest. If he will not give up the key, take the box to Vaughan, and he will break it open. It contains money: take care of it. It will make hundreds difference to you. It is for yourself and sister, and entirely at your own disposal after I am gone. But I shall want it from you every three months while I live."

The testator appears, either by himself or his son, to have kept [*251] possession of the key. The box was twice *delivered up to the testator, and re-delivered by him to the plaintiff: but there is nothing stated, in this bill, which leads one to suppose that, when it was delivered to the plaintiff for the last time, it was not to be held by her upon precisely the same terms as when it was first delivered to her. And it seems to me that the plain inference from the transactions, as they are stated, is that, all along, the testator meant to retain, to himself, the complete dominion over whatever might be placed in the box; and that it was a mere accident that he happened to die shortly after the third delivery, and did not re-demand the box from the plaintiff. My opinion is that, from the beginning to the end, there was nothing more than, to a certain extent, putting the plaintiff in possession of the box, but retaining to himself the absolute power over its contents: and the plaintiff seems to have so understood the transaction; and

(a) 2 Ves. jun. 111; and 4 Bro. C. C. 286. (b) 7 Taunt. 224. (c) 2 Esp. N. P. C. 663.

1839.—In re Fauntleroy.

her acts were in accordance with such understanding. That being so, there was no *donatio mortis causa*, nor any thing in the nature of a *donatio mortis causa* in respect of which this court can act. There was no gift. The plaintiff held the box and its contents in trust for the testator; and, if he did not happen to execute that trust in favor of himself, then and in that case only, it was to be for the benefit of the holder; and I apprehend that that is not such a trust as this court can execute.

Demurrer allowed.[1]

*IN RE FAUNTLEROY.

["252]

1839; 26th July.—Trustees; Construction of 11 Geo. 4, and 1 Will. 4, c. 60.

The court may appoint new trustees under 11 Geo. 4, and 1 Will. 4, c. 60, s. 22, although the instrument creating the trust, contains a power to appoint new trustees.

THIS was a petition presented, under 11 Geo. 4, and 1 Wm. 4, c. 60, for the appointment of new trustees of a deed, the surviving trustee being out of the jurisdiction of the court.

Mr. Turner, in support of the petition, said that the deed creating the trust, contained a power to appoint new trustees, which was now vested in the surviving trustee: that the 22d section was the only section of the act which authorized the court to appoint new trustees upon petition; and it seemed to be doubtful from the language of the recital, whether that section authorized the court to appoint new trustees in any case, except where the instrument creating the trust, contained no power to appoint new trustees.(a)

"THE VICE-CHANCELLOR:—This case is clearly within the 22d ["253] sect. of the act.

That section refers to the case of an instrument containing no power to appoint new trustees, as one of the strongest instances of difficulty: but it is

(a) The section above referred to is as follows: "And whereas cases may occur upon applications by petition under this act for a conveyance or transfer, where the recent creation or declaration of the trust or other circumstances may render it safe and expedient for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, (as the case may require,) to direct, by an order upon such petition, a conveyance or transfer to be made to a new trustee or trustees, without compelling the parties seeking such appointment to file a bill for that purpose, *although there is no power in any deed or instrument creating or declaring the trusts of such land or stock to appoint new trustees*: Be it, therefore, further enacted, that, in any such case, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the said Court of Chancery, to appoint any person to be a new trustee by an order to be made on a petition to be presented for a conveyance or transfer under this act, after hearing all such parties as the said court shall think necessary; and, thereupon, a conveyance or transfer shall and may be made and executed, according to the provisions hereinbefore contained, to or so as to vest such land or stock in such new trustee, either alone or jointly with any surviving or continuing trustee, as effectually and in the same manner as if such new trustee had been appointed under a power in any instrument creating or declaring the trusts of such land or stock, or in a suit regularly instituted."

[1] As to *donatio mortis causa*, see further *Duffield v. Elwes*, 1 Sim. & Stu. 240, 245. n. 1.

 1839.—*Molony v. Kennedy.*

not thereby meant that the existence of that circumstance is to be the condition upon which the power thereby given, to the court, is to be exercised.

If the court may make the appointment where the instrument creating the trust, contains no power for that purpose; it, surely, may do so where the instrument does contain such a power.[1]

[*254]

**MOLONY v. KENNEDY.*

1839; 26th July.—Husband and Wife; Separate Property.

A husband and wife lived separate from each other. At the death of the wife, she was possessed of cash and bank notes arisen from property settled to her separate use. Held that the husband was entitled to them in his marital right.

In 1817, the plaintiff intermarried with his late wife, who was then the widow of W. C. Jackson: on their marriage, an annuity of 800*l.* to which Mrs. Molony was entitled under her first husband's will, was settled to her separate use. In 1821 a separation took place, between the plaintiff and his wife, which continued until the death of the latter. In 1830, Mrs. Molony, purchased, out of the savings of her separate property, a sum of 2168*l.* stock

[1] Where by a marriage settlement a new trustee or trustees were authorized to be appointed, in case either became *unfit to act in the trusts*, it was held, that the bankruptcy of the trustee rendered him unfit to act; and, that although the power in the settlement directed the property to be vested in the new trustee, "jointly with the surviving or continuing trustee," there being none such did not prevent a valid appointment of, and transfer to a new trustee under the power. *In re Roche*, 1 Conn. & Law. 306. The Revised Statutes of New York have made provision, analogous to the English statute, for cases of this description. Both our own, and the English statute, would seem to be little more than a legislative sanction and extension of the principle long recognized by courts of equity, as to trusts,—that there shall always be a competent trustee—and in case of the failure of a trustee, the court itself assumes the execution. The portion of our revised statutes bearing upon the subject is as follows: (1 Rev. Stat. 2d edit. p. 724, § 70.) "Upon the petition, or bill, of any person interested in the execution of a trust, and under such regulations as for that purpose shall be established, the Court of Chancery may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or who, for any other cause, shall be deemed an unsuitable person to execute the trust." And by § 71: "The Chancellor shall have full power to appoint a new trustee, in place of a trustee resigned or removed; and when, in consequence of such resignation or removal, there shall be no acting trustee, the court, in its discretion, may appoint new trustees, or cause the trust to be executed by one of its officers, under its direction." And see *Hawley v. James*, 5 Paige, 447. *Van Epps v. Van Epps*, 9 Paige, 240. Where a testator, by his will, continued the agent, who then managed his estate, in his agency, Sugden, Lord Chancellor, intimated, that if the agent "were to oppose the will of his employer, and conduct himself improperly, he should remove him without any hesitation; and this court has power to do so, as circumstances would then arise, which the testator did not contemplate." *Lawless v. Shaw*, Lloyd & G. 172. In cases where the court is called upon to appoint a trustee, there must be, in the first instance, a reference to the Master; *In re Roche*, *ubi supra*; *Devey v. Peace*, Taml. 77; *In the Matter of Stuyvesant*, 3 Edw. Ch. Rep. 299. The rule has, however, been dispensed with, under particular circumstances, in the appointment of the committee of a lunatic, where the court has acted without the intervention of the Master; *Ex parte Ferrow*, 1 Russ. & M. 112, and n. 2, *ibid.*

1839.—*Molony v. Kennedy.*

in the names of the defendants Kennedy and Shee, in trust for such persons as she should, by deed or will, appoint, and subject thereto, in trust for herself for life, and, after her death, in trust for her next of kin, as if she had died intestate and unmarried. Shortly afterwards she made a will by which she disposed of that sum of stock, and appointed the defendants her executors. In 1838 Mrs. Molony died. At the time of her death she had, in her possession, 3255*l.* in cash and bank notes, part of the savings of her separate property, which the defendants took possession of, and, for safety, lodged at a banker's, and afterwards purchased with it, 3505*l.* stock in Kennedy's name.

The defendants having refused to transfer the 3505*l.* to the plaintiff, until he had enabled himself to give them a proper discharge by taking out administration to his wife, the bill, in this cause, was filed, praying for an account of the property which was in Mrs. Molony's possession at her death; and that the defendants might be decreed to hand over the same to the plaintiff.

Mr. *Wigram* and Mr. *Glasse*, for the plaintiff, said that the plaintiff was clearly entitled, in his marital "right, to the property which [255] was in his wife's possession at her death, and that he might maintain an action of *trover* for it.

Mr. *Teed*, for the defendants, said that the property in dispute 'was admitted to have arisen from the wife's savings; that the plaintiff's right to it was the same as if Mrs. Molony had been his daughter and not his wife, and had died intestate: that there was no personal representative to her except as to stock purchased in the names of the defendants: that, as she was living separate from her husband with an adequate allowance, the property was subject to her debts: and, if the plaintiff took it subject to paying the debts of his wife(a) he must clothe himself with the character of administrator to her. *Fettiplace v. Gorges*.(b)

THE VICE-CHANCELLOR :—Mrs. Molony's annuity of 800*l.* and everything that arose from it, was exempt from the control of her husband during her life; and, as the cash and bank notes which were found in her possession at her death, arose from that annuity, they were part of her separate property, and she might have disposed of them either by deed or by her will. But, as she made no disposition of them, the quality of separate property ceased at her death; and, if it ceased at her death, the consequence is that Mr. Molony is entitled to them, in his marital right.

Declare that the plaintiff is entitled to the 3505*l.* subject to the payment of his wife's funeral expenses and the expenses properly incurred by the defendants in taking care of the property.[1]

(a) It did not appear that Mrs. Molony left any debts. (b) 1 Ves. jun. 46; and 3 Bro. C. C. 8.

[1] For American decisions bearing upon this point see, Am. Ch. Dig. Husband and Wife, III, XIII.

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[*256]

*WELLESLEY v. WELLESLEY.

1839: 24th July.—Lien; Construction; Husband and Wife; Articles of Separation; Consideration. By articles of separation between A. and his wife, dated in June, 1834, A. covenanted that he would, on or before the 1st February, 1835, either by a charge on freehold estates of inheritance, or by investing an adequate sum in the purchase of stock, or by the best means which might be then in his power secure an annuity of 1000*l.* to a trustee for his wife. In December, 1834, A. and his son joined in limiting freehold and copyhold estates, of which A. was tenant for life with remainder to his son in tail male, to trustees, in trust to raise 462,000*l.*, and, thereout, to pay off incumbrances on the estates, and to pay the surplus to A.; and, subject thereto, to stand possessed of the estates, in trust for such persons as A. and his son should jointly appoint; and, subject thereto, in trust for A. for life, with remainder in trust for his son in fee if he should survive A., but, if he die in A.'s lifetime, then, in trust for him in tail male, with remainder in trust for A. in fee; and A. was empowered, subject to the raising of the 462,000*l.*, to charge the estates with a jointure of 1500*l.* a year, for his then or any future wife. Held that the articles and the deeds of December, 1834, formed but one transaction, and that the wife was entitled to have the covenant in the articles performed by means of the provisions, for A.'s benefit, contained in the deeds of December, 1834.

By articles of separation, the husband covenanted with his wife's trustee, to secure to her an annuity of 1000*l.*, on or before a certain day; and the trustee covenanted with the husband, that, on the annuity being secured, he would enter into a covenant to indemnify the husband against the wife's debts. Held that the latter covenant, though conditional, was sufficient to support the articles.

THE bill was filed, by Mrs. Wellesley, against her husband and certain other parties. It stated that, by articles of separation between the plaintiff and her husband, dated the 21st of June, 1834, Mr. Wellesley for himself, his heirs, executors and administrators, covenanted with Colonel Paterson, the plaintiff's father, to pay to W. L. Bicknell, the plaintiff's solicitor, for her separate use, the sum of 1000*l.*, by instalments, the last instalment to be [*257] paid on or before the 14th of November then next: "that, in consequence of the covenant thereafter, agreed to be entered into by Colonel Paterson, Mr. Wellesley would, *on or before the 1st day of February, 1835, well and effectually, either by a charge on freehold estates of inheritance to be situate in England or Wales, or by an investment of an adequate sum of money in some of the stocks or funds of Great Britain, or by the best means which might then be in his power, secure the payment of an annuity of 1000*l.* to Colonel Paterson, his executors and administrators, in trust for the separate use of Mrs. Wellesley during her life; the first payment to be made on the 14th of November, 1834; and it was thereby further agreed that, upon the annuity of 1000*l.* being so secured as aforesaid, such deeds should be executed by all necessary parties for carrying into effect the agreement and the intention of the parties therein expressed, with such covenants, on the part of Mr. Wellesley, for permitting the plaintiff to live separate from him; and with such covenants, on the part of Colonel Paterson, or, (in case of his death in the mean time) of some other responsible person, for indemnifying Mr. Wellesley against all debts contracted by the plaintiff after the annuity should*

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have been so secured as aforesaid and during the then remainder of her life, as counsel should advise.

The bill then stated that Mr. Wellesley had paid 850*l.* in respect of the 1000*l.* agreed to be paid on or before the 14th of November, 1834; but that 150*l.* still remained due in respect thereof: that Mrs. Wellesley and Colonel Patterson had frequently requested Mr. Wellesley specifically to perform the agreement on his part; but he had refused so to do, pretending that he had not, since the 21st of June, 1834, either before or on or since the 1st of February, 1835, been seised of, entitled to or *interested in any freehold estate or [258] estates of inheritance in England or Wales, or had any power or authority to charge any freehold estate or estates of inheritance in England or Wales of the value or to the extent of 1000*l.* a year, or of any value or to any extent, and that he had not from the 21st of June, 1834, possessed the means of investing an adequate or any sum in any of the stocks or funds of Great Britain for or towards securing an annuity of 1000*l.*, and that he had not, on the 1st of February, 1835, nor had he, at any time since, had, in his power, any means of securing the payment of an annuity of 1000*l.*; whereas the plaintiff charged that Mr. Wellesley, before and on the 1st of February, 1835, had, and had ever since, and still had full power and authority to charge freehold estates in England and Wales and other freehold estates, with an annuity of 1000*l.* during the plaintiff's life. The bill then charged that, on the 21st of June, 1834, Mr. Wellesley was seised of an estate for his life, without impeachment of waste, of and in freehold and copyhold estates in the counties of Essex, Southampton and Herts, with remainder to the defendant William Richard Wellesley, his eldest son by a former marriage, in tail male, and that he was seised as tenant in tail in remainder expectant on the decease of his father, Lord Maryborough, of estates in the counties of Cavan and Westmeath, and in King's and Queen's counties in Ireland; and that the estates of which he was so seised were subject to charges of sums in gross amounting, in the whole, to 270,775*l.* 8*s.* 10*d.* besides arrears of interest, and to annuities amounting to 6430*l.* 14*s.* besides the arrears thereof. The bill then set forth indentures of the 12th, 13th, and 15th of December, 1834, made between Mr. Wellesley and his eldest son and other parties by which the son's estate in tail male in the lands and hereditaments in the *counties of Essex, Southampton and Herts, was barred, and those [259] lands and hereditaments were limited to the use of the defendants, Wright and Greenley, in fee, in trust to raise 462,000*l.* and, thereout, to pay off the annuitants and other incumbrances on the estates, whose names were mentioned in the schedules, and to pay the residue of the 462,000*l.* to such person or persons as Mr. Wellesley should, in writing, appoint, and, subject thereto, to him, his executors, &c: and, it was declared that, in case the trustees should have ascertained, at any time previously to the complete execution of the before mentioned trusts, that there would be eventually a surplus or residue of the 462,000*l.* which would be applicable according to the

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appointment or for the benefit of Mr. Wellesley, then it should be lawful for them, at any time or times and from time to time, to pay so much of the 462,000*l.* as should, for the time being, be ascertained to be the amount of such surplus, according to the appointment or for the benefit of Mr. Wellesley, as was thereinbefore directed of and concerning such ultimate surplus or residue: and that no person, except Mr. Wellesley, his executors, &c., to whom any sum of money was thereinbefore directed to be paid out of the 462,000*l.* and who had not, before the execution of the deed of the 12th of December, 1834, a lien or charge upon the hereditaments therein comprised, should have any lien or charge thereon or upon the 462,000*l.*, or any claim or demand upon the trustees, under or by virtue of the three last mentioned deeds or any of them; and that, subject to the raising of the 462,000*l.* the trustees should stand seised of the hereditaments in trust for such person or persons as Mr. Wellesley and his son should, jointly, appoint, and subject thereto, in trust for Mr. Wellesley, during his life, and, after his de-
 [*260] cease, in trust for his son in fee, in case he should survive his father, but, in case he should die in his father's lifetime, then in trust for him and the heirs male of his body, and, in default of such issue, in trust for Mr. Wellesley in fee. And it was thereby further declared *that it should be lawful, for Mr. Wellesley, at any time during his life, but subject to the trust for raising the 462,000*l.*, to appoint, to or in trust for his then wife or any woman whom he might marry after her decease, for her or their life or lives, and for her or their jointure or jointures, any annual sum or yearly rent charge, not exceeding 1500*l.*, to be issuing out of and charged upon the hereditaments, and to limit the same to a trustee for a term of years, in trust for better securing such yearly rent charge.*

The bill then stated that the freehold hereditaments in the counties of Essex, Southampton and Herts, which were comprised in the deeds of December, 1834, were of the annual value of 23,000*l.*: that Mr. Wellesley had on the 1st of February, 1835, and still had power to charge the annuity of 1000*l.* upon the interest reserved to him in the surplus of the 462,000*l.*, and upon a charge of 31,731*l.* 5*s.* agreed to be kept up and sustained for his benefit as therein mentioned, and also upon the estate limited to him in the lands and hereditaments comprised in the deeds of December, 1834, *and by exercise of the power, thereby reserved to him, of appointing and creating a yearly rent charge of 1500*l.* in favor of the plaintiff, and that he ought to exercise that power, in her favor, to the extent necessary for securing to her the annuity of 1000*l.* for her life: that, if necessary for the same purpose, the residue of the 462,000*l.* ought to be raised, and after paying off the incumbrances upon the lands and hereditaments comprised in the deeds of December, 1834, the residue, or a sufficient portion thereof, ought to be
 [*261] invested either in the purchase of freehold estates of inheritance in England or Wales, or of a competent amount of the stocks or funds of Great Britain: but that Mr. Wellesley pretended that he had, under the*

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articles of separation, a right to elect either to secure that annuity by a charge on freehold estates, or by purchase of stock in the public funds, or in such other manner as he might think proper; but the plaintiff charged that she was entitled to have the annuity effectually secured by the best means which were, on the 1st of February, 1835, or had been since in Mr. Wellesley's power, at her election: that Mr. Wellesley then had and still had, in his power, the means of charging the annuity on freehold estates of inheritance in England in manner before mentioned: that, of the 462,000*l.*, the sum of 260,000*l.* only had been raised and duly applied towards the payment of the incumbrances and debts mentioned in the deeds of December, 1834; and that Mr. Wellesley and his son and the trustees, instead of raising so much of the residue of the said 462,000*l.* as was necessary for paying the remainder of those incumbrances and debts, had already raised and were about to raise considerable sums of money upon security of the charge of 462,000*l.* and of Mr. Wellesley's interest in the lands and hereditaments, and had paid the sums so raised, and threatened to pay the sums about to be raised, to Mr. Wellesley; and that the trustees had also paid to him the rents of the estates, in derogation of the plaintiff's rights: that Mr. Wellesley had paid only 850*l.* of the 1000*l.* which he had contracted to pay to Bicknell for the plaintiff's use; and that the annuity of 1000*l.* was wholly in arrear.

The bill prayed that Mr. Wellesley might be decreed to pay the residue of the 1000*l.* to Bicknell for the *plaintiff's use; and specifically to perform the articles of separation on his part; and effectually to charge the annuity of 1000*l.* upon the interest reserved to him in the surplus of the 462,000*l.*, and also upon the charge of 31,731*l.* 5*s.* agreed to be kept up and sustained for his benefit as before mentioned, and upon the estate limited to him in the lands and hereditaments comprised in the deeds of December, 1834, and to effectuate such charge by exercising, to a sufficient extent, the power, thereby reserved to him, of appointing a yearly rent charge of 1500*l.* in favor of the plaintiff; that, if necessary for the purpose of effectually securing the annuity of 1000*l.*, the residue of the 462,000*l.* might be raised, and a sufficient part thereof applied in payment of the incumbrances on the lands and hereditaments comprised in the deeds of December, 1834; and that a sufficient portion of the residue thereof, might be invested either in the purchase of freehold estates of inheritance in England and Wales, or of a competent amount of some of the stocks or funds of Great Britain, for effectually securing the annuity of 1000*l.*; and that Mr. Wellesley might be decreed to pay, to the plaintiff, the arrears of that annuity, or that they might be raised out of the before mentioned interests of Mr. Wellesley; and that he might be restrained from creating any mortgage, charge, or incumbrance upon the hereditaments in the counties of Essex, Southampton and Herts, or upon any estate, right or interest secured to or provided for him by the deeds of December, 1834, and from receiving the rents and profits of the said hereditaments; and that the trustees might be restrained from

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paying the same to him, or to any person or persons on his account; and that a receiver might be appointed thereof.

[*263] *The trustees demurred to the bill, for want of equity, and because it appeared, thereby, that divers persons or some person therein mentioned or referred to, were or was necessary parties or a necessary party thereto; but such person or persons were not or was not made parties or a party thereto.

Mr. *Knight Bruce* and Mr. *Toller*, in support of the demurrer, contended, first, that the covenant entered into, by Mr. Wellesley, in the articles of separation, to secure an annuity of 1000*l.* in favor of his wife, did not create any lien or charge upon any particular estates or other property belonging to him; but was a mere, personal covenant on his part: that the bill did not state that Mr. Wellesley had not power to charge any other estates than those which were mentioned in it, or that he could not invest money in the funds for the purpose of securing the annuity; that the words: "the best means which may then be in his power," were introduced, into the covenant in order to show that Mr. Wellesley was not to be sued on it, if he should not charge the annuity either on land or on stock in the funds: *Freemoult v. Dedire*,^(a) *Williams v. Lucas*,^(b) *Gardner v. Marquis of Townshend*,^(c) *Carleton v. Leighton*.^(d)

Secondly, that the bill, in fact, prayed that the trusts of the deed of the 15th of December, 1834, might be carried into execution; and, therefore, all the persons in whose favor any trust was declare by that deed, ought to have been made parties to the suit *Munch v. Cockerell*,^(e) *Goodson v. Ellison*.^(f)

[*264] *And, thirdly, that there was no positive covenant, in the articles of separation, to indemnify Mr. Wellesley against his wife's debts; and consequently there was no consideration to support the articles.

Mr. *Jacob* and Mr. *Willcock* in support of the bill, said that, under the articles, Mrs. Wellesley was entitled to have her annuity secured either on the estates vested in the trustees, or, if she preferred it, by an investment, in the funds, of an adequate portion of the surplus of the 462,000*l.*: that the words; "the best means that may be then in his power," meant that Mrs. Wellesley was to have the best security for her annuity that her husband could give: that no words of similar import were used in the cases cited in support of the demurrer: that there was another important difference between those cases and the present, namely, that no time was fixed for the performance of the covenants; but, in the present case, the annuity was to be secured on or before a specified day: that the provision, in the deed of the 15th of December, 1834, that no person should have a lien or charge upon the estates or upon the 462,000*l.*, meant merely, that persons who previously

(a) 1 P. W. 429.

(d) 3 Mer. 667.

(b) 2 Cox, 160.

(e) Ante, vol. 8, p. 219.

(c) Coop. C. C. 301.

(f) 3 Rna. 583; see 593 and 594.

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had liens on the estates, should have no additional lien under that deed: that the provision enabling Mr. Wellesley to appoint and secure a rent charge of 1500*l.* a year in favor of his wife, could not have arisen from his affection for her, as they then were and had been, for some months before, living separate from each other; but, as that power was given to him subsequently to his entering into the covenant, it must be considered to have been inserted, in the deed, for the purpose of enabling him to perform his covenant.

Prebble v. Boghurst,(a) *Ravenshaw v. *Hollier*,(b) *Roundell v. [265] Breary*,(c) *Deacon v. Smith*,(d) *Girling v. Lee*,(e) *Tooke v. Hastings*,(f) *Glegg v. Glegg*,(g) *Corbet v. Corbet*,(h) *Burn v. Carvalho*.(i)

Mrs. Wellesley, being the assignee of her husband, has the same rights as he had; and if either Mr. Wellesley or his son had filed a bill for the purpose of compelling the trustees to account for what they had received under the trust deed, there would have been no occasion to make the incumbrancers parties to the suit: *Lord Dillon v. Plaskett*,(k) *Walwyn v. Coutts*.(l)

The demurrer is wrong in point, of form: it ought to have specified the absent parties.

Mr. Knight Bruce, in reply:—The first and main question is whether the covenant in the articles, created any lien upon the property comprised in the deeds of December, 1834: for, if no lien was created upon that property, no account or injunction can be sought for as against the demurring parties.

Several cases have been cited in support of the bill; but, as far as I am aware, there is no instance in which a covenant such as is now sought to be enforced, has been enforced, against the covenantor, himself, with respect to any specific property. Where a covenantor has agreed to purchase and settle land, and afterwards does purchase land which may answer the purpose, and *dies seised of it without having performed his covenant, [266] the presumption of law is, in the absence of any evidence to the contrary, that he acquired the land for the purpose of executing his covenant; but where there is any evidence of a contrary intention, that presumption does not arise; and, consequently, when a covenant of such a nature is sought to be enforced against the covenantor in his lifetime, all that he has to say, is that he did not acquire the property with the intention of settling it. There is a passage in Lord Hardwicke's judgment in *Deacon v. Smith*, which fully supports my argument. His Lordship says: "I think no purchaser, or mortgagee who is a purchaser *pro tanto*, will be affected; for, if the husband had sold them or mortgaged them, it would have been evidence of a different intention, and would, therefore, have taken off all evidence of his intention to bind them by the articles."(m) That passage proves, most decisively, that the lien does not attach upon the acquisition of the property, but upon the

(a) 1 Swanst. 309.

(d) 3 Atk. 323.

(g) 4 Brown P. C. 614.

(k) 2 Bligh N. S. 239.

(b) Ante, vol. 7 p. 3.

(e) 1 Vern. 63.

(h) 1 Sim. & Stu. 612; see 621.

(l) 3 Mer. 707; and ante, vol. 3, p. 14.

(c) 2 Vern. 482.

(f) 2 Vern. 97.

(i) Ante, vol. 7. p. 109.

(m) See 3 Atk. 327.

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presumed intention to devote it to the purposes of the covenant. The argument on the other side, is that the mere acquisition, the mere possession of the property, gives the lien : but that is contradicted by all the decided cases. I admit, however, to the fullest extent, that, if there be a covenant to purchase and settle land, and the covenantor does purchase land and dies seised of it, then, in the absence of evidence to the contrary, it will be held that he purchased the land with the intention of performing his covenant. In *Freemount v. Dedire*, the distinction was taken between a covenant to settle certain specified lands, and a covenant to settle lands generally ; and the Lord Chancellor said : " With regard to the lands in Rumney Marsh, the marriage articles, being a specific lien upon them, makes the covenantor, as to [*267] them, but a trustee ; and, therefore, during the life of the wife, they are not to be affected by any of the bond debts. But the covenant for settling lands, of the value of 60*l.* per annum, on the wife, for her life, does not specially bind any lands ; wherefore, as touching that, the wife must come in only as a specialty creditor with the other specialty creditors." In *Williams v. Lucas*, the testator had borrowed, of James Lane, 300*l.*, and, by his note of hand, he promised to pay the same on demand, and to give a security, by mortgage of lands, for the same, when required. The testator had no real estate at the time, except an advowson and some tithes ; and the question was whether the note gave the creditor any lien on the real estate, or whether it was a mere simple contract debt. The Lord Chief Baron said that the case could not be distinguished from *Freemount v. Dedire* : that the creditor had taken a personal security, reserving to himself the power of calling for a real security ; which, however, he had not done ; and, therefore, it was impossible to say that this debt was a charge on any particular lands. In *Gardner v. the Marquis of Townshend*, Sir William Grant was of opinion that, though a person who purchased lands, having entered into a prior covenant to convey and settle lands, might be presumed so to purchase in discharge of his covenant ; yet that Lord Townshend could not be considered as in the light of a purchaser so liable, but was, in fact, entitled, in equity, to the lands in question at the time of his entering into the covenant, and that his afterwards getting a decree for an actual conveyance from the trustees, could make no difference. This demurrer cannot be overruled without, at the same time, overruling the cases which I have cited.—[The Vice-Chancellor. In this case, Mr. Wellesley covenants to secure the annuity to his wife, on or before a given day ; but, in the cases to which you have referred, the covenant was general as to the time of its performance, and, therefore, [*268] fore, the covenantor was allowed the whole of his life to perform it in.]—Where no time is fixed for the performance of a covenant, the covenantor is bound to perform it, either upon request or within a reasonable time. In *Ravenshaw v. Hollier*, which was cited in support of the bill, your Honor held that a covenant to settle the estate, or 4000*l.* in lieu of it, created no lien or charge on any of the father's estates ; and that the subsequent

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agreement between the father and son, was merely voluntary and was fairly abandoned by them. That case, therefore, was decided on the same principle as the cases to which I have before referred.

The question then is whether the circumstance that a certain time was appointed for performing the covenant in this case, makes any difference. The articles of separation were dated in June, 1834. The covenant was to be performed on or before the 1st of January, 1835. Now, the deeds under which the interests arose which are sought to be affected by this bill, are dated in December, 1834, and consequently, before the time appointed for performing the covenant had arrived. When the deeds of December, 1834, were executed, Mr. Wellesley was tenant for life of the estates comprised in them; and, according to the argument for the plaintiff, he had no right to enter into those deeds, for all his property was bound by the covenant. He did not covenant to acquire property in order to perform his covenant, or to charge any specific property; but according to the plaintiff's construction, the covenant bound all his property in every part of the kingdom and of every description. A receiver might have been appointed over the whole of it; and no purchaser or mortgagee, having notice of the covenant, could have dealt with him safely. Under the covenant, Mr. Wellesley has a right to elect whether he will secure the annuity on *freehold estates, [*269] generally, or by an investment in the funds, or by the best means in his power; and unless the court is prepared to hold that a simple obligation creates a lien upon all the covenantor's property, it is quite impossible to support the present bill, which seeks to establish a lien upon specific estates selected, not by the covenantor, but by the party with whom he has contracted, and against his consent and the consent of the trustees; and that too in a case in which it is not suggested that he has no other freehold estates than those mentioned in the bill, or that he has no stock in the funds, or that the means pointed out by the bill, are the best means in his power of securing the annuity.

It was said that the power reserved to Mr. Wellesley, under the deed of the 15th of December, 1834, was acquired by him for the purpose of enabling him to fulfil his covenant; but there is no allegation, in the bill, to that effect; and I submit that the court cannot, without overruling all the authorities, hold that the covenant in question created a lien upon any particular portion of the covenantor's property. It must either create a lien upon the whole of his property, or upon none at all. The consequences of holding that it creates a lien on the whole of his property, which I have endeavored to point out, are too monstrous to be contemplated for a moment.

With respect to the objection for want of parties; it is impossible for any one to read the prayer of the bill, without seeing that it is filed for the purpose of carrying the trusts of the deed of the 15th of December, 1834, into execution. It alleges that a portion of the 462,000*l.* has been raised and, in part, misapplied: and then it prays that the residue of that sum may be raised,

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and that a sufficient part thereof may be applied in discharge of the [*270] incumbrances on the lands *comprised in the deed of 15th of December, 1834; and that the surplus, or a sufficient portion thereof, may be invested, either in the purchase of estates or of a competent amount of stock, for effectually securing the plaintiff's annuity; and that the arrears of her annuity may be raised out of Mr. Wellesley's interest in the estates. The trustees have a right to account, once for all; and, therefore all the *cestui que trusts* must be before the court. The demurrer too is right in point of form; for it points out, with sufficient clearness, who the necessary parties are.

THE VICE-CHANCELLOR:—Upon the first point in this case, it seems to me that there is an equity.

The court can, of course, know nothing of any property that Mr. Wellesley has, except as the bill states it; and, there, I find it alleged that, on the 21st of June, 1834, Mr. Wellesley was seised, for his life, without impeachment of waste, of freehold and copyhold lands and hereditaments in Essex, Hampshire and Hertfordshire, with remainder to his eldest son, William Richard Wellesley, in tail male. That being the state of the property, and the only property which, it appears, Mr. Wellesley was interested in, (a) he did on the 21st of June, 1834, enter into the articles of separation, for which the covenant on the part of Colonel Paterson, though, to a certain extent, it was a conditional one, was in my opinion, a sufficient consideration. By those articles Mr. Wellesley covenanted that he would, on or before the 1st of February, 1835, well and effectually, either by a charge on freehold estates of inheritance to be situate in England or Wales, or by an investment of an inadequate sum of money in some of the stocks or funds of [*271] Great Britain, *or by the best means which might be then in his power, secure the payment, to Colonel Paterson, his executors, &c., during the life of Mrs. Wellesley, of an annuity of 1000*l.* Then, by deeds of the 12th, 13th, and 15th of December, 1834, those estates of which Mr. Wellesley was seised for life with remainder to his son in tail male, were limited to the two trustees, who are the demurring parties, upon trust to raise a sum of 462,000*l.*, which was to be applied in the manner specified, in great detail, but with an ultimate trust for the benefit of Mr. Wellesley himself. And then by the same instrument, power was expressly given, to Mr. Wellesley, to limit to his then present wife, or any woman or women he might marry after her decease, a jointure of 1500*l.* a year.

Now I cannot but think, seeing the precise manner in which the benefits are given to Mr. Wellesley by the deeds of December, 1834, (benefits which he could not have had out of his life estate) so as to enable him to comply with the provisions of the articles of separation, that it is quite according to legal principles to hold that those articles and the deeds of December, 1834,

(a) Mr. Wellesley was tenant in tail in remainder of estates in Ireland, and was interested in the charge of 31,731*l.* 5*s.*

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were parts of the same transaction, that is to say, that the articles and the deeds ought to be taken in connection with each other, and that the powers and benefits which were given, to Mr. Wellesley, by the deeds of December, 1834, were given to him for the purpose of enabling him to perform the covenant which was contained in the articles. When, in June, 1834, we find Mr. Wellesley contracting to secure an annuity to his wife, and when, before the close of the same year, we find him and his son dealing, the one with his life estate and the other with his inheritance, so as to enable Mr. Wellesley to fulfil his covenant contained in the articles, I think that it is right to hold that the deeds of December, 1834, are to be taken in connection with the articles of June, 1834, *so as to be nothing more than carrying [*272] on one and the same transaction.

Having regard, therefore, to the particular manner in which these deeds are framed, I am of opinion that Mrs. Wellesley has an equity to have the covenant specifically performed in the way in which it can be actually performed by virtue of the provisions which Mr. Wellesley caused to be introduced into the deeds of December, 1834.

In my opinion, however, as the bill is framed, it is almost impossible for the suit to proceed, without adding other parties to the bill. The bill, as I understand it, does, in effect, ask that the trusts declared in December, 1834, may be carried into execution; and I do not very well see how that can be done, without having some at least of the other persons interested under those trusts, parties to the suit. Therefore, it seems to me that what I ought to do, is to overrule the demurrer, so far as it is a demurrer for want of equity, but to allow it for want of parties. At the same time, however, I think that the plaintiff ought to have leave to amend the bill generally. (a)[1]

[1] Lord Cottenham, when this case was before him, November, 1839, intimates his disapprobation of the course pursued by the Vice-Chancellor as to giving the plaintiff leave to amend; but he would not interfere with the order of the Vice-Chancellor in this respect. "It is not usual," he says, "upon allowing a general demurrer, to give leave to amend; but it may be done. It is in the discretion of the court so to do. In all those orders of discretion, the Court of Appeal considers, whether, under all the circumstances of the case, it is expedient to alter an order which the other branch of the court may have made." This being an appeal from a discretion, was dismissed with costs. 4 Myl. & Cr. 554, 560.

(a) The plaintiff, accordingly, amended her bill, by introducing a statement that the arrangement of December, 1834, was entered into, by Mr. Wellesley, for the purpose of providing, for him, the means of securing the annuity of 1000*l.* and in part performance of the articles of separation. The trustees demurred, to the amended bill, for want of equity. On the 30th November, 1839, the Lord Chancellor overruled the demurrer; his Lordship's opinion being founded on the construction which he put on the articles, namely, that they amounted to a contract to charge the annuity upon such lands as Mr. Wellesley might have power to charge in February, 1835; and that the demurring defendants were trustees of property which he had, at that time, power so to charge; and that the court would, therefore, by its decree, if necessary, secure to the plaintiff the annuity so contracted for, out of the property so vested in the defendants. [At the conclusion of the report of the case when it came up on demurrer to the amended bill, before the Lord Chancellor, it is said, "No formal judgment was given upon the question of want of parties, but the demurrer was overruled generally." 4 Myl. & Cr. 561, 581. In this case, Lord Cottenham, after

 1839.—*Carthew v. Barclay*.

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**CARTHEW v. BARCLAY*.

1839 ; 1st August.—Advancing cause ; Costs.

Costs of an opposed application to advance a cause, directed to be costs in the cause, upon the application being granted.

MR. K. BRUCE and Mr. Wood, for the plaintiffs moved that this cause (which was a foreclosure suit) might be advanced, under the 4th order of the 9th of May, 1839.

Mr. *Jacob*, Mr. *Richards*, Mr. *Chandless*, Mr. *Thompson*, opposed the application on behalf of several defendants.

Affidavits were made on both sides.

a statement of the facts alleged in the bill, observes : " If, at the hearing, these facts being proved, the court will have no power to make any decree, except that Mr. Wellesley do perform his contract, and no power to act upon the land, then the demurrer must be allowed ; but if the court can act upon the land, then the defendants who have demurred, and are made defendants as trustees of the land, are properly made defendants, and the demurrer must be overruled ; that is, in that case, according to the plaintiff's showing, she will have a decree against them. If there be a contract for sale, and the vendor proceeds so to deal with the property as to incapacitate himself from performing, this court will act upon the property. If the plaintiff in this case should obtain a decree against Mr. Wellesley, establishing her title to have the annuity charged upon the property, of which the defendants demurring are trustees for him, can it be doubted that the court would act upon such property for the purpose of enforcing this equity ? and if so, the defendants, as trustees of it, are necessary parties for that purpose. The only ground upon which the defendants could contend with success, that they are improperly made parties to the bill, would be to establish either that the bill must be dismissed against Mr. Wellesley, or that the decree against him can only be against him personally, and that the court would have no power to affect the property in question : which comes to this, that the court being of opinion that Mr. Wellesley was bound to give effect to his contract, and to charge the annuity upon the property, of which the defendants are trustees for him, must confine itself to a personal decree against him for that purpose, and could not make any decree against the trustees ; but it is clear that the moment the court declares such right in the plaintiff, these defendants will, at all events, become trustees for the plaintiff to that extent. That this court will grant a specific performance of an agreement for the grant of an annuity, cannot now be questioned ; and this agreement appears to me to contain within itself all that is necessary to give it legal validity ; but if this court is to execute the agreement, it must do so, according to the terms of it. The terms are, on a day certain, to charge the annuity on lands, or, on an investment of stock, or by the best means in his (Wellesley's) power. I think it quite immaterial, for the present purpose, whether this gave to the husband an option, or whether he has other lands besides those vested in these defendants, upon which he can now charge the annuity ; because the bill alleges that he refuses to charge it in any manner ; and this court will not permit him, under the pretence of exercising an option, to evade the performance of his contract. Being, therefore, of opinion that the contract as stated in the bill, must, upon the case stated, be enforced against Mr. Wellesley, and that, to effect that object, the court will act upon the estates which he had a power of charging in February, 1835, and of which the defendants are trustees for him, I think that this demurrer must be overruled. My opinion being founded upon the construction I put upon these articles of separation, that they amount to a contract to charge the annuity upon such lands as the husband had power to charge in February, 1835 ; and that the defendants are trustees of the property which he had at that time power so to charge ; and that this court, will therefore, by its decree, if necessary, secure to the plaintiff the annuity, so contended for, out of the property so vested in the defendants, I do not think it necessary to discuss the ground upon which I am informed the Vice-Chancellor overruled this demurrer, &c."

1839.—*Easum v. Appleford.*

The Vice-Chancellor having granted the application, the counsel for the defendants applied for the costs of the motion, on the ground that it was an indulgence granted to the plaintiffs.

The counsel for the plaintiffs contended that it was in the ordinary course of justice to advance causes which, from their nature, were entitled to be heard as short causes, and that, the application having succeeded, the costs ought to be costs in the cause; and the Vice-Chancellor so decided.

**EASUM v. APPLEFORD.*

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1839; 2d August.—Will; Construction; Appointment; Residuary bequest.

A testator directed that, in case of one of his daughters having no child, his trustees should stand possessed of a sum of 3000*l.* and the stock upon which it should be invested, including the accumulations of the surplus dividends which should not have been applied, in manner in the will mentioned, during the daughter's minority, upon such trusts as the daughter should by will appoint; and, in default of appointment, or in case of appointment as to such parts of the 3000*l.* as should not be effectually comprised therein, or whereof the trusts to be thereby limited should either never take effect, or should determine, upon the trusts by his will declared of his own residuary estate.

The daughter having no child, by her will, after reciting that the 3000*l.* and the accumulated dividends had been blended, with funds to which she was absolutely entitled, in a sum of 6700*l.* consols, standing in the names of trustees, proceeded, in express execution of the power, to direct that the 3000*l.*, and the stock upon which that sum or the surplus dividends should have been invested, should be transferred to certain trustees named in her will, upon trust, as to 2700*l.* consols, for her mother, and as to 250*l.* consols for another person, and, as to the residue, upon the trusts after declared of her residuary estate. She then proceeded to give what she described as "all the residue of my stock in the public funds, and all my moneys and securities for money, and all the residue of my estate and effects," to the same trustees, upon trust to convert, and to invest in the funds such part as should not already be so invested, and to stand possessed of all such funds, and also of the residue of the said trust funds which should remain after paying and satisfying the several legacies of stock before directed to be paid or transferred thereout to her mother and the other person referred to, upon certain trusts which she proceeded to declare.

The mother died in the daughter's lifetime.

Held that the 2700*l.* consols was not well appointed, and that it was subject to the trusts declared, by the testator, of his residuary estate.

MATTHEW EASUM, by his will dated the 18th of January, 1816, after giving certain legacies, devised and bequeathed all his real and personal estate to his trustees and executors, upon trust to convert the same *into money; and he directed that, out of the produce thereof, they [*275] should invest 3000*l.*, in their names, on real or government securities, and should stand possessed thereof upon trust to apply the whole, or such part as they should think fit, of the interest and dividends thereof, for the maintenance and education of his daughter Mary Ann Easum, until she should attain twenty-one or be married; and to invest the surplus (if any) of the interest and dividends, on like security, in their names, and to stand possessed thereof upon the trusts thereafter declared of the 3000*l.*: and he di-

 1839.—*Easum v. Appleford.*

rected his trustees to stand possessed of the 3000*l.* after his daughter should attain twenty-one or be married, in trust for her separate use, during her life, and, after her decease, upon certain trusts for the benefit of her children; and, if she should have no child who, being a son, should attain twenty-one, or, being a daughter, should attain that age or be married, then that the 3000*l.* should be and remain upon and for such trusts, intents and purposes, as his daughter (whether sole or married) should, by her will, appoint: "And, in default of any such direction or appointment, the said sum of 3000*l.* shall be and remain (or, in case any such direction or appointment shall be made, then such parts of and interests in the said sum of 3000*l.* as either shall not be well and effectually comprised therein, or as shall be comprised therein, but whereof the trusts and estates to be thereby limited, shall either never take effect or shall determine, shall be and remain) upon such and the same trusts, and for such and the same intents and purposes, and with, under and subject to such and the same powers, provisos and declarations, as are hereinafter declared and contained of and concerning the residue of the said trust moneys, or as near thereto as the circumstances of the case will permit."

And, as to all the residue of the trust moneys so as aforesaid referred [*276] to by the testator, "he declared that the trustees should, as soon as conveniently might be after his decease, lay out and invest the same, in their joint names, upon real or government security, and stand possessed thereof upon trust for all and every of the children which he might have living at the time of his decease (exclusive of his daughter Elizabeth,) equally to be divided among them, share and share alike. The testator died on the 20th of February, 1816. He left six children who attained twenty-one, exclusive of his daughter Elizabeth.

Mary Ann Easum made her will dated the 12th of August, 1835, which, after reciting her father's will so far as it related to the 3000*l.*, proceeded as follows: "And whereas the said trustees, after the decease of my said late father, laid out and invested not only the said sum of 3000*l.*, and the surplus of the dividends which accrued, from time to time, during my minority, but also my share of the said testator's residuary estate to which I was absolutely entitled, under his said will, on attaining my age of twenty-one years, indiscriminately in the purchase of various sums of stock in the public funds, so that it is now difficult to ascertain how much of such stock was purchased with the said sum of 3000*l.* and the surplus dividends thereon, and how much with my said share of the said residuary estate and the surplus dividends thereon: but the stocks or funds which have arisen from both the said sources, and which are now standing in the names of my trustees in the bank books, consist of the sum of 6700*l.* or thereabouts in the three per cent. consolidated annuities. And whereas I attained my age of twenty-one years several years ago, and, thereby, became entitled and am now desirous to exercise the power of appointment given or reserved to me by the [*277] said will of my said late father. Now, in "pursuance of the said

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power and authority, and of all other powers and authorities enabling me in this behalf, I do, by this my last will and testament in writing, direct and appoint that the said sum of 3000*l.*, or the stocks or funds in or upon which the same or any part thereof, or the surplus dividends thereof, now are or is or shall or may, at the time of my decease, be laid out or invested, and all other moneys, stocks or funds over which I have any power of appointment given to me by the said will, shall go and be transferred, by the trustees or trustee in whose names or name the same may happen to stand at my decease, unto John Henry Burnall and Isaac Sheffield the younger, upon trust that they do and shall, thereout, assign and transfer the sum of 2700*l.* three per cent. consolidated annuities, or so much of any other stocks or funds constituting any part of the said trust funds as shall be equal in value thereto at the day of my decease, unto my dear mother, Ann Easum, for her own absolute use and benefit: and do and shall also, thereout, in the same way and manner, transfer and assign the sum of 250*l.* three per cent. annuities, or a like amount in value of any such other stocks or funds as aforesaid, unto Sarah Williams, the wife of James Williams, for her own sole and separate use and benefit, independent of her present or any future husband: and do and shall stand and be possessed of the residue of the said stocks or funds and securities as aforesaid constituting the remainder of the said trust funds, upon the trusts and to and for the intents and purposes hereinafter declared and expressed of and concerning my residuary estate and effects. And, as to all the residue of my stock in the public funds, and all my moneys and securities for money, and all the rest, residue and remainder of my estate and effects, whatsoever and wheresoever, not hereinbefore bequeathed and disposed of, and whether in *possession, [278] reversion, remainder or expectancy under the will of my said late father, Matthew Easum, or my late grandfather, John Green, or otherwise howsoever, I give and bequeath the same and every part thereof, unto the said J. H. Burnall and J. Sheffield the younger, their executors, administrators and assigns, upon trust to get in, receive and convert into money all such parts of my said residuary estate and effects as shall not consist of money or stock in the public funds, or of money out upon government or real securities at interest, and to lay out and invest the same in the purchase of stock, in their names, in the public funds, in addition to such residuary stock as may belong to me at the time of my decease, or upon government or real securities at interest, and do and shall stand and be possessed of all such stocks, funds and securities, and also of the residue of the said trust funds which shall remain after paying and satisfying the several legacies of stock hereinbefore directed to be paid or transferred, thereout, unto my said mother and the said Sarah Williams, upon the trusts and for the intents and purposes following, that is to say, upon trust, thereout, to appropriate and set apart the sum of 1000*l.* three per cent. consolidated annuities, or on so much of other stock as shall be equal thereto in value, and to pay the dividends and

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annual produce thereof unto Sarah Easum, the widow of my late brother Edward Easum, deceased, for and during the term of her natural life, for her separate use independent of any husband with whom she may intermarry, and for which her receipt, not by anticipation, shall be a sufficient discharge; and, from and after the decease of the said Sarah Easum, upon trust to transfer one-third part or the share of the said last mentioned stocks or funds, unto my said dear mother, or to her executors, administrators, or assigns

[*279] in case of her decease in the "lifetime of the said Sarah Easum, to and for her or their own absolute use; and, as to one other third part or share thereof, upon trust to pay, apply and dispose of the dividends and interest thereof in, for and towards the maintenance and education of Robert Easum, the eldest son of Robert Hayes Easum, until he shall attain the age of twenty-one years, and, when and as soon as he shall attain that age, then upon trust to transfer and make over the said one-third part of the said stocks or funds unto him, the said Robert Easum, for his use and benefit, if the said Sarah Easum shall be then dead (but, if not, then the actual transfer thereof shall be postponed till after her decease,) but, in case the said Robert Easum shall not live to attain the age of twenty-one years, then upon trust to stand possessed thereof for the benefit of the several persons and for the several intents and purposes next hereinafter mentioned and declared concerning the remainder of the stocks, funds, securities, and moneys constituting my said residuary estate; and, as to the remaining one-third part or share of the said sum of 1000*l.* three per cent. consolidated annuities so directed to be appropriated as aforesaid, *and also as to the remainder of the said stocks, funds, securities and moneys constituting my said residuary estate*, upon trust to pay the dividends, interest and annual produce thereof, respectively, unto Joseph Appleford, for and during the term of his natural life; and from and after his decease, then upon trust to stand possessed thereof for all and every the children or child of the said Joseph Appleford, who, being a son or sons, shall live to attain the age of twenty-one years, or, being a daughter or daughters, shall live to attain the same age or be married, which shall first happen, equally to be divided between them, if more than one, share and share alike."

[*280] "And I do hereby declare that "none of the legacies or sums in stock hereinbefore given, shall be considered as a specific legacy; and, in case of any misdescription or change or deficiency of any of the said stocks or funds, or of the trustees' names in which the same are or may be standing, or any other mistake or alteration, then the said legacies or sums in stock shall be made up and payable by and out of any other stocks or funds belonging to me equal thereto in value, or out of any other part or parts of my personal estate and effects."

Mary Ann Easum survived her mother, and died on the 30th of January, 1839.

The bill, after stating as above, alleged that the 1000*l.* three per cents re-

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ferred to in the will of Mary Ann Easum, was appropriated and set apart, by her executors, wholly out of the personal estate to which she was absolutely entitled, and not out of any trust funds over which she had a power of appointment under Matthew Easum's will; that all the debts and funeral and testamentary expenses of Matthew Easum, and all the legacies and bequests given by his will, had been paid, and the whole of his personal estate had been duly administered and distributed, except the sum of 2700*l.* consols, which was then standing in the names of the plaintiffs, and which was part of the securities upon which the sum of 3000*l.* mentioned in the wills of Matthew Easum and Mary Ann Easum, was invested, and had been retained and set apart, by the plaintiffs, for the purpose of satisfying the appointment, by the will of Mary Ann Easum, expressed to be made of the sum of 2700*l.* three per cent. consols therein mentioned, if any effectual appointment thereof should appear to have been thereby made; and the plaintiffs were anxious to 'transfer and administer the 2700*l.* consols upon the trusts [281] to which it was subject; but disputes had arisen, between the parties to whom the 3000*l.* was given, by the will of Matthew Easum, in default of appointment, on the one hand, and the parties claiming under the residuary bequest contained in the will of Mary Ann Easum, on the other, whether any effectual appointment of the 2700*l.* consols, had been thereby made.

The bill prayed that the rights and interests of all parties in the, 2700*l.* consols, might be ascertained and declared by the court; and that the trusts of Matthew Easum's will, so far as related to that sum, might be carried into execution under the decree of the court.

The plaintiffs, who were two in number, were the present trustees of the will of Matthew Easum. One of them was his surviving personal representative; and the other of them was one of the children of Matthew Easum, and was also the personal representative of several of his other children who had died. The defendants were Joseph Appleford and his children, the trustees and executors of Mary Ann Easum's will, and other children and representatives of children of the testator Matthew Easum.

The facts of the case as stated in the bill, were not disputed; and the only question was whether, in the event, which had happened, of the death of Mary Ann Easum's mother, the 2700*l.* consols had been well appointed, or had fallen into the residue of the testator's estate.

The cause now came on to be heard.

Mr. *Jacob* and Mr. *Craig*, for the plaintiffs, submitted that the 2700*l.* consols had not been well appointed by *Mary Ann Easum, [282] and that it now formed part of the residuary personal estate of the testator Matthew Easum.

Mr. *Wigram* and Mr. *Sheffield*, for Joseph Appleford and his children, contended that the 2700*l.* consols had been well appointed, by Mary Ann Easum, to the trustees mentioned in her will, and that they were now entitled to receive that sum, for the purpose of its being applied upon the trusts

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which she had, by her will, declared of her personal estate ; and that, in fact, she had made it part of her personal estate. They cited *Falkner v. Butler*,^(a) *Oke v. Heath*,^(b) *Duke of Marlborough v. Lord Godolphin*.^(c)

Mr. Knight Bruce, Mr. Coleridge, and Mr. Piggott, for other parties.

THE VICE-CHANCELLOR :—The case seems to me perfectly plain. As I understand it, the testatrix meant to dispose of the 3000*l.* over which she had a power of appointment by her father's will. There would be a considerable part of that 3000*l.*, including the surplus dividends, beyond the 2700*l.* consols and 250*l.* consols, which she gives out of it ; and, taking that to be so, there really is no doubt ; for, after reciting that the 3000*l.* and its surplus dividends, and the property to which she was absolutely entitled, had been blended in the 6700*l.* consols then standing in the names of the trustees, she, expressly, in execution of the power, directs that the 3000*l.* or the stocks upon which that sum or its surplus dividends might be invested, [*283] should go to her *trustees upon trust to transfer 2700*l.* consols or stock of equal value, to her mother, and 250*l.* consols or stock of equal value, to Sarah Williams, and directs that her trustees : “do and shall stand possessed of the residue of the said stocks or funds and securities as aforesaid, constituting the remainder of the said trust funds, upon the trusts and to and for the intents and purposes hereinafter declared and expressed of and concerning my residuary estate and effects.”

I am clearly of opinion that no other sensible construction can be put on these words, than that she directs all to go to her trustees, on the trust of her residuary estate, except the 2700*l.* consols and 250*l.* consols. Then she says : “As to all the residue of my stock in the public funds and all *my* moneys and securities for money, and all the rest, residue, and remainder of *my* estate and effects, I give and bequeath the same, to the same persons, upon trust to convert and invest in stock such parts as shall not consist of money or stock.” And she directs that they : “do and shall stand and be possessed of all such stocks, funds, and securities.” And then follow words which appear to me to be surplusage, namely :—“and also of the residue of the said trust funds which shall remain after paying and satisfying the several legacies of stock hereinbefore directed to be paid or transferred thereout unto my said mother and the said Sarah Williams, upon the trusts and for the intents and purposes following.” Now these words I admit are surplusage ; but they appear to me clearly to show that what she meant to dispose of was all the trust fund *after* satisfying the legacies of stock, namely, the legacies of 2700*l.* consols and 250*l.* consols ; whereas it is said in argument that [*284] what she meant **was* all the trust funds, excluding the legacies of stock, whether disposed of or not.

Upon these grounds it appears to me that the 2700*l.* consols must be con-

(a) Amb. 514.

(b) 1 Vez. 135.

(c) 2 Vez. 61.

Monck v. The Earl of Tankerville.

sidered to be unappointed and to be now subject to the trusts declared, by Matthew Easum's will, of his residuary personal estate.(a)

MONCK v. THE EARL OF TANKERVILLE.

1839; 8th and 10th August.—Amendment; Costs; Practice.

A bill was filed for a foreclosure of a mortgage and for a transfer of a sum of stock. On the answer being filed, disclosures were made which rendered it advisable to amend the bill, by striking out all that related to the mortgage; and, thereby, nearly one-half of the bill and answer, was rendered useless. The court, however, refused to order, on motion, the plaintiff to pay the defendant's costs occasioned by the amendment; as it appeared that the amendment was made under the advice of counsel and not for the purpose of vexation or oppression.

THE object of the bill, as originally filed, was to obtain a foreclosure of two mortgages and also a transfer of a sum of stock. After the answer had been put in, the plaintiff, amended his bill and struck out of it all that related to the mortgages, and so reduced it to a bill for a transfer of the stock.

Mr. *Knight Bruce* and Mr. *G. L. Russell*, for the defendant, now moved that the plaintiff might be ordered to pay, to the defendant, his costs of the suit up to the time of filing the amended bill, or so much of the defendant's costs of the original bill and of his answer thereto and of the other proceedings thereon as had been occasioned by the relief sought with respect to the mortgages. They said that nearly one-half of the "bill" [285] had been struck out, and that more than one-half of the answer had been rendered useless: that the bill, as it originally stood, was multifarious; and that the objection, for multifariousness, was taken by the answer, whereupon, the order to amend was obtained: that, if the plaintiff had gone to a hearing with the bill as it originally stood, he would have been obliged to pay the costs to the defendant; that if, at the hearing, the amended bill should be dismissed with costs, the defendant would not be able to obtain the costs occasioned by the amendment; and the effect would be that a plaintiff might dismiss his bill, partially at least, without payment of costs. They referred to Lord Lyndhurst's 30th order, and to *Watts v. Manning*; (a) *Mavor v. Dry*; (b) *Bullock v. Perkins*; (c) *Dent v. Wardel*; (d) and 1 Daniell's Pract. 517 and 518.

Mr. *Jacob* and Mr. *Purvis*, for the plaintiff, said that the 29th of Lord Lyndhurst's orders was against the motion; for that, under that order, the court at the hearing, would have power to deal with all the costs that had been incurred in the cause: that the cases cited had no application; for it was sworn, in the plaintiff's affidavit, that the amendments were not made

(a) Affirmed by the Lord Chancellor. [5 Myl. & Cr. 56. Lord Cottenham considered this to be a case of "lapsed appointment" and the unappointed subject, as in the case of "a lapsed legacy," sunk into the general residue of the estate.]

(b) 1 Sim. & Stu. 421. (c) 2 Sim. & Stu. 113. (d) 1 Dick. 110. (e) Ibid. 339.

1839.—*Monck v. The Earl of Tankerville.*

for the purpose of vexation or oppression ; but were rendered necessary by the disclosures made in the answer.

THE VICE-CHANCELLOR :—In two of the cases which have been cited in support of the present motion, the court proceeded on the ground [*286] that the bill had been vexatiously amended. In **Bullock v. Perkins*, the Lord Chancellor said : it would be a matter of great consequence and of great injustice to a defendant, if a plaintiff should be permitted to act in this manner. For a plaintiff might bring a vexatious bill, and put the defendant to a great expense in taking a copy of it, in answering it and examining witnesses ; and then, after publication is passed, upon seeing the depositions, and finding thereby that he hath no equity, might, under pretence of amending his bill, strike out such parts as he cannot expect relief from, and, thereby prevent the court from doing that equity to the defendant, by ordering him his costs, which the plaintiff hath not in himself." It appears also that, in that case, the cause had gone off at the hearing for want of parties, and then it was that the amendment was made. In *Mavor v. Dry*, the Master of the Rolls says : "the rule that the plaintiff shall pay 20*s.* costs only on amending his bill, does not bind the court where there has been great oppression and vexation. This appears to me to be a case of that nature:" and the same ground seems to have existed for the order in *Dent v. Wardel*, namely that the plaintiff in amending his bill, had acted vexatiously and oppressively.

In the present case, the bill connects the sum of stock with the two mortgages ; and it is stated in the plaintiff's affidavit, that, at the time when the instructions for preparing the bill were given, it was impossible to obtain the information which rendered the amendments necessary, without having access to documents which were in the defendant's possession ; and that on the answer being put in, an inspection of those documents was obtained, and the amendments were then made, under the advice of counsel. And it [*287] further "appears by the same affidavit, that the expense which the defendant has been put to in consequence of the amendments, has been very trifling. Consequently, the amendments in this case, do not appear to have been vexatious or oppressive ; as they were in the cases before Lord Hardwicke and Lord Gifford.

I must, therefore, say that this does not appear to me to be a case in which I can grant the motion.

Motion refused, without costs.

 1839.—*Strother v. Dutton*.

SOAMES v. MARTIN:

1839; 9th August.—Will; Construction; Legacy.

Testator directed the interest of a sum of money to be applied for the maintenance and education of his infant nephew, but made no disposition of the principal. Held that the nephew was entitled to the interest, during his life.

THE testator in this cause, directed the interest of a sum of money to be applied for the maintenance and education of his nephew, (who was an infant,) but made no disposition of the principal. The question was whether the nephew was entitled to the principal, or to the interest during his life, or during his minority only.

The case of *Badham v. Mee*,^(a) in which Sir J. Leach, M. R., said that the words, "maintenance, education, and bringing up," standing by themselves, had reference to minority, was cited as an authority that the nephew was entitled to the interest of the sum of money during his minority only.

THE VICE-CHANCELLOR :—My opinion is that the child is entitled to the interest during his life; and that the principal is undisposed of.

*In the case cited, the words were, "maintenance, education, and [^{*288} *bringing up*]." Those words necessarily apply to the infant state.

But all persons who have attained twenty-one, are not in a state in which they do not want education; and there is no period of life in which a person does not require maintenance.^(a)[1]

Mr. Knight Bruce, Mr. Wakefield, Mr. Jacob, Mr. Jeremy and Mr. Coleridge were counsel in the cause.

STROTHER v. DUTTON.

1839; 5th August.—Practice; Preliminary Accounts; Fifth Order of May, 1839.

Under the 5th order of May, 1839, the court will order preliminary accounts to be taken, although the cause has been set down for hearing.

MR. JACOB and Mr. Geldart, for the plaintiff, moved, under the fifth order of the 9th of May, 1839, for a reference to the Master, to take an account of the personal estate and of the rents and profits of the real estate of the testator in the cause, come to the hands of two of the defendants, the executors and

(a) 1 Russ. & Myl. 631.

(b) See *Kilvington v. Gray*, post, p. 293.

[1] In *Ellis v. Maxwell*, 3 Beav. 587, maintenance was extended beyond the age of twenty-one, although the party had not, by the terms of the will, acquired a vested interest in the fund. Lord Langdale, M. R., says: "But, upon the result of the whole, I think, that according to the terms of the will, the eldest son though excluded from a vested interest in the capital, is entitled to an allowance out of the income for his maintenance and education; and then the question is, whether the trustees have authority to continue this allowance after the eldest son's attainment of twenty-one years of age. And whatever ambiguity there may be in the first clause [of the will] relating to maintenance, I think that, upon the second, the trustees have such authority, &c."

 1839.—*Meinertzhagen v. Davis*.

trustees of the will, and for various inquiries relating to the real and personal estate.

Mr. *Knight Bruce*, contra, said that witnesses had been examined and publication had passed, and that the cause had been set down for hearing; and that the order in question was not meant to apply to a cause in so advanced a stage.

The Vice-Chancellor said that it might be useful to have the preliminary accounts and inquiries taken and made, although the cause had been [*289] set down for hearing; "and that that circumstance did not prevent the application of the order under which the motion was made.

Motion granted.(a)

MEINERTZHAGEN v. DAVIS.

1839; 3d November.—Practice; Preliminary Inquiries; Fifth Order of May, 1839.

The court will not direct preliminary inquiries to be made under the 5th order of May, 1839, unless it is plain that they would be directed at the hearing, and would be binding on the parties to the suit.

In this cause, a motion for certain preliminary inquiries under the 5th order of May, 1839, was made by Mr. *Knight Bruce* and opposed by Mr. *Jacob* and Mr. *Lee*.

The grounds on which the motion was opposed were, first, that two of the defendants were resident out of the jurisdiction of the court, and had not appeared to the bill: secondly, that the inquiries sought to be obtained, might prove to be unnecessary when the cause should be heard.

THE VICE-CHANCELLOR;—This notice of motion is, certainly, not consistent with either the terms or the legitimate construction of the fifth order; for, in the first place, that order was not meant to apply except to plain cases, that is, to cases in which it is reasonably clear that the inquiries sought to be obtained would have been directed at the hearing, and will be binding on the parties.[1] Now, in the present case, two of the defendants are out of the jurisdiction of the court, and have not appeared to the bill; and it is [*290] said that, as they are alleged, by the bill, to be out of the "jurisdiction they are to be considered as not being parties to the suit. It is obvious, however, that, before the cause is heard, they may appear and put in their answers, and thereby, perhaps, render all that may have been done, under the reference, entirely useless.

The order under which the present motion is made, does not authorize the court to direct inquiries to be made before the hearing of the cause, unless it shall appear to the court that the order will be beneficial to such of the parties to the cause as may not be competent to consent thereto, and that the

(a) See next case. [*Curd v. Curd*, 2 Hare, 116.]

[1] Vide *Topham v. Lightbody*, 1 Hare, 289.

1839.—In re Taylor.

same is consented to by such of the defendants as, being competent to consent, have not put in their answer to the bill, and that the same is consented to by, or is proper to be made upon the statements contained in the answers of such of the defendants as have answered the bill. It is evident, therefore, that, in a case like the present, the court has no power to make the order.(a)

*IN RE TAYLOR.

[*291]

1839 : 4th and 8th November.—Construction of 2 and 3 Vict. c. 54 ; Vice-Chancellor ; Jurisdiction ; Infant.

The Vice-Chancellor has jurisdiction to make orders under 2 and 3 Vict. c. 54, (for amending the law relating to the custody of infants,) although the Lord Chancellor and Master of the Rolls are alone mentioned in the act.

THIS was a petition addressed to the Lord Chancellor, by a married lady, the mother of several infant children, under 2 and 3 Vict. c. 54 (to amend the law relating to the custody of infants,) which enacts that it shall be lawful for the Lord Chancellor and the Master of the Rolls in England, and for the Lord Chancellor and the Master of the Rolls in Ireland respectively, upon hearing the petition of the mother of an infant or infants being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, if he shall see fit, to make order for the access of the petitioner to such infant or infants, at such times and subject to such regulations as he shall deem convenient and just : and, if such infant or infants shall be within the age of seven years to make order that such infant or infants shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as he shall deem convenient and just.

Mr. Knight Bruce and *Mr. Simpson* appeared for the petitioner, and said that a doubt was entertained as to whether the Vice-Chancellor had jurisdiction under the act, inasmuch as only the Lord Chancellor and the Master of the Rolls were mentioned in it.

Sir W. Follett, *Mr. Jacob*, *Mr. Wigram*, and *Mr. Roundell Palmer*, appeared for the respondent, the father of the infants.

*THE VICE-CHANCELLOR :—By the act of Parliament by which [*292] the office of Vice-Chancellor was created (53 Geo. 3, c. 24) the Vice-Chancellor is empowered to hear and determine all causes, matters and things, which shall be, at any time, depending in the Court of Chancery in England, either as a court of law or as a court of equity, or incident to any ministerial office of the said court, or which have been or shall be submitted to the jurisdiction of the said court, or of the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal for the time being, by the special authority of any act of Parliament, as the Lord Chancellor, Lord

(a) See the preceding case.

 1839.—*Kilvington v. Gray.*

Keeper, or Lords Commissioners for the custody of the Great Seal shall, from time to time, direct: and that all decrees, orders and acts of such Vice-Chancellor so made or done, shall be deemed and taken to be respectively, as the nature of the case shall require, decrees, orders and acts of the said Court of Chancery, or of such incident jurisdiction as aforesaid, or under such special authority as aforesaid, and shall have force and validity and be executed accordingly. It seems to me, therefore, that this case is plainly within the terms of the 53 Geo. 3.

Besides, I have been informed, by the best authority, that, when the act of the 2d and 3d of her present Majesty, was introduced into the House of Lords, it did contain the words, "The Vice-Chancellor;" but that those words were afterwards struck out, because jurisdiction was expressly given, by the act, to the Lord Chancellor; and that jurisdiction would be exercisable, by the Vice-Chancellor, as a matter of course; and, therefore, it was deemed unnecessary to mention the Vice-Chancellor. For these reasons, I have no doubt that I have jurisdiction in this case.

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KILVINGTON v. GRAY.

1839; 19th November.—Will; Construction; Infant; Maintenance.

Testator made a certain provision for the infant son of his relation M. W., until the age of sixteen, and then left the infant to the care of his trustees, to provide for him in some business or profession, and his future maintenance, out of the testator's funded property. Held, that the infant on attaining sixteen, was entitled to receive out of the testator's funded property, a sum sufficient to provide for him in some business or profession, and to an annual allowance for his future maintenance during his life; and it was referred to the Master, to inquire and state what sums were proper to be allowed for those purposes.

THOMAS KILVINGTON, the testator in the cause, by his will dated the 13th of August, 1822, devised his freehold estates in the county of York, to William Gray and Francis Barroby, their heirs and assigns, to the use of Thomas Bramley and John Haddon Ashwith, their executors, administrators, and assigns, for the term of one thousand years next ensuing his decease, upon trust, by mortgage or out of the rents and profits thereof, to raise and pay to Thomas Kilvington, Lamb Walker and William Walker an annuity of 100*l.* each during their respective lives, if Edward Kilvington should so long live, or there should be issue male of his body so long in existence; and, after the decease of Edward Kilvington and failure of issue male of his body, then to pay to Thomas Kilvington, Lamb Walker and William Walker, an annuity of 200*l.* each, in lieu of the annuity of 100*l.* each, during the then remainder of their respective lives: and the testator directed that the same annuities should, during the respective minorities of the annuitants, be applied by Bramley and Askwith, their executors, &c., for their maintenance, education and benefit, in such manner as Bramley and Askwith, their execu-

 1839.—*Kilvington v. Gray.*

tors, &c., should think proper: and he appointed William Gray, Francis Barroby and Edward Kilvington executors of his will. The testator made a codicil, dated the 29th of August, 1823, which was as follows:

"whereas, my relation Mrs. Walker in York, has been *delivered of [*294] a son since I made my will; to the maintenance of this child I allow 10*l.* a year, to Mrs. Walker, till it arrives at the age of ten years; and, after that time, 20*l.*, till he is sixteen years old. *I then leave him to the care of my trustees, to provide for him in some business or profession, and his future maintenance out of my funded property.*"

The testator died on the 13th of September, 1823.

By the decree at the hearing of the cause, on the 27th of November, 1824, the will and codicil were established, and the trusts thereof were ordered to be carried into execution.

By the order on further directions made on the 17th of August, 1825, the executors were ordered to transfer so much 3*l.* per cent. consols, standing to the credit of the cause, as the Master should ascertain to be set apart to answer the provision by the codicil, given and directed to be made for the son of Mary Walker, into the name of the Accountant General in trust in the cause, "Mary Walker's infant son's annuity account:" and it was ordered that, out of the dividends thereof, the sum of 5*l.* should be paid half yearly, to Mary Walker on the 13th of September, and the 13th of March, in each year, until further order. On the 8th of May, 1829, the executors transferred 333*l.* 6*s.* 8*d.*, consols as directed by the before mentioned order; and the dividends thereof, amounting to 10*l.* per annum, were paid to Mary Walker, until the infant attain the age of ten years; and, on his attaining that age, the executors in obedience to another order in the cause, made a similar transfer of the further sum of 333*l.* 6*s.* 8*d.* consols, out of the funds in the cause, and the dividends *of that sum as well as of the before mentioned sum [*295] of stock, amounting to 20*l.* per annum, were paid to Mary Walker.

On the 5th of August, 1839, the infant attained the age of sixteen; and, shortly afterwards, presented a petition stating to the effect before mentioned, and that in March, 1834, 23,500*l.* was raised by sale of 25,817*l.* stock standing to the credit of the cause, and pursuant to an order of the court, was invested in the purchase of a freehold estate under the trusts of the testator's will respecting his funded property, and that the residue of such funded property, other than the 666*l.* 13*s.* 4*d.* stock standing to "Mary Walker's infant son's account," consisted of 5888*l.* three per cents. 48,153*l.* three and a half per cents., which were standing in the name of the Accountant General in the cause, "The residuary personal estate account." That the petitioner was advised that, on his attaining the age of sixteen, he became entitled to receive, out of the testator's funded property, a sum sufficient for the purpose of providing for him in some business or profession, and to an annual allowance for his future maintenance. The petition prayed for a declaration to that effect, and that it might be referred to the Master, to inquire and certify what

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sum would be proper to be allowed for the purpose of providing for the petitioner in some and what business or profession, and also what yearly sum would be proper to be allowed for his future maintenance from the said 5th day of August, 1839, for the time to come, and out of what funds, and to whom the same ought to be paid during his minority.

Mr. *Jacob*, in support of the petition, said that the trustees were [*296] bound, by the codicil, to provide, for the *petitioner, in some business or profession, and also for his maintenance during the remainder of his life; but that the amount of the provision was not specified, and, therefore, it must be determined by the court. *Foley v. Parry.*(a)

Mr. *Girdlestone* and Mr. *Koe*, for the plaintiff and other parties, said that there was no gift to the petitioner, but only a vague discretionary power, in the trustees, to provide for him; and that, as the matter was left entirely to the discretion of the trustees, the court would not take, upon itself, the exercise of that discretion. *Pink v. De Thuissey*;(b) *Walker v. Walker.*(c)

THE VICE-CHANCELLOR :—The testator has imposed it, as a duty, on the trustees, to take care of the infant, and to provide for him in some business or profession, and his future maintenance; and the question is whether the court, when it sees that the testator has done so, and has pointed out the fund out of which the provision is to be made, does not take upon itself the exercise of the discretion which the testator has reposed in the trustees. Unless that be so, I do not see on what principle my decision in *Foley v. Parry* could have been affirmed by the Lord Chancellor.

With respect to the time during which the maintenance of the child is to continue, it seems to me that the word "future," comprehends all time; and it is probable that the child may be put into some business or [*297] *profession which will not afford him a maintenance, until after he has attained the age of twenty-one.

My opinion, therefore, is that the provision for the maintenance of the petitioner, ought to continue during his life; and I am confirmed in that opinion by seeing that, in the prior part of the will, the provision for the maintenance of the three infants there named, is expressly circumscribed by the words: "during their minorities."(d)

Declare that the petitioner is entitled, under the codicil, to receive, out of the testator's funded property, a sum sufficient for the purpose of providing for him in some business or profession, and to an annual allowance, for his future maintenance, from the 5th day of August last; and refer it to the Master, to inquire and state whether it will be fit and proper and for the benefit of the petitioner to place him out to any and what trade or profession, and with whom, and what sum of money will be fit and proper to be advanced on such occasion, and out of what fund the same ought to be paid: and let the Master also inquire and state what yearly sum or sums will be proper to

(a) *Ante*, vol. 5, p. 138; and 2 *Myl. & Keen*, 138.(b) 2 *Madd.* 157.(c) 5 *Madd.* 424.(d) See *Seames v. Martin*, *ante*, p. 287.

 1841.—*Ex parte Ommaney*.

be allowed, for the future maintenance of the petitioner, from the 5th day of August last for the time to come, and out of what fund, and to whom during his minority the same ought to be paid.

**EX PARTE OMMANEY*.

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1841: 8th May.—Costs; Mortgagor and Mortgagee; Infant Heir.

The infant heir of a mortgagee in fee, having been found, by the Master, to be a trustee of the mortgaged estate, for the executor of the mortgagee, the executor petitioned that the infant might be ordered to convey the estate to the mortgagor, on payment of the principal and interest due on the mortgage, and costs. Held that the costs of the proceeding before the Master, must be paid by the mortgagor.

THIS was a petition presented, under 11 Geo. 4 and 1 Will. 4, c. 60, by the executor of a mortgagee in fee, praying that the infant heir of the mortgagee, (who had been found by the Master to be a trustee of the mortgaged estate for the executor,) might be ordered to convey the estate to the mortgagor, on payment of the principal and interest due on the mortgage, and of the costs of the proceeding before the Master. The mortgagor had offered to pay the principal and interest, on the estate being re-conveyed to him; and the only question was whether the costs of the proceeding before the Master, ought to be paid by the mortgagor, or out of the assets of the mortgagee.

Mr. *Dickinson*, for the petitioner, cited *Wetherell v. Collins*.(a)

Mr. *Lloyd*, for the mortgagor, who had been served with the petition, cited *Ex parte Richards*,(b) and *The Midland Counties Railway Company v. Wescomb*.(c)

The Vice-Chancellor said that the costs in question, were not costs of the conveyance, but were incurred in order to give the infant the capacity of re-conveying the mortgaged estate; and that he thought that they ought to be paid by the mortgagor.

(a) 3 Madd. 255.

(b) 1 Jac. & Walk. 264.

(c) 2 Railway Cases, 211.

1839.—*Arkell v. Fletcher.*

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"ARKELL v. FLETCHER.

1839; 13th November.—Will; Construction; Leaseholds.

Testator devised to trustees, all his messuages or tenements, farms, lands, hereditaments, and premises, with the appurtenances, situate in C. and W., and all other his freehold lands and tenements whatsoever; to hold all such his said real estate, with the appurtenances, to the trustees and the heirs, upon trust for the use of his wife for life, with limitations, after her decease, which were applicable to freeholds only. And he gave all his household goods, implements of husbandry, farming stock, moneys, securities for money, and all other his personal estate and effects whatsoever, to his wife, for her own sole use. The testator was seised, in fee, of freehold lands in C., W. and S., but there was no messuage or other building on any of those lands, except a wooden barn and stable on the land in S. He was also possessed of land in C. for a long term of years, on which there were a messuage, and farm buildings; and, at his death and for six years before, he occupied the freehold and leaseholds as one farm, but they did not adjoin each other. Held that the leaseholds did not pass, under the devise of all the testator's messuages or tenements, farms, &c., but under the bequest of the testator's personal estate.

In October, 1818, Richard Fletcher, deceased, the first husband of the plaintiff Phœbe Arkell, purchased of Joseph Price and took an assignment from him, of a messuage with the out buildings, barn, stables, yards and orchards thereto belonging, and of a piece of pasture land situate in the parish of Cowhoneyborne, in Gloucestershire, for the remainder of a term of four thousand eight hundred years, which commenced in 1719; and he continued in possession thereof until his decease: and, at the time of making his will and thenceforth until his decease, he was seised in fee of freehold estates in the same parish and in the parishes of Welford and Saintbury, in Gloucestershire. On the 17th of April, 1824, he made his will in the following words:

"I give, devise and bequeath, unto my cousin, Richard Fletcher, of Charringworth, and William Fletcher, of Stoke, and to my friend, William Cornell, of Mickleton, *all my messuages or tenements, farms, lands,*

[*300] *hereditaments and premises, with the appurtenances, situate, lying and being in the several parishes of Cowhoneyborne and Welford in the county of Gloucester, and all other my freehold lands and tenements whatsoever and wheresoever, to hold all such my said real estate and any part thereof, with the appurtenances, unto my said trustees, and the survivors and survivor of them and the heirs and assigns of such survivor for ever, upon the following trusts, viz., upon trust and to and for the use of my wife Phœbe and her assigns, for and during the term of her natural life, and from and immediately after her decease, then, upon trust and to and for the use of the eldest son of the body of my sister, Muriel, now the wife of Robert Fletcher, of Aston Magna, in the county of Worcester, and the heirs male of her body lawfully begotten, and for want and in default of such issue male of my said sister, Muriel, then I devise the said real estates, with the appurtenances, to and for the use of all and every the daughters and daughter of my said sister Muriel by her present or any future husband, to be equally divided between them as tenants in common and not as joint tenants; and, in default of all such issue as aforesaid, then I give and devise the same estates and*

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every part thereof to my right heirs for ever. Provided always and I do hereby charge all my said real estates with the payment of an annuity of 10*l.* to my old and faithful servant, Elizabeth Darke, to be paid to her quarterly, for and during the term of her natural life; and I also charge all my said real estates with the payment of 20*l.* each to my nieces, Elizabeth Muriel and Ann Susannah Fletcher, daughters of the said Robert Fletcher, to be paid and payable to them within twelve months after the decease of my said wife; which legacies I do hereby give and bequeath to my said nieces accordingly. I give and bequeath, to my said wife, *all my household goods, implements of husbandry, farming stock, moneys, securities for money, and all other my personal estate and effects whatsoever and wheresoever*, to and for her own sole use and benefit, subject nevertheless and I do hereby charge the same with the payment of all my just debts, funeral and testamentary expenses, and also with the following legacies. I give and bequeath the sum of 100*l.* to be by them, my said trustees, put and placed out at interest as they may think proper, and to and for the use and benefit of my said niece, Elizabeth, until she shall attain the age of twenty-one years; at which time I direct the same shall be paid to her, with the interest thereon; and I hereby give and bequeath the same to my said niece accordingly; and I do also charge my said estate with the payment of 100*l.* each to my said cousins, Richard and William Fletcher, and 50*l.* to the said William Cormell, to whom I bequeath the same accordingly, to be paid and retained by them, in twelve months after my decease, in consideration of their accepting the trusts of this my will:" and the testator appointed Richard Fletcher, William Fletcher and William Cormell joint executors of his will.

The testator died in 1824, leaving Richard Fletcher, the younger, the eldest son of his sister Muriel Fletcher, him surviving: and, on the 18th of November, 1824, his will was proved by Richard Fletcher the elder, William Fletcher and William Cormell.

In December, 1825, the plaintiff married the defendant Joseph Arkell: and by the settlement on her marriage, she assigned all her household goods plate, linen, china, implements of husbandry, farming stock, moneys, securities for money and all other her personal estates and effects to Richard Fletcher the elder, and William Cormell, in trust for her separate use. William Cormell afterwards died, and, thereupon, William Fletcher was appointed a trustee of the settlement in his place.

The bill, after stating as above, alleged that the plaintiff, being desirous of raising 1000*l.* upon the security of the leasehold premises in Cowhoneyborne, which one Izod was willing to advance to her upon such security, a proper mortgage deed was prepared for that purpose, to which Richard Fletcher the elder was made a party; but he declined to execute it, alleging, as did also Richard Fletcher the younger, that the leasehold premises did not pass, by the will, to the plaintiff absolutely; but that she took only a life interest therein under the devise of the real estate contained in the will; and that Richard

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Fletcher the younger, as the only son of Muriel Fletcher, was entitled to those premises in tail male or absolutely after the plaintiff's decease: but the plaintiff charged that, under the bequests contained in the will in her favor, she became absolutely entitled, on the testator's death, to the leasehold premises for the residue of the term of 4800 years, and that Richard Fletcher the younger had not any interest therein.

The bill prayed that the plaintiff might be declared to be absolutely entitled, for her separate use, under the will and the trusts of the settlement, to the leasehold premises, for the remainder of the term of 4800 years, and that Richard Fletcher, the elder, and William Fletcher might be directed to execute a mortgage of those premises, to Izod for securing the 1000*l*.

It appeared, by the answer of Richard Fletcher the elder, William [*303] Fletcher, and Richard Fletcher the "younger, which, it was agreed, should be read as evidence, and also by the admissions agreed upon between the parties, that the testator was, at the date of his will and at his death, seised in fee simple of certain pieces of freehold land, containing about fifteen acres, situate in the parish of Welford in the county of Gloucester: and also of certain pieces or parcels of freehold land containing thirty-nine acres, or thereabouts, situate in the parish of Cowhoneyborne: and also of certain pieces of freehold land containing twenty-eight acres, or thereabouts, situate in the parish of Saintbury in the same county: and that the before mentioned freehold lands were, at the date of his will and at the time of his death, totally devoid of any messuages or tenements, erections or buildings of any kind whatsoever, except a small barn, and stable built with boards, upon the land in the parish of Saintbury: and that the testator, at his death, was possessed of two pieces of land containing together 7*A.* 0*R.* 4*P.* or thereabouts, situate at Cowhoneyborne aforesaid which he purchased, in June, 1817, of John Halford, for the remainder of three several terms of 5000, 5000 and 2000 years: and also of the leasehold premises at Cowhoneyborne which the testator purchased of Joseph Price, in 1818, for the remainder of the term of 4800 years, as before mentioned; and that the last mentioned premises consisted of a messuage, tenement or farm house, with outbuildings, barn, stable, yard and orchards, and also of certain pieces of land thereto adjoining, containing fifteen acres or thereabouts, and of a cottage and garden: and that the before mentioned freehold and leasehold premises did not adjoin each other, but were, some years prior to the death of the testator, occupied together by him as one farm, and the same continued to be so occupied by him down to and at the time of his death, and that the same were always [*304] denominated "by him, in his lifetime, as his farm: that the testator was not, at the respective times of making his will and of his death, seised, possessed of or entitled to, nor had he any disposing power over any messuages, tenements or buildings except those before mentioned to have been purchased by him of Joseph Price: nor was he seised, possessed or entitled to, nor had he any disposing power over any farm, or any real or lease-

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hold property whatever, except the freehold and leasehold premises before mentioned.

Mr. *Jacob* and Mr. *Koe*, for the plaintiff:—The testator begins with devising all his messuages, lands, tenements and hereditaments. If he had stopped there, then, according to *Rose v. Bartlett*,^(a) his freehold estates only would have passed. He goes on, however, and says: “and all other my freehold lands and tenements whatsoever and wheresoever: to hold all such my said real estate, &c.” There are, therefore, stronger grounds, in this case, for holding that the leaseholds do not pass, than there were in *Rose v. Bartlett*. Besides it appears, from the answer and the admissions, that the testator had only one messuage and one farm; and, therefore, there is nothing to answer the words, “messuages and farms.” In fact, the words now under consideration, are words which testators generally use in devising their real estate. Moreover, the limitations in the will are applicable to freeholds only. *Whitaker v. Ambler*.^(b) Then, in a subsequent part of the will, the testator gives, to his wife, all his household goods, implements of husbandry, farming stock, moneys, securities for money, and all other his personal estate and effects whatsoever and wheresoever. It is observable *that this [*305] is not a gift of the residue of the testator's personal estate; but it comprises every article of a personal nature; and, therefore, there is no ground for saying that the testator had, in the prior part of his will, dispose of any part of his personal property.

Mr. *Anderdon* for Joseph Arkell, the plaintiff's husband.

Mr. *Knight Bruce* and Mr. *Rudall* for Richard Fletcher the elder, and William Fletcher and Mr. *W. R. Ellis*, for Richard Fletcher, the younger:—A devise of messuages, lands, &c., will pass leaseholds, if the court can collect an intention to pass them from other parts of the will, or from extrinsic circumstances. Now, the leaseholds were held for unusually long terms. They were occupied by the testator, together with the freeholds, as one farm: and the testator had no other farm; nor had he any messuage, except the leasehold one; nor any building upon any part of his freehold property, except the wooden barn and stable on the land at Saintbury. Can it be reasonably imputed to the testator, that he intended to split the farm; or to sever from it the farm house, barn, stables, &c., without which it could not be occupied as a farm? There is no incorrectness in the expression, “all other my freehold lands and tenements;” for freeholds are indisputably included in the first branch of the sentence, and the words, “real estate,” are not inapplicable to leasehold property; for a leasehold interest, is an interest in reality, though of a chattel nature. The long unity of possession of the leaseholds with the freeholds, is, of itself, sufficient to justify the court in holding that they were intended to pass together: in addition to which, it must be remembered that any other construction *would render the word “messua- [*306]

(a) Cro. Car. 292.

(b) 1 Eden, 151.

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ges" inoperative. *Lane v. Earl of Stanhope*,^(a) *Hobson v. Blackburn*,^(b) *Day v. Trig*,^(c) *Addis v. Clement*,^(d) *Doe v. Martin*,^(e) *Lowther v. Cavendish*.^(f)

It cannot be reasonably supposed that the testator intended to pass long and valuable terms for years, under the words: "household goods, implements of husbandry, farming stock, moneys and securities for money:" and by the words: "all other my personal estate and effects," he must be held to have meant things of the same nature as those which he had before mentioned, and not lands.

Mr. Jacob in reply:—This case goes much further than *Rose v. Bartlett*; for the question is not whether leaseholds pass under a devise of, "all my lands and tenements;" but whether they pass under a devise of, "all my freehold lands and tenements." In *Day v. Trig*, the testator devised all his freehold houses in Aldersgate street, having no freehold, but only leasehold houses there; and it was held that, the plain intention of the testator being to pass some houses, and he having no freehold houses in Aldersgate street, the word "freehold" should rather be rejected, than the will be inoperative; and, therefore, that the leaseholds should pass; but it was likewise said, that if there had been any freehold houses to satisfy the words of the will, the leasehold houses would not have passed. In *Lane v. Stanhope*, the testator devised all his manors, messuages, houses, farms, lands, woodlands, hereditaments, and real estate whatsoever; and not, as in the present case, all his messuages, &c., and all other his freehold lands, &c. Besides, the decision in that case has been disapproved of by Lord Eldon and other judges.^(g) In *Hobson v. Blackburn*, the decision turned on the words, "with their appurtenances;" and the leasehold parts of the houses in Ludgate hill and Ludgate street, were held to be appurtenant to the freehold parts. Here the argument rather is that leaseholds are not appurtenant to the freeholds, but that the freeholds are not appurtenant to the leaseholds. In *Doe v. Martin* also, the word "appurtenances" was used. In *Addis v. Clement*, the testator devised all his messuages, lands and tenements in a certain parish, which he then stood seised or possessed of or in any way interested in: and the Lord Chancellor held that the leaseholds passed, because the words possessed of or interested in were applicable to property of that nature: no such words, however, are found in this will. In *Lowther v. Cavendish*, Sir James Lowther made a devise of all his manors, messuages, lands and tenements; but those words were followed by "mines of coal, lead, &c.;" and, in a subsequent part of his will, the testator bequeathed all his goods, chattels and personal estate not otherwise disposed of: and Lord Keeper Henley held that leasehold mines passed under the first devise. But, in *Whitaker v. Ambler* the same learned Judge, on the case of *Lowther*

(a) 6 T. R. 345.

(b) 1 Myl. & Keen, 571.

(c) 1 P. W. 286.

(d) 2 P. W. 456.

(e) 2 Black. 1148.

(f) 1 Eden, 99.

(g) See *Thompson v. Lady Lawley*, 2 Bos. & Pull. 303.

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v. Cavendish being cited to him, said that if Sir James Lowther had devised all his personal estate whatsoever, to the residuary legatee, and had afterwards given all his lands, &c., he should have thought, even though he had used the words, "mines, collieries, &c.," that nothing "would" [*308] have passed except the freeholds. The words of the devise now in discussion, have no distinct meaning or effect, but are mere words of general description.

THE VICE-CHANCELLOR:—I have often had occasion to consider the effect of the decision in *Rose v. Bartlett*; and I have always understood that it amounts to this, namely, that if you find words which import a devise of lands simply, freehold lands only will pass; but, if those words are joined with others, then you must consider what effect ought to be given to the whole of the words taken collectively.

Here the testator had an estate in the parishes of Cowhoneyborne, Welford and Saintbury, consisting of eighty-two acres of freehold land: and, in 1817, he purchased seven acres in Cowhoneyborne of John Halford; and, in 1818, he purchased fifteen acres in the same parish with a messuage, barn, stables, &c., of Joseph Price. These two properties contained, together, twenty-two acres, and were held for long terms of years. Now there could not have been any very long unity of possession of the freeholds with the leaseholds; for I find, by the copy of the will which has been handed up to me, that it was proved on the 18th of November, 1824. It appears also that, on the twenty-eight acres in Saintbury, there was a barn and stable. That being the situation of the property, the question, so far as I have been able to collect it from the bill and the admissions, is whether there is, on the face of the will, a clear intention to give the freeholds and the leaseholds, collectively, as one farm. The words are: "all my messuages or tenements, farms, lands, hereditaments and premises, with the appurtenances, situate, lying and being in the several parishes of Cowhoneyborne and Welford, in the *county of Gloucester, and all other my freehold lands and tene- [*309] ments whatsoever and wheresoever." Now the first observation which strikes my mind, is that the gift in question, is a mere gift, in general terms of a most vague nature. If the word "messuages" were found alone, there might be some ground for saying that the words of the devise would not be satisfied without including the fifteen acres of leasehold land upon which the messuage stood: but the words are messuages or tenements, and not messuages only: and therefore they would be applicable to the barn and stable on the twenty-eight acres in Saintbury: for the testator does not mention any particular parish. Consequently, those words, taken in conjunction with the subsequent words, are, I think, mere vague words of general description. It is also observable that the testator uses the word "farms," in the plural number: but it has not been contended that he had more than one farm. Then he says: "and all other my freehold lands and tenements whatsoever and wheresoever; to hold all such my said real estate and any

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part thereof, with the appurtenances, unto my said trustees, and the survivors and survivor of them, and *the heirs and assigns* of such survivor for ever, upon the following trusts ;” and then he proceeds to declare uses which are applicable only to freehold estate. In my opinion, therefore, the fair construction of those general words : “all my messuages or tenements, farms, lands, hereditaments and premises,” is to make them applicable to freehold estates alone.

Then, having declared uses of his real estates, which exhaust the whole of his interest, he proceeds to say : “I give and bequeath to my wife all my household goods, implements of husbandry, farming stock, money, [310] *securities for money, and all other my personal estate and effects whatsoever and wheresoever, to and for her own sole use and benefit.” It is to be observed that the first use which the testator declared of his freehold estates, was for his wife and her assigns, during her natural life : and there is no incongruity in saying that his intention was to give his freehold estates in one way, and the rest of his property in another way.

My opinion, therefore, is that this will cannot be construed so as to give the freeholds and the leaseholds collectively ; but that the true construction of it is that the wife is entitled to the freehold estates for her life only, and that she takes the leasehold estates together with the household goods, implements of husbandry, &c. ; absolutely.(a)

[311] *THE ATTORNEY GENERAL v. NETHERCOTE.(b)

1839 : 6th November.—Evidence ; Depositions.

Depositions were suppressed for irregularity in the order under which they had been taken. The examiner, on the witnesses again going before him for examination under an order for that purpose, read over to them their depositions taken under the former order, and inquired whether they were correct ; and, on being answered in the affirmative, he caused them to be signed by the witnesses. The court suppressed the depositions as having been irregularly taken.

On the 11th of February, 1839, an order for enlarging publication, which the defendants had obtained in January, of the same year, was discharged for irregularity, on the application of the informant ; and, on the 21st of March following, the depositions of the defendant's witnesses, which had been taken under it, were suppressed. On the 27th of the same month, the court ordered that the defendants should be at liberty to examine witnesses, and that publication should be enlarged until the last day of Trinity Term.

The depositions taken under the last mentioned order, having been published, the informant now moved that they might be suppressed for irregularity.

In support of the motion, affidavits were made by a clerk to the informant's agents, and by one of the witnesses : from which it appeared that, upon the

(a) A case was afterwards directed to be sent for the opinion of the Court of Common Pleas ; but the parties subsequently acquiesced in the Vice-Chancellor's decision.

(b) *Ex relations.*

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witness going before the examiner, none of the interrogatories were read over to him, but his deposition taken under the order of January, 1839, was produced to him, and he was asked, by the examiner, whether it was not his deposition; and upon his answering in the affirmative, the examiner, altered the date of the deposition, and the witness went over his signature to it, with a dry pen.

A clerk to the defendant's agents deposed that he had applied, to the examiner, to learn the precise way in which the depositions had [*312] been taken under the order of March; and that the examiner had informed him that, in examining the witnesses, he had read over, to each witness, the interrogatories to which he was to depose, and which had been left under the last mentioned order, and that he had afterwards read over, to the witness, his answers to the same interrogatories taken under the order of January; and that he had, at the same time, asked the witness if he had anything to add to his deposition, and if the same was correct; and that, on receiving a reply in the affirmative, he had altered the date of the deposition, and had caused the witness to re-sign it; and that, if any alteration, became necessary, he had made such alteration, and then had the deposition re-signed; that the depositions of two of the witnesses were entirely new, and had been altogether re-written; and that the deposition of another of the witnesses, or the greater part of it, was new, and had to be re-written.

Mr. Knight Bruce, Mr. Jacob and Mr. Anderdon, for the motion, contended that the depositions had been irregularly taken, and that the passing a dry pen over the witness' name, did not amount to a signing of the new depositions. *Shaw v. Lindsey.*(a)

Mr. Wakefield and Mr. Coleridge, against the motion, submitted that, as there was a material discrepancy, in the statements contained in the affidavits, as to what had taken place in the examiner's office, the court, before deciding on the motion, ought to require a certificate from the examiner himself: that the manner in which the depositions were stated to have been taken, was "not the same as in *Shaw v. Lindsey*; the witness [*313] ses not having come to their examination with a ready written statement, which might be the dictation of others; but having simply, re-affirmed the answers which, a few weeks before, they had, themselves, in the usual manner, given to the same interrogatories.

The Vice-Chancellor said he thought that there was no necessity, in the present case, for requiring a certificate from the examiner; that, if it was irregular to take the witness' own ready prepared statement in writing, as a disposition, it was still more irregular to adopt depositions which the witnesses had made some months previously; [1] and that, the manner in

(a) 15 Ves. 380.

[1] So where an order had been made allowing depositions taken in an original cause, to be read in a cross cause, excepting that of a particular witness, who was, consequently examined in the cross cause. "But," Kent, Ch. says, "how was he examined? By copying his deposition in the

1839.—*Robertson v. The Great Western Railway Company.*

which the depositions had been taken being wholly repugnant to the principles of the court, an order for suppressing them, must be made with costs.(a)

[*314] **ROBERTSON v. THE GREAT WESTERN RAILWAY COMPANY.*

1839: 13th November.—Pleading; Parties; Specific Performance; Trespass.

A. agreed to sell, to B., a piece of land in the occupation of his tenant, and to buy up the tenant's interest. B. having entered on the land before payment of his purchase money, A. and his tenant served him with notices not to trespass: and, afterwards, A. filed a bill, against B, for a specific performance and to restrain the trespass. Held that the tenant was not a necessary party to the suit.

THE plaintiff had agreed to sell, to the defendants, a piece of land in the occupation of his tenant, and to buy up the tenant's interest. The defendants having entered on the land before payment of their purchase money, the plaintiff and his tenant served them with notices not to trespass on the land; and, afterwards, the plaintiff filed a bill, against the defendants, for a specific performance of the contract and to restrain the trespass. The defendants demurred, to the bill, because the tenant was not a party to it.

Mr. *Knight Bruce*, Mr. *Jacob* and Mr. *Stephens*, in support of the demurrer, said that the tenant was a necessary party; as one object of the bill was to restrain an act by which he was affected; and, therefore, he might file another bill against the defendants.

Mr. *Wigram* and Mr. *Keene*, in support of the bill, said that, as the tenant was not a party to the contract, it was unnecessary to make him a party to the suit. *Humphreys v. Hollis*:(b) *Taskar v. Small*.(c)

THE VICE-CHANCELLOR:—The subject is one, and the parties who have committed the injury are one and the same; but, the subject being one and the injury being one, it happens that two persons are affected by it;

[*315] and, *in my opinion, the court cannot very well administer justice in the case, without having before it both the persons who are affected by the act which is made the subject of complaint.

Demurrer allowed.

original cause. He went, therefore, before the examiner with a prepared deposition. This is against the course and policy of the court, and it would lead to the most dangerous practices. The witness ought to go before the examiner, as Lord Coke, observes, (4 Inst. 279) 'untaught and without instruction.' He should be free to answer the sifting interrogatories that are framed for the issue in that case, instead of merely filing an affidavit ready drawn. I should undoubtedly, be justified in totally suppressing the deposition of A. in the cross cause, if I was to follow the strict rule of authority." The deposition, however, was in this instance admitted; but as an indulgence, which the Chancellor says he hopes "will never be abused." *Underhill v. Van Cortlandt*, 2 Johns. Ch. Rep. 346.

(a) The defendants having intimated their intention of appealing from the above decision, it was arranged that the order should not be drawn up, but that the cause should be advanced and the depositions read; and an order to that effect was afterwards made.

(b) Jack. 73.

(c) 3 Myl. & Craig, 63.

1839.—*Laing v. Laing*.

In December, 1839, the above decision was reversed, by the Lord Chancellor: his Lordship being of opinion that none but the parties to the contract, were necessary parties to the suit.(a)[1]

LAING v. LAING.

1839: 15th November.—Will; Construction; Legacy.

Testator gave 5000*l.* stock to a female infant, to be paid or transferred to, or settled on her, by his executors, by such deed or instrument in writing, as they should think most prudent and proper, on her attaining twenty-one. The infant married in the testator's lifetime, and, afterwards, attained twenty-one. The court ordered the stock to be transferred to her, on her sole receipt.

THOMAS BLACK, by his will, dated the 17th of June, 1837, gave to the plaintiff Charlotte the wife of the defendant Henry Laing, then Charlotte Miller, spinster, 5000*l.* stock, to be paid or transferred to or settled upon her, by his trustees and executors, by such deed or instrument in writing, as they in their judgment, should think most prudent and proper upon her attaining the age of twenty-one.

The testator died in May, 1839. The plaintiff married Henry Laing in the testator's lifetime; and, in July, 1839, she attained twenty-one.

*The bill prayed that the plaintiff might be declared to be entitled [316] to have the 5000*l.* stock paid or transferred either to her and her husband, or to herself alone for her separate use, as the defendants, the trustees and executors of the will, should in their judgment, think most prudent and proper, or as the court should direct.

The trustees and executors, in their answer, said that they considered that it would be most prudent and proper that the stock should be settled upon such trusts that the plaintiff might be entitled to receive the dividends thereof for her life, to her separate use, and that, after her death, her husband might receive the dividends during his life, in case he should survive her, and upon trust, after the death of the survivor, as to the capital, for all the plaintiff's children, subject to a power of appointment, by her, among such children.

Mr. *Knight Bruce* and Mr. *Rolt*, for the plaintiff, cited *Burrell v. Crutchley*.(a)

Mr. *Jacob*, for the executors and trustees.

Mr. *Prior*, for the plaintiff's husband.

THE VICE-CHANCELLOR:—The settlement suggested by the trustees, is

(a) See *Seddon v. Connell*, ante, p. 84.

(b) 15 Ves. 544.

[1] To a bill for the performance of a contract of sale, in the usual form, the parties to the contract are the only proper parties. *Wood v. White*, 4 Myl. & Cr. 460, 483. And see *Glyn v. Saunders*, 3 Myl. & K. 450, 471.

 1839.—Butler v. Lowe.

not consistent with the words of the will. I see no reason why the fund should not be settled on the plaintiff for her separate use, or transferred to her, on her sole receipt, if she prefers it.

[*317] *Decree the fund to be transferred to the plaintiff, for her separate use, on her separate receipt; and the costs of the suit to be paid out of the testator's general residuary estate.

BUTLER v. LOWE.

1839; 15th November.—Will; Construction.

Testator gave legacies of 200*l.* to each of the children of his nephews and nieces begotten or to be begotten, and directed that the legacies should be paid to them at the usual periods. Held that the children of the nephews and nieces who were born after testator's death, were not entitled to participate in the legacies.

JOHN LOWE, by his will dated the 22d of July, 1835, gave all his freehold, copyhold and real estates, and all his personal estate, to the plaintiff, in trust, as to his personal estate, to convert into money such part thereof as should not consist of money, and to stand possessed thereof in trust, in the first place, to pay his debts and funeral and testamentary expenses, and to invest the remainder on the usual securities, and to stand possessed of the same in trust to pay certain annuities and legacies. The will then proceeded as follows:

"I give to each of the children of my nephew, William Lowe, the younger, son of my brother William Lowe, *begotten or to be begotten*, the sum of 200*l.*; to each of the children, *begotten or to be begotten*, of my nephew, Henry Lowe, another son of my said brother William Lowe, 200*l.*: to each of the children of Catharine Healey, 200*l.*: to Ann Parkes, sister of the said Catharine Healey, 200*l.*: to each of the children of my nephew Josiah Lowe, *begotten or to be begotten*, 200*l.*: to each of the children of William Murcott (except his son Jonathan Murcott) 200*l.*: to Charles Hopkins, of Dorlaston in the county of Stafford, 200*l.*: to each of the children of my niece, [*318] now the wife of Edwin *Abraham Butler, as well those by her former husband as by her present husband, *begotten or to be begotten*, 200*l.*: to each of the children of Sarah, formerly Sarah Lowe, now the wife of Richard Thompson, a daughter of my brother William Lowe, 200*l.*: and provided there be no child of the said Sarah Thompson living at my death, then I give, to the said Sarah Thompson, the sum of 500*l.* for her own separate use and benefit, and not to be subject, in any way, to the debts or engagements of her said husband. I also give, to John Parkes, son of the late Catharine Parkes, formerly of Birmingham, and brother of the said Catharine Healey, 200*l.*: also the like sum of 200*l.* to each of his children *begotten or to be begotten*; and I direct that the said legacies, which I have given to the children of my nephews, the said William Lowe the younger and Henry

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Lowe, and of the said Catharine Healey and of the said Josiah Lowe, and of the said William Murcott, and to Charles Hopkins, and to each of the children of my said niece, the wife of the said Edwin Abraham Butler, as well those by her former husband as her present husband, and to each of the children of the said Sarah formerly Sarah Lowe, the wife of the said Richard Thompson, and also to the children of the said John Parkes, shall be paid to them respectively, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain the age of twenty-one years, or marry under that age, with the consent of their parents or parent, guardians or guardian; and that all interest and dividends, with all accumulations on the said respective sums of 200*l.*, shall be added to and paid over as part of the said legacy itself; and, in the mean time and until such legacies shall be paid or applied, I direct that the same be laid out in the purchase of government or parliamentary stocks or *public funds, or upon real security in [*319] England or Wales, so that the same may accumulate. Provided always, and I do hereby declare my will to be that, in case any of the said children and the other persons to whom I have respectively given the sum of 200*l.* each, shall be under age at the time of the decease of their said parents, or shall have no parents living at the time of my decease, it shall and may be lawful to and for my said executors and the survivors and survivor of them, his executors or administrators, to pay and apply for and towards their maintenance, education and advancement in the world respectively, all or any part of the said sum of 200*l.* and of the interest and dividends thereon, to which such child or children or other persons respectively shall, for the time being, be entitled in expectancy under the trusts of this my will; and also to advance any part of the residue of my real and personal estate to such an amount, and at such time or times as my said executors, or the survivors or survivor of them, his executors or administrators shall, in their or his discretion, think right and most advantageous for the benefit of such child or children and the said other persons, any or either of them respectively, or out of the trust moneys, stocks, funds or securities to which such child or children or other persons respectively shall, for the time being, be entitled in expectancy, for and towards the advancement and placing out in the world, or establishment of any such child or children, or the said other persons respectively: and, in case there shall be, at any time or times, a suspense or vacancy of the person or persons for the time being entitled to a vested interest in the trust moneys, stocks, funds or securities under this my will, or to the interest, dividends and annual produce thereof, then and in such case and so often as the same shall happen, the interest, *dividends and annual [*320] produce of the said trust moneys, stocks, funds or securities respectively, or so much thereof respectively, as shall so, for the time being, be suspended from vesting and not applied for maintenance and education or advancement in the world as aforesaid, shall, during such suspension, be laid out and invested in the purchase of a competent share or competent shares

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of the public stocks or funds of Great Britain, or at interest upon government or real securities in England or Wales, so that the same may accumulate; and that the said last mentioned trust moneys, stocks, funds or securities, and the accumulations thereof respectively, shall belong to or be in trust for such person or persons as, under or by virtue of the trusts of this my will, shall become entitled to a vested interest in the trust moneys, stocks, funds and securities from the annual produce of which the said accumulations shall be respectively provided. And I do hereby give, subject to the payment of my debts, funeral and testamentary expenses, and the said two annuities, and the several legacies hereby given, all the rest and residue of my property, estate and effects whatsoever, and all the rents, profits and produce of my real and copyhold estates, and the moneys to be produced by sale thereof, unto and to be equally divided among *all and every the children* of my said nephew, William Lowe the younger, of my said nephew, Henry Lowe, of the said Catharine Healey, of the said Ann Parkes, to each of the children of my said nephew Josiah Lowe, of the said William Murcott (except his said son Jonathan,) the said Charles Hopkins, to each of the said children of my said niece, now the wife of the said Edwin Abraham Butler, as well those by her former husband as by her present husband, and to each of the children of the said Sarah Thompson, formerly Sarah Lowe, share and share alike, as tenants in common, **and to be paid and payable to them respectively, as and when they shall respectively attain the age of twenty-one, being sons, or, being daughters, when they shall attain that age or respective days of marriage under that age, with consent as aforesaid. Provided always, and I do hereby declare my will and mind to be that, in case any of the said persons to whom I hereby give the residue of my property, both real and personal, shall depart this life before their or any or either of their respective shares shall become payable (that is to say) before they respectively attain the age of twenty-one years or days of marriage under that age as aforesaid, and without having any lawful issue, then my will and mind is that the share of the person or persons so dying shall sink into and become part of the general residue of my estate and effects, always allowing whatever may have been advanced, under the power hereinbefore given, for the maintenance, education or advancement in the world of any of the said children hereinbefore mentioned, and to be divided equally among all and every of those that shall live and become entitled to the share.*" And the testator directed the plaintiffs, to sell his freehold and copyhold estates, and to stand possessed of the money arising therefrom upon the trusts thereinbefore declared; and until the same should be divided and paid over to the several persons thereinbefore directed, to invest the same in the usual securities, and to stand possessed of the same and the interest, dividends and annual produce thereof, in trust for the several persons and in manner therein mentioned.

The testator died in March, 1836. All the persons to whose children le-

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gacies of 200*l.* each, were given by the will, were still alive; and all of them, except Sarah Thompson, had children living at the testator's death; and some of them had children born afterwards. Some of the children born in the testator's lifetime, had attained twenty-one. [*322]

Doubts having arisen as to whether the children born and to be born after the testator's death, were entitled to legacies of 200*l.* the bill was filed, by the executors and trustees, praying that the trusts of the will might be carried into execution under the decree of the court, and that the persons entitled, according to the true construction of the will, to receive legacies of 200*l.* each, might be ascertained and declared.

Mr. *Spencer* and Mr. *Anderdon* for the plaintiffs.

Mr. *Knight Bruce* and Mr. *Campbell*, for the children of the persons named in the will, who were born before the testator's death:—The question is whether a bequest to the children of A. begotten or to be begotten, includes children born after the testator's death. In *Storrs v. Benbow*,^(a) the testator directed his executors to pay, out of his personal estate, the sum of 500*l.* a piece to each child that might be born to either of the children of either of his brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship: and it was held that a child born after the testator's death, was not included in the bequest. The present case is stronger than that; for there is an express direction, in this will, under which the residue is to be distributed as soon as the eldest of the children attains twenty-one. But it cannot be distributed at that period, if children born after the testator's death, [*323] are to take. The gifts of the legacies and of the residue are in words which are, as nearly as possible, similar to each other: consequently, the same effect must be given to both those gifts. If the after born children are held to be entitled, the consequence will be that the residue will be locked up until all the persons to whose children legacies are given, are dead. In *Def. v. Goldschmidt*,^(b) which probably will be cited by the counsel for the after born children, the testator gave, to all the children of his sister, whether then born or thereafter to be born, the sum of 200*l.* each payable at twenty-one; and directed that, until the shares of the said children should become payable, the interest thereof should be paid to his sister: and he requested his executors, as soon as might be after his decease, to set apart a sufficient fund for paying the legacies to his sister's children, as they became due, and in order that his sister might receive the interest thereof in the meantime: and, in case his sister should die before all her sons attained twenty-one, and before all her daughters attained that age or married, then he directed that the interest of the legacies provided for them, should be applied for their education and maintenance. It was in consequence of this last clause that Sir W. Grant, Master of the Rolls, held that the after born children were entitled to

(a) 2 Myl. & Keen, 46.

(b) 1 Mer. 417.

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legacies; as it showed that the testator conceived his sister could not die leaving any child that would not be provided for by him. In *Scott v. The Earl of Scarborough*,^(a) the testator directed his trustees to accumulate the rents and interest of his real and personal estates for twenty years after his death, and then to stand possessed of the accumulated fund, in trust for all [*324] and every the "children and child of three of his children whom he named, then born or *who should thereafter be born during the lifetime of their respective parents* : and it was in consequence of those last words, which, are not found in this will, that the present Master of the Rolls held that children born after the end of the term of twenty years, were entitled to share in the fund.

Mr. Jacob and Mr. Wood, for the children born after the testator's death, relied on *Blam v. Blam*,^(b) and *Defflis v. Goldschmidt*, as precisely in point. They cited also *Sprackling v. Ranier*.^(c) The decision in *Storrs v. Benbow*, is rather a strong one. The Master of the Rolls said that, in that case, there was an immediate gift at the death of the testator : but here there is no gift which confers a vested interest immediately upon the death of the testator. In *Scott v. Lord Scarborough* all the cases on the subject are collected; and all of them except three, are cases of residuary bequests. In this case the testator has used two modes of expression : one is, "children begotten or to be begotten," and the other, "children" simply, as in the gift to the children of Catherine Healey and Sarah Thompson. The fair inference, therefore, is that, when he used the latter expression, he meant to exclude after born children : for the court cannot hold that the word, "children," standing by itself, means the same as "children to be begotten ;" for, in that case, it would, in effect, strike the words, "to be begotten," out of the will.

THE VICE-CHANCELLOR :—The principle upon which the courts [*325] both of law and equity, act in construing wills, is to give the preference to that construction which is in favor of the vesting of the gift. Thus a devise to A. and his children, if he has no children at the death of the testator, has been held to give him an estate tail : *Wild's case* ^(d) but if he has children living at the testator's death, then it has been held that he and his children take as joint tenants. So, if there is a bequest to the children of A., begotten and to be begotten, it has been generally held that the words, "to be begotten," show only that the testator contemplated children to be born after the date of his will, and before his death.

The only question then is, whether there is anything in this will, which prevents the general rule from applying. With respect to the gifts to the children of Catherine Healey and Sarah Thompson, I have to observe that we do not know what were the ages or other circumstances of those individuals at the time when the will was made. Perhaps they might have been

^(a) 1 Beavan, 154.^(b) Ante, vol. 3, p. 492.^(c) 1 Dick. 344.^(d) 6 Rep. 16.

 1841.—*Jackson v. Cassidy.*

such as to induce the testator to think that neither of those ladies would have children after the date of his will.

When I first looked at the will, I thought that there might be something in the clause which provides for the maintenance of the legatees, which might prevent the general rule from applying: but, on further consideration, I am of opinion that it is quite as applicable to the case of children living at the death of the testator as to any other case. I do not, therefore, see anything in the language of this will, which prevents the general rule from applying.

*JACKSON v. CASSIDY.

[*326]

1841; 8th May and 15th June.—Practice; Affidavits; Injunction.

Special injunction dissolved with costs, office copies of the affidavits in support of it, not having been obtained, when it was moved for.

MOTION, by the defendant, to discharge a special injunction obtained, by the plaintiff, on the 27th of March last, on the ground that the affidavits on which the injunction had been obtained, were not filed, or, at all events, that office copies of them were not procured at the time when the injunction was applied for.

The Vice-Chancellor ordered the motion to stand over, in order that the precise time at which the affidavits were filed, and the office copies delivered, might be ascertained from the clerk of the affidavit office.

15th June.—It did not distinctly appear from the statement made by the clerk of the affidavit office, whether the affidavits were filed at the time when the injunction was moved for; but it clearly appeared that office copies of them were not obtained till after that time: and, on that account,

The Vice-Chancellor dissolved the injunction, with costs.(a)

Mr. *Wigram* and Mr. *Hetherington*, for the defendant.

Mr. *Knight Bruce* and Mr. *Goodeve*, for the plaintiff.

(a) See Beam. Ord. 56, 57.

CASES IN CHANCERY

BEFORE

THE VICE-CHANCELLOR.

JONES v. GOODRICH.

1839; 14th, 21st and 22d November.—Receiver.

Pending a contest between the plaintiff and defendant in the Ecclesiastical Court, as to the validity of two wills made by the testatrix, the plaintiff filed a bill for a receiver of the testatrix's estate, and to set aside an assignment made by her to the defendant. The court declined to appoint a receiver of the property comprised in the assignment, that property being claimed by the defendant, independently of either will.

THE plaintiff was the executor and residuary legatee under a will made by Harriett Lloyd, the testatrix in the cause. The defendant was the executor and residuary legatee under a subsequent will of the same testatrix. The object of the bill was to have a receiver appointed of the testatrix's personal estate including certain leasehold houses, pending a contest between the parties in the Ecclesiastical Court, as to the validity of the two wills; and also to set aside an assignment of the houses which the testatrix had made to the defendant, on the ground that the defendant had obtained it by the exercise of undue influence over the testatrix's mind.

Mr. *Knight Bruce*, and Mr. *James Russell*, for the plaintiff, now moved for the receiver. They relied upon *Edmunds v. Bird*.(a)

[*328] "The motion was opposed by Mr. *Wigram* and Mr. *Bethell* for the defendant. They cited *Dent v. Bennett*.(b)

The Vice-Chancellor granted the motion.[1]

The Lord Chancellor afterwards discharged his Honor's order, so far as it

(a) 1 V. & B. 542.

(b) Ante, vol. 7, p. 539.

[1] "Two rules may, I believe, be stated with perfect safety. First: where probate or administration has been granted, a receiver will not be appointed pending litigation in the Ecclesiastical Courts, to recall probate, unless a special case be made for doing so. Secondly: where no probate or administration has been granted, it is of course to appoint a receiver pending a *bona fide* litigation in the Ecclesiastical Courts to determine the right of probate or administration, unless a special case can be made for not doing so." *Wigram, V. C., Rendall v. Rendall*, 1 Harv. 154. See further as to the appointment of a receiver pending a litigation relative to the probate of a will, *Merr v. Littlewood*, 2 Myl. & Cr. 454, 458, n. 1.

1839.—*Bentley v. Foster.*

related to the rents and profits of the leasehold houses, on the ground that the defendant claimed those houses adversely to both the wills. His Lordship declined to follow the order made in *Edmonds v. Bird*, and relied upon the following passages in Lord Hardwicke's judgment in *Wills v. Rich.*(a)

"If both parties in this case, had not brought their bills and submitted the matters in dispute to Chancery, I should have been inclined to have left the whole to the discretion of the spiritual court, who, in cases of controverted wills, appoint an administrator, *pendente lite*, to take care of the estate.

"Where a person, let him be heir at law, or next of kin, or any other man whatever, keeps possession of the testator's real or leasehold estate, such an administrator is entitled to bring ejectments for the recovery of the possession; indeed, this did admit of a doubt in courts of law for a considerable time, but is now fully settled, ever since the case of *Walker v. Woollaston*, in the Court of King's Bench."^(b)

*BENTLEY v. FOSTER.

[*329]

1839 : 18th and 19th November.—Copyright; Alien.

If an alien resident abroad, composes a work there, but publishes it first in this country, he is entitled to the protection of the laws of this country relating to copyright: *semble*.

MOTION to dissolve an injunction restraining the defendant from pirating a work the copyright of which the plaintiff, in July, 1833, purchased of the author, who was a citizen of the United States of America and was domiciled and resident there.

Mr. *Wigram* and Mr. *K. Parker*, in support of the motion, referred to the acts of Parliament by which copyright in books was vested in and secured to the authors; (c) and also to the acts of Parliament, (which, they said were *in pari materia*) by which the copyright in prints, engravings and other works of art, was vested in and secured to the inventors; (d) and they contended, from the language of those acts, that no works were protected thereby, except such as were *composed* or *invented*, as well as printed and published in this country; and consequently, that the author of the work in question, being an alien resident abroad, and having written the work there, could have no property in it, and, therefore, could assign none to the plaintiff: that, if international copyright existed under the before mentioned acts, the 1st and 2d Vict. c. 59, (for securing to authors, in certain cases, the benefit of international copyright,) was unnecessary.

"The following cases were cited in support of the motion; *Delon*—[*330].

(a) 2 Atk. 285.

(b) 2 P. W. 576.

(c) 8 Anne, c. 19; 12 Geo. 2, c. 36; 41 Geo. 3, c. 107; 54 Geo. 3, c. 156.

(d) 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; 17 Geo. 3, c. 57; 34 Geo. 3, c. 23; 38 Geo. 3, c. 71; 54 Geo. 3, c. 56.

1839.—*Livesey v. Livesey*.

dra v. Shaw; (a) *Page v. Townshend*; (b) *Clementi v. Walker*; (c) *D'Almaine v. Boosey*. (d)

Mr. Knight Bruce, Mr. Jacob and Mr. Adams, for the plaintiff, said that there was nothing, in the acts of Parliament relating to the copyright, which prevented an alien friend from having the benefit of them, wherever his work was composed, provided it was first published in this country.

The Vice-Chancellor said that, in his opinion, protection was given, by the law of copyright, to a work first published in this country, whether it was written abroad by a foreigner or not; that, if an alien friend wrote a book, whether abroad or in this country, and gave the British public, the advantage of his industry and knowledge, by his first publishing the work here, he was entitled to the protection of the laws relating to copyright in this country; but, as the question which had been discussed, was a legal one, he should direct the plaintiff to bring an action within three weeks, for the purpose of trying his right, and should continue the injunction in the mean time. (a) [1]

[331]

LIVESEY v. LIVESEY.

1839; 20th November.—Exception.

Where an exception to a report not only states that the Master ought not to have reported as he has done, but suggests what he ought to have found; the court, if it allows the exception and refers it back to the Master to review his report, intends not to adopt the conclusion suggested, but that the whole subject of the reference shall be reconsidered, by the Master, either upon the old evidence, or upon that and any other evidence which may be brought before him.

In this case, the Vice-Chancellor ruled that, where an exception to the Master's report not only states that the Master ought not to have reported as he has done, but suggests what he ought to have found, the court, if it allows the exception and refers it back to the Master to review his report, does not adopt the conclusion which the exception suggests that the Master ought to have come to; but intends that the whole subject of the reference shall be reconsidered, by the Master, either upon the old evidence alone, or upon that and any other evidence which the parties may think proper to bring before him. [2]

(a) Ante, vol. 2, p. 237

(b) Ante, vol. 5. 395.

(c) 2 Barn. & Cress. 661.

(d) 1 Youn. & Col. 288.

(e) An action was accordingly commenced, but the defendant consented to a verdict being taken against him.

[1] As to literary piracy, and the jurisdiction of the court in such cases, see *Barfield v. Nicholson*, 2 Sim. & Stu. 1, 7, n. 1; 10, n. 1.

[2] In a reference to a Master for any purpose, the order need not particularly empower him to take testimony, if the subject matter is only to be ascertained by evidence; and in taking evidence, although the better plan is to take the answers in writing, upon written interrogatories, he may examine witnesses *vis à voce*, the parties to the suit being present, personally, or by counsel, and not objecting to such a course. *Story v. Livingston*, 13 Peters, 359; et vide 3 Myl. & Cr. 649, n. 1.

1839.—*Beadles v. Burch.*

Mr. Knight Bruce, Mr. Jacob, Mr. Bethell, Mr. Anderdon and Mr. Greene were counsel in the case. The cases of *Twysford v. Trail*,^(a) and *Church v. King*,^(b) were referred to in the course of the argument.

*BEADLES v. BURCH.

[*332]

1839; 20th, 22d, 23d, and 27th November.—Parties; Solicitor; Fraud; Administrator.

A solicitor who has joined with his client in practising a fraud, may be made a co-defendant to a suit to set aside the transaction.

A. died intestate, having *bona notabilia* in two dioceses; and B. took out a prerogative administration to him. One of A.'s next of kin afterwards died intestate, and C. took out administration to him, in the diocese of P. Held, on demurrer, that a bill, by C. against B., relating to A.'s estate, was sustainable; as it did not appear that B. was not residing within the diocese of P.

THE defendant Burch having possessed himself of the personal estate of Knightley Adams, late of Paddington in Middlesex, deceased, under a pretended will, some of the next of kin instituted proceedings against him, in the Court of Chancery, for the purpose of securing the deceased's property, and also in the Prerogative Court of the Archbishop of Canterbury, for the purpose of setting aside the pretended will. The Court of Chancery appointed a receiver of the estate, and the Prerogative Court adjudged the will to be fraudulent, and that Knightley Adams had died intestate; and it appointed Lydia Coleman, the wife of the defendant T. Coleman, one of the next of kin, administratrix to the deceased.

An agreement for compromising the above mentioned suits was afterwards made between the next of kin and Burch; one of the terms of which was that the draft of it should be settled by counsel on behalf of all parties, and as so settled, should be finally approved of and adopted by them. The draft was settled accordingly; but, pending a discussion which afterwards took place, between the parties and their solicitors, relative to the particulars and value of the intestate's property as stated in the draft, a fraudulent scheme, as the bill alleged, was resorted to by Burch and his solicitors, in collusion together and in collusion with T. Coleman and Lydia his wife and their solicitors, for procuring the agreement to be completed on terms more favorable to Burch than those contained in the draft settled by *coun- [*333] sel, by relieving Burch from a portion of the costs, charges and expenses which, according to the draft, he was to pay: and, in order to carry such scheme into effect, Messrs. James & Sons, Burch's solicitors, without any communication to the plaintiffs (who were two of the surviving next of kin, and the administrator of one of the deceased next of kin of the intestate) caused the draft to be altered in certain material respects, and an engrossment made by them therefrom, to be executed on the 17th of May, 1838, by the

(a) 3 Myl. & Cr. 645.

(b) 2 Myl. & Cr. 220. [230, n. 1.]

1839.—*Beadles v. Burch.*

plaintiffs and the other parties to the agreement. The bill then set forth the deed of compromise, as executed by the parties, and pointed out in what respects it differed from the draft settled by counsel; and it alleged that the plaintiffs were prevailed on to execute the deed so improperly and fraudulently altered, upon the faith of assurances, made to them, that the engrossment corresponded with the draft settled by counsel, and in ignorance that any alteration had been made therein: that Sarah Robinson, one of the intestate's next of kin and one of the parties to the deed of compromise, died on the 5th of July, 1839, and *letters of administration of all and singular her goods and chattels were granted, by the Consistory Court of Peterborough, to the plaintiff William Robinson, her husband; and he thereby became her legal personal representative.* The bill charged that, although Messrs. James & Sons and the solicitors of T. Coleman and Lydia his wife, acted only as solicitors in respect of the matters mentioned in the bill, yet the plaintiffs were entitled to sue them in respect thereof, and to have a discovery, from them, of the means by which, and of the circumstances under which the before mentioned alterations were inserted in the deed of compromise; and to charge them, personally, with the costs of the suit; and, the more [*334] especially, as Coleman and wife and *Burch pretended that they left the entire management of the aforesaid matters to their solicitors respectively, and, consequently, they could not personally make any answer or give any discovery in respect thereof. The bill prayed that the alterations made in the deed of compromise, might be declared to be fraudulent and void; and that the deed might be rectified and made conformable to the draft settled and approved of as aforesaid; and that the compromise might be carried into effect on the footing of and as provided by the draft; and that the defendants Burch, Coleman and wife and their solicitors might be decreed to pay the costs of the suit, and the costs of rectifying the deed of compromise.

Messrs. James & Sons and Burch, separately demurred, to the bill, for want of equity and because the legal personal representative of Sarah Robinson, was not made a party to the suit.

Mr. Wakefield and Mr. Koe, in support of the first cause of demurrer, said that Messrs. James & Sons were not personally interested in procuring the deed of compromise to be executed by the plaintiffs, but acted merely as agents in the business; and that a bill to obtain discovery and payment of costs could not be sustained against an agent; Mitf. Treat. 3d. edit. p. 152. *Bennet v. Vade*, (a) *Le Texier v. The Margravine of Anspach*, (b) *Fenton v. Hughes*. (c)

In support of the second cause of demurrer, they said that it appeared, by the recitals in the deed of compromise, that the intestate died possessed of *bona notabilia* *in Middlesex and Hampshire, and that a great portion, if not the whole of his property remained *in specie* and

(a) 2 Atk. 324; see 328.

(b) 15 Ves. 159.

(c) 7 Ves. 287.

1839.—*Beadles v. Burch.*

unadministered; that there was no suggestion, in the bill, that he left any debts; that, as administration to his effects had been granted to Lydia Coleman by the Prerogative Court, his estate must have been administered in that court, if the Court of Chancery had not interfered; that the person to whom letters of administration were granted by a Consistory Court, was not thereby constituted the personal representative of the deceased, except within the diocese; and, consequently, the plaintiff Robinson could not cite Lydia Coleman to exhibit an inventory of the intestate's effects, or take any other proceedings against her in the Prerogative Court. *Hilliard v. Cox*, (a) *Young v. Elworthy*, (b) *Newman v. Hodgson*, (c) *Thomas v. Davies*, (d) *Challnor v. Murhall*, (e) *Scarth v. The Bishop of London*. (f)

Mr. Knight Bruce, Mr. Girdlestone, and Mr. R. W. E. Foster, in support of the bill:—The argument in support of the demurrer, has confounded the case of the personal representative of an original intestate, with the case of the personal representative of one of his next of kin.

There is a total absence of any statement, in the bill, that Mrs. Robinson had *bona notabilia* out of the diocese of Peterborough: and it cannot be fairly inferred that the deed of compromise created *bona notabilia* out of that diocese; for there may be nothing to be received, by the [*336] next of kin, under that deed. The whole of the intestate's property may be exhausted in paying his debts. The allegation as to the representation, which must be taken to be true, is that letters of administration of all and singular the goods and chattels of Sarah Robinson, were, on the 5th day of July, 1839, granted, by the Consistory Court of the Bishop of Peterborough, unto the plaintiff William Robinson; and that he thereby became and is now the sole, legal personal representative of the said Sarah, his late wife. That allegation, according to all fair intendment, must be taken to mean the legal personal representative of his late wife for the purposes of the suit. It is one thing to require a prerogative administration to be taken out before the money which is the subject of the suit, is paid out of court; and another thing to say that the suit shall not go on until a prerogative administration has been taken out. That distinction was taken, by the present Master of the Rolls, in *Metcalfe v. Metcalfe*. (g) His Lordship says: "It does not appear to me that this demurrer can be sustained. It is very true that a prerogative probate or administration must be obtained before money can be paid out of court: and, in *Young v. Elworthy*, Sir John Leach was of opinion that it was necessary to produce a prerogative probate before the decree could be drawn up: but no case has ever gone to the extent that a party cannot commence a suit without a prerogative administration, or that, if he does so, the suit may be stopped by demurrer. Whether the intestates, to whose estates the plaintiff has taken out administration, had any goods out of the province of York, does not appear upon these proceedings.

(a) 1 Lord Raym. 582; and 2 Salk. 746.

(b) 1 Myl. & Keen, 215.

(c) 7 Ves. 409.

(d) 12 Ves. 417.

(e) 6 Ves. 118.

(f) 1 Haggard's Eccles. Rep. 625.

(g) 1 Keen, 74.

1839.—*Beadles v. Burch.*

[*337] The plaintiff has obtained such *administration as constitutes him the legal personal representative of each of the deceased parties; and, though it may become necessary, in the progress of the suit, that the plaintiff should obtain a prerogative administration out of the Court of the Archbishop of Canterbury, that does not appear to me to be a sufficient reason for saying that this suit should not be permitted to proceed; for the defendants will have the opportunity of raising the objection by their answer."

There is no case in which the court has adjudicated that an agent charged with having been personally guilty of a fraud, cannot be made a party to a suit against his principal. Moreover, in this case, distinct and substantive relief is prayed against Messrs. James & Sons. We ask that they may pay, not only the costs of the suit, but also the costs of rectifying the deed of compromise, which is distinct and substantive relief: and it never has been decided that a plaintiff cannot make an agent a party to a suit, for the purpose of having specific relief against him in respect of the part which he has taken in the transaction which forms the subject matter of the suit. *Mittf. Treat.* 4th edition, 162. *Buckley v. Dunbar*, (a) *Bowles v. Stewart*, (b)

27th November.—THE VICE-CHANCELLOR:—In this case I have read through the whole of the bill, and am of opinion that it states such a case as requires an answer.

It was said that it was improper to file the bill against Messrs. James & Sons: but there can be no doubt of the propriety of filing such a bill, if what [*338] is stated, *by Lord Redesdale, in the 2d edition of his work on pleading, and repeated, word for word, in the fourth edition, is correct. There his Lordship states in the most explicit language that: "Where bills have been filed to impeach deeds on the ground of fraud, attorneys who have prepared the deeds, and other persons concerned in obtaining them, have been frequently made defendants, as parties to the fraud complained of, for the purpose of obtaining a full discovery; and no case appears, in the books, of a demurrer by such a party, because he had no claim of interest in the matter in question by the bill." This is stated, by Lord Redesdale, without any authority. Then he goes on in the next sentence: "Indeed an attorney, under such circumstances, being brought as a party to the suit to a hearing, has been ordered to pay costs, apparently on the same ground as costs were awarded against arbitrators in the cases of their misconduct before noticed." For this his Lordship does give an authority, but with a wrong reference.(c) In the 4th edition, published by Mr. Jeremy, the sentence is preserved as it stood in the 2d edition. I cannot suppose that a person of his Lordship's experience, would have stated in his book, that attorneys had been made parties to such bills, if there could be any doubt that such had been the case. In the case of *La Texier v. The Margravine of Anspach*, the opinion of Lord Eldon

(a) 1 Anst. 37.

(b) 1 Scho. & Lef. 209.

(c) The authority cited is 2 Atk. 234, instead of 324. See *Treat. on Plead.* 3d edit. 153; 4th edit. 169.

1839.—*Beadles v. Burch.*

is thus expressed: "Where an attorney or other agent is so involved in the fraud charged by the bill, that though a re-conveyance or other relief cannot be prayed against him, a court of equity will, rather than that the plaintiff shall not have his costs, order that agent to pay them; if he is made a *party, the plaintiff must pray that he may pay the costs; other- [*339] wise a demurrer will lie." From this passage in Lord Eldon's judgment, it is clear that his Lordship took it for granted that the practice was as Lord Redesdale had laid it down. In *Bowles v. Stewart*, Lord Redesdale himself acted on what he had stated in the second edition of his work; for there he says: "as to Mr. Bowles' solicitor, he was acting for his client; but his duty as a solicitor did not bind him to assist his client in an act of injustice. I am sorry a man who has had so ample a testimonial to his character, should have been led into such a mistake; but his zeal for his client has led him too far: he has properly been made a party. He was an acting party in the transaction, and properly brought to a hearing, and ought to be chargeable with the costs, so far as they relate to the release, in case they cannot be recovered from Richard Bowles." So that here is a judicial recognition of the doctrine stated by Lord Redesdale in his treatise on pleading.[1]

I wish it to be understood that I am now merely proceeding upon the footing of the statements contained in the bill, and desire that Messrs. James & Sons will not suppose I have the last suspicion of the purity of their intentions in acting as they have done. I have known them too long to suppose that they would be guilty of any impropriety of conduct. But, from what is stated in the bill, I think that they have been properly made parties, and that what is prayed against them is properly prayed.

The point raised by the second demurrer, is more important. It seems to me to be an astonishing proposition that, in no case, is a person who has obtained a *diocesan probate or administration, capable of being [*340] a plaintiff in equity. I always thought it was a rule that such a party could bring an action in any of the courts in Westminster Hall; and, if he may bring any action, of course, equity, which follows the law, would permit him to file a bill. The case of *Hilliard v. Cox*, clearly proves that a diocesan administrator can support an action at law. There a special plea was put in, not on the ground that a diocesan administrator could not sup-

[1] A defendant who has improperly interfered with a party's right so as to make a suit necessary, may be compelled to answer the whole bill, with a view to charge him with costs, notwithstanding a disclaimer. *Hutchinson v. Reed*, 1 Hoff. Ch. Rep. 317. A person having a claim against a testator's estate, prevailed on the executors to hand over to him part of the testator's assets under circumstances from which he must have known that in so doing the executors were acting hastily, improvidently, and against their duty as executors: it was held, that such person was a proper party to a suit instituted by a legatee against the executors for the administration of the estate, although the bill contained no charge of collusion or insolvency. *Cannett v. Bell*, 1 Yo. & Coll. C. C. 569. And see *Graham v. Coape*, 3 Myl. & C. 638, 644, n. 1. *Reed v. Warner*, 5 Faigo, 650.

 1839.—*Morris v. Morgan.*

port the action, but because the letters of administration ought to have been taken out in another diocese: and, if, in the present case, it had appeared, on the face of the pleadings, that there could not properly have been an administration from the Consistory Court of Peterborough, that would have been a good ground of demurrer.

But the case stands differently. Here, Knightley Adams had died intestate; and, after some contest, a prerogative administration to his effects, was granted to Lydia Coleman. Sarah Robinson was one of the next of kin of the intestate; and the right which she had was a right to sue the administratrix for her portion of the clear residue, after all the property had been turned into money and the debts and funeral expenses of the intestate satisfied. It is of no importance that the first intestate was possessed of property in different dioceses: as the right of his next of kin was not to the specific chattels of which he died possessed; but to the clear surplus of the proceeds of his personal estate, after payment of all demands upon it. Now there is nothing, on the face of the bill, to show that Lydia Coleman was not residing in the diocese of Peterborough; and, therefore, my opinion, on this part of the case, is that it may very well be that the diocesan administration *which was granted, to T. Robinson the husband of Sarah Robinson, was properly granted. Consequently that ground of demurrer fails: and, in my opinion, it must be altogether overruled with costs.[1]

MORRIS v. MORGAN.

1839; 23d and 25th November.—Demurrer; Commission to examine witnesses abroad. If a demurrer to a bill praying relief and a commission to examine witnesses abroad, is good as to the relief, it is good as to the commission.

THE plaintiff was the surviving partner and the personal representative of his deceased co-partner, in a mercantile house in the Island of Java; and, the house having stopped payment, the creditors, in March, 1839, entered into an agreement or arrangement, by which they authorized and directed the plaintiff to proceed to England, to get in the debts which were due to the firm from various persons there, and to remit the amount to Java, in order that the same might be divided rateably amongst the creditors. The plaintiff accordingly proceeded to England; and, shortly after his arrival, the defendant, who resided in Java and was one of the parties to the agreement or arrangement, caused an action to be brought against the plaintiff, in the Court of Queen's Bench, for the recovery of the debt due to him. The bill was, thereupon, filed, praying that it might be declared that the agreement was binding on the defendant, and that the commencement and prose-

[1] *Vide Jones v. Howells*, 2 Hare, 342.

1839.—*Morris v. Morgan.*

cution of the action was inconsistent therewith and a fraud upon the plaintiff and the other creditors of the firm; and that the defendant might be enjoined from carrying on or prosecuting any proceedings in violation thereof; and that, in the meantime, the defendant might be restrained from all further proceedings in the action, and from commencing or prosecuting any other proceeding at law touching the matters contained in the bill; [*342] and, if necessary, that the plaintiff might be at liberty to sue out one or more commissions for the examination of witnesses in Batavia and elsewhere, as there might be occasion, touching such matters. The defendant demurred to the bill, for want of equity and because all the parties to the agreement of March, 1839, ought to have been made parties to the suit.

Mr. *Jacob* and Mr. *Tennant* supported the demurrer for want of equity, on the following grounds: first, that there was no consideration for the agreement; and, secondly, if there was, that it was not one of the terms of the agreement that the defendant, or any of the other parties to it, should abstain from suing the plaintiff; that the bill was not for a discovery and a commission to examine witnesses abroad in aid of the plaintiff's defence to the action: but for equitable relief and for a commission to examine witnesses abroad in aid of the plaintiff's title to that relief; and, consequently, if the plaintiff was not entitled to the relief, he was not entitled to the commission, which was incident to the relief.

Mr. *Knight Bruce* and Mr. *Walker*, in support of the bill, said that it was not necessary that any consideration for the agreement should flow from the debtor: that it was entered into, by all the creditors, for their mutual benefit; and the signature of one, was a consideration for the signature of every other creditor; that the object of the agreement was to obtain an equal distribution, of the debts to be got in, amongst all the creditors; and, therefore, it was contrary to the spirit of the agreement that one of the creditors should sue the plaintiff: that a commission to examine witnesses [*343] abroad, was relief: and that it was sought, by the bill, to obtain evidence in support, not only of the equitable relief, but of the plaintiff's defence to the action; and, therefore, the demurrer, which extended to the commission, covered too much. *Thorpe v. Macauley*.^(a) *The Earl of Suffolk v. Green*,^(b) Mitf. Treat. 149, 4th edition.

THE VICE-CHANCELLOR:—In *The Earl of Suffolk v. Green*, the bill seems to have been filed for a discovery and also to perpetuate the testimony of witnesses; and the court held the objection to the discovery to be good; but overruled the demurrer, on the ground that the plaintiff was entitled to perpetuate the testimony of the witnesses: and, in *Thorpe v. Macauley*, the court gave the plaintiff the commission, although it thought that there was sufficient ground for refusing him the discovery. These cases are not opposed to the general rule, that, where a bill prays any thing besides relief, if

^(a) 5 Madd. 218.^(b) 1 Atk. 450.

 1839.—*Morris v. Morgan.*

the court allows the demurrer to the relief, it covers every thing, and the bill is out of court.[1]

Now this bill prays, &c.—[His Honor here read the prayer]—and, for the purpose of obtaining that relief, it represents that the plaintiff had carried on business, in Java, in co-partnership with a gentleman named Haswell; that Haswell died in 1838, and, shortly afterwards, the plaintiff stopped payment: that, in March, 1839, the creditors of the firm entered into an agreement by which they agreed to sanction the plaintiff's departure for England, he undertaking to act as their agent in collecting the assets of the firm in [*344] that country: *but the agreement does not contain any stipulation that the creditors should not sue the plaintiff. Then, towards the end of the bill, there is an allegation that the defendant pretends that there never was any agreement or understanding, between the plaintiff and the creditors, that the creditors or any of them should suspend any proceeding which they might be entitled to take against the plaintiff for the recovery of their debts: and then the bill charges the contrary of such pretence to be true; and that there was a distinct *understanding*, between the plaintiff and the creditors, that the assets which might be recovered in pursuance of the agreement or authority of March, 1839, should be divided amongst them rateably and in proportion to their debts, and without any preference; and that the plaintiff, while acting by virtue thereof, should not be sued for such last mentioned debts. The plaintiff, therefore, does not charge that there was such an *agreement*, but only that there was such an *understanding*; and, therefore, as I understand him, he admits that there was no such agreement. I think, therefore, on the plaintiff's own showing, that this demurrer must be allowed.

[1] "If the admission or discovery of a fact stated in the bill, or called for by the interrogatories [in the bill,] cannot aid the complainant in his suit, or in obtaining the relief which he claims, or to which he may be entitled in this court, or elsewhere, upon the case made by his bill, the defendant may demur to the discovery of such immaterial fact; or he may, in his answer, refuse to make the discovery, and rely upon the immateriality of the fact of which a discovery is sought. But where the complainant is not entitled either to discovery or relief, upon the whole case as stated in the bill, the defendant should demur to the relief, as well as the discovery. And he cannot by demurring to the discovery of particular facts, compel the court to decide the whole case, as upon a general demurrer to the bill." Walworth, Ch. *Kuypers v. The Ministers, &c. of the Dutch Reformed Church*, 6 Paige, 573.

Langley v. Fisher.

**LANGLEY v. FISHER.—LANGLEY v. OVERTON.*

[*345]

1839 ; 28th November.—Impertinence ; Answer to a Bill of Revivor.

After the defendants had answered the bill, one of the plaintiffs died ; upon which a bill of revivor was filed, praying that the defendants might answer it. The defendants, in their answer, admitted the right to revive, and stated that, since answering the original bill, they had become bankrupt, and obtained their certificates. Held, that those statements were not impertinent.

AFTER the cause of *Langley v. Fisher* had been set down for hearing, one of the male plaintiffs died, and one of the female plaintiffs married : in consequence of which the surviving plaintiffs in the suit, together with the husband of the female plaintiff, filed a bill of revivor against the personal representative of the deceased plaintiff and the defendants to the original suit, stating the above mentioned facts, and praying that the defendants might answer the premises, and that the original suit and the proceedings therein might be revived, or that the defendants might show good cause to the contrary.

G. D. Fisher and N. G. Prideaux, two of the defendants to the original bill, put in a joint and several answer to the bill of revivor, in which they admitted the facts stated in that bill, and added that, shortly before they put in their answer to the original bill, a *fiat* was issued against Fisher, under which he was declared a bankrupt, and G. Beard and C. Fisher were appointed assignees of his estate ; that, after the two defendants had put in their answer to the original bill, G. D. Fisher obtained his certificate, and a *fiat* issued against Prideaux, under which he was declared a bankrupt, and F. G. Prideaux and R. M. Williams were appointed assignees of his estate : that N. G. Prideaux afterwards obtained his certificate : that the defendants were advised that, by their bankruptcies, the proceedings in the original suit became defective ; but, nevertheless, the *plaintiffs in that suit, [*346] did not file any supplemental bill for the purpose of making the defendants' assignees parties to the suit, nor had they made the assignees defendants to their bill of revivor, although they were well aware that the defendants had become bankrupt, as before mentioned. The defendants submitted that, previous to the marriage of the female plaintiff and to the death of the deceased plaintiff, the suit had become defective by the bankruptcies of the defendants, and that their assignees were necessary parties to the original suit, and also to the bill of revivor ; and they prayed the same benefit of the objection, as if they had pleaded it in bar to the bill of revivor : and they insisted on their bankruptcies and certificates, and on the 6th Geo. 4th, c. 16, (to amend the laws relating to bankrupts,) and 1st and 2d Will. 4, c. 56, (to establish a court in bankruptcy,) in bar to the bill of revivor, and to so much of the original bill as sought an account against them or either of them, or to make them or either of them personally liable in respect of the matters in the original bill stated ; and they prayed the same benefit of the

Langley v. Fisher.

matters thereby insisted on, as if they had pleaded the same to the bill of revivor or to the original bill.

The plaintiffs excepted, for impertinence, to all the passages in the answer, except those in which the facts stated in the bill of revivor were admitted: and, the Master having overruled the exceptions, they excepted to his report.

Mr. *Knight Bruce*, Mr. *G. Richards* and Mr. *Anderdon*, for the plaintiffs:—The bill to which this answer has been put in, is a simple [*347] bill of revivor: the sole object of it is to restore "the original suit to the position to which it stood before it became abated; and the order to revive was obtained before the answer was filed. All the passages comprised in the exceptions before the Master, are wholly immaterial, and altogether foreign to the office of an answer to a bill of revivor. If a defendant disputes the plaintiff's right to revive, he cannot do so by answer, but must either plead or demur. The mere putting in of an answer, is an admission of the right to revive. In *Wagstaff v. Bryan*,^(a) Sir John Leach, Master of the Rolls, says: "the question is whether long statements introduced for the purpose of showing that there has been irregularity and misconduct in the proceedings of the plaintiff are impertinent, because the defendant can have no advantage of them with reference to the order of revivor, which is the only order that can be made on this bill. In my opinion it would lead to great oppression, if a defendant were at liberty to introduce into his answer, matter of which he can have no advantage with reference to the proceeding which he is called on to answer." His Honor then points out very pointedly, the principle on which his judgment proceeds: he says: "the principle upon which I proceed is that nothing ought to remain, in the answer, except that which is called for by the bill, or would be material to the defence with reference to the order or decree which may be made on the bill.[1] This answer, therefore is impertinent, in so far as it brings forward a case which can have no effect on the order of revivor." In *Devaynes v. Morris*,^(b) the Lord Chancellor says: the sole question is whether the present plaintiff is entitled to put the cause in a proper state to carry [*348] on the decree." In this "case it would be, *to be carried on to a decree*. "I am of opinion that, according to the practice of the court, he is clearly so entitled without any reference to the merits of the decree or of the facts. It follows, therefore, that all the statements in the answer as to such facts, proceedings and merits, are irrelevant. If the proper time for making the defence has been permitted to pass, the omission cannot be supplied in this manner; and, if new matter has arisen, varying the situation of the parties, other means exist of bringing it forward; but the right of a party to prosecute the decree, and, therefore, to do what is necessary for that pur-

(a) 1 Russ. & Myl. 28.

(b) 1 Myl. & Craig, 213. See 225.

[1] Vide *Attorney General v. Foster*, 2 Hare, 92.

1839.—Langley v. Fisher.

pose, cannot depend upon the merits of the decree." No issue can be joined upon any thing contained in this answer; and all the statements in it which are comprised in the exceptions, are wholly irrelevant to the object of the bill, that is, to restore the suit to the condition in which it was before the abatement took place; and, consequently, the Master ought to have reported every one of those statements to be impertinent.[1]

The other cases cited, were *Lewis v. Bridgman*,(a) *Codrington v. Houlditch*,(b) *Metcalf v. Metcalf*,(c) and *Merrewether v. Mellish*.(d)

Mr. Jacob and Mr. Puller, appeared for the defendants, in support of the Master's report: but

The Vice-Chancellor, without hearing them said:—None of the cases which have been cited, have any application to the question which has been raised on the argument of these exceptions.

"The rule is that, if a plaintiff files a bill of revivor, and the de- [*349] fendant objects to his right to revive the suit, he must do so by demurrer, where the ground of objection appears on the face of the bill; but, if the objection is founded on matter extraneous to the bill, he must state that matter by way of plea. If the defendant does not either plead or demur to the bill of revivor, an order to revive may be obtained, as of course, at the expiration of eight days after appearance.

In this case, the right of the plaintiffs to revive the suit, is not denied by the defendants: but what the defendants mean to represent, is that they have become bankrupt and have obtained their certificates since putting in their answer to the original bill;[2] and that, although the plaintiffs are entitled to revive the suit, yet they cannot have a decree against the defendants in the same form as they might have had if there had been no such bankruptcies and certificates. It appears too, from the office copy of the bill, that the subpoena which it prays for, is one which requires the defendants to answer the bill of revivor, as well as to show cause, if they can, why the suit should not be revived. These defendants, by their answer, do represent, what they had a right to represent, namely, that the plaintiffs cannot have a decree made against them in the same form as it might have been made, at the time when they put in their answers to the original bill. And, though it is true that the objection might have been stated at the bar, at the hearing; yet I think that it is by no means incumbent on defendants who are called on to answer a bill of revivor, to omit any facts which materially concern the decree. In my opinion, the defendants to such a bill, in case they are required

(a) Ante, vol. 2, p. 465. (b) Ante, vol. 5, p. 286. (c) 1 Keen, 74. (d) 13 Ves. 161.

[1] As to what is impertinence in an answer: see *Woods v. Morrell*, 1 Johns. Ch. Rep. 103. Am. Ch. Dig. Pleading, Answer, VIII. Prolixity in a statement is not impertinence, though it may be a matter for consideration in costs. *Lowe v. Williams*, 2 Sim. & Stu. 574

[2] Bankruptcy, since the time of filing the original bill is a good plea to the bill; for, as Leach, V. C., says, "as any matter which arises between the declaration and plea, may be pleaded at law, so, matters which arise between the bill and plea may be pleaded in equity." *Turner v. Robinson*, 1 Sim. & Stu. 3, 4, n. 1.

 1841.—*Bannatyne v. Leader.*

to answer it, have the same right as all other defendants have, that
 [*350] *is, to state, in their answer, such facts as are favorable to them, as
 showing that the same decree as might have been originally made,
 cannot be obtained against them; notwithstanding those facts do not tend to
 show that the plaintiffs are not entitled to revive the suit.

My opinion, therefore, is that the exception to the Master's report must be
 overruled.[1]

 BANNATYNE v. LEADER.

1841; 18th, 19th, 20th, 22d, 23d, and 24th January, and 24th June.—Act of Bankruptcy; Fraudulent preference; Order and disposition.

On the 9th of May, 1831, M., being a partner with R. in a linen manufactory, sold and assigned his share in the partnership to L.; but M. being apprehensive that the transaction, if made public, would cause a run on certain banks in which he was engaged, and might prevent his being re-elected for the borough of A., which he then represented, the dissolution of the partnership between him and R., and the formation of the new partnership between R. and L. was, at his request, not announced in the Gazette or otherwise made public, until the 3d of January, 1832. On the 2d of that month, M. stopped payment, and, on the 26th, a fiat issued, on a debt incurred in 1830, under which he was found a bankrupt. On the 1st of July, 1831, M. being indebted on bond, to the trustees of his son's marriage settlement, assigned, at his son's request, a house and furniture, to the trustees, as a security for the bond debt. At the time of the assignment, M. was in some pecuniary difficulties arising from the failure of stock transactions and other speculations in which he had been engaged. Held that, under all circumstances of the case, the assignment was not a fraudulent conveyance, by M., with intent to defeat or delay his creditors, and, therefore, not an act of bankruptcy; and that his share in the linen business was not in his order and disposition up to the 3d of January, 1832.

In and prior to the month of May, 1831, John Maberly carried on the business of a linen manufacturer, in copartnership with John Baker
 [*351] Richards, at Aberdeen and other towns in Scotland, and in London, under the firm of Maberly & Co. On the 9th of May, 1831, Maberly sold his share and interest in the business and the property belonging thereto, to the defendant John Temple Leader: but, being apprehensive that the transaction, if made public, might be prejudicial to his return, on the then expected dissolution of Parliament, for the borough of Abingdon, which he then represented, and might cause a run on certain banks in Scotland in which he was engaged, he stipulated that the name of the firm should not be changed nor the transaction be publicly announced, until after the 31st of December, 1831. The business was accordingly carried on by Richards and Leader under the old firm, but without any interference on the part of Maberly, until the 3d of January, 1832. On that day the dissolution of the old partnership and the formation of the new one, were advertised in the Gazette: the advertisement, however, was dated on the 9th of May, 1831.

[1] Vide 1 Russ. & M. 29, n. 1. 1 Keen, 80, n. 3. *Attorney General v. Foster*, 2 Hare, 81. *Woods v. Woods*, ante, 197, 217, n.

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On the 1st of July, 1831, Maberly being indebted, on bond, to the trustees of his son's marriage settlement, in the sum of 12,300*l.*, and being possessed of a leasehold house and furniture in the Regent's Park, assigned that property, at his son's request, to the trustees, in trust to sell and apply the proceeds in satisfaction of the debt, and to pay the surplus, if any, to him.

On the 26th of January, 1832, a *fiat* in bankruptcy issued against Maberly, under which he was declared a bankrupt. The petitioning creditor's debt was contracted in 1830.

The bill was filed, by Maberly's assignees, for the purpose of setting aside the sale to Leader, on the "ground that the assignment of [352] the 1st of July, 1831, was an act of bankruptcy within the third section of the late bankrupt act, (6 Geo. 4, c. 16,) and that the property, the subject of the sale, was in Maberly's order and disposition at the time of his bankruptcy.(a)

Mr. Jacob, Mr. Richards and Mr. James Russell, appeared for the plaintiffs.

Mr. Knight Bruce, Sir William Follett, Mr. Sharpe, and Mr. Walford appeared for Leader: and

Mr. Wigram and Mr. Reynolds for the other defendants who claimed under J. B. Richards.

The cases cited were, for the plaintiff, *Ryall v. Rowles*:(b) and, for the defendants, *Simpson v. Sikes*,(c) *Flook v. Jones*,(d) *Poland v. Glyn*,(e) *Newton v. Chantler*,(f) *Belcher v. Prittie*,(g) *Fidgeon v. Sharp*,(h) *Hartshorn v. Slodden*,(i) *Morgan v. Brundrett*,(k) *Atkinson v. Brindall*,(l) *Baxter v. Pritchard*,(m) *Rust v. Cooper*,(n) *Harwood v. Bartlett*,(o) and *Crosby v. Crouch*.(p)

*THE VICE-CHANCELLOR:—In this case a bill has been filed, [353] by the assignees of John Maberly, a bankrupt, against John Temple Leader and other parties, under the following circumstances.

Before and in 1825, John Maberly carried on linen manufactories at Aberdeen and Montrose, with branch establishments at Edinburgh, Glasgow, and Dundee, and in Bread street, London, under the firm of "Maberly & Co." At the same time, he carried on a banking business at Aberdeen and Montrose, with branches at Edinburgh, Glasgow, and Dundee, and in Bread street, under the firm of John Maberly & Co. He carried on the banking business till January, 1832, when he became bankrupt.

On the 12th of March, 1825, articles of agreement were made between John Maberly and John Baker Richards, whereby Richards, in consideration

(a) For a more detailed statement of the facts of the case, see *Bannatyne v. Leader*, ante, p. 230; *Belcher v. Prittie*, 10 Bing. 408; and the Vice-Chancellor's judgment in this case.

(b) 1 Atk. 165; and 1 Vez. 348.

(c) 4 Bing. 22, note.

(d) 1 Marsh. 196.

(e) 2 Bing. N. C. 225.

(f) 6 Bing. N. C. 61.

(g) 6 M. & S. 295.

(h) 7 East, 138.

(i) 2 Bos. & Pul. 582.

(j) 1 Adol. & Ell. 456.

(k) 11 East, 256; and 2 Camp. N. P. C. 166.

(l) 4 Bing. 20.

(m) 10 Bing. 408.

(n) 5 Barn. & Adol. 289.

(o) 2 Cowp. 829.

(p)

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of 100,000*l.*, was admitted a partner, for a moiety, in the linen business. The partnership was to continue for twenty-one years; and it was agreed that deeds should be executed containing a provision for vesting the tenements in which the business was carried on, with the fixtures, plant engines and machinery, in trustees, for the benefit of the partners, according to their interests in the partnership. Nothing was mentioned, in the articles, about the name of the partnership firm; and, in fact, the business was carried on under the name of *Maberly & Co.* In 1829 certain heritable and moveable properties in Scotland, constituting all or the greatest part of the property in the manufactories, were vested, by Scotch conveyances, in *James William Freshfield* and *Robert Langford*, as trustees for *Maberly* and *Richards*:

[*354] and, "in the same year, a lease of a house, No. 47, in *Bread street*, for thirty-four years and upwards, in which the London establishments of the linen manufactories and banking business were carried on, was made to *Maberly* and *Richards*. A part of the house used by *Maberly* for his banking business, was let, by the partnership, to him. On the 19th of December, 1825, an indenture of that date was made between *John Maberly* of the first part, *Robert Langford* of the second part, and *William Leader*, the father of the defendant *John Temple Leader*, of the third part, which recited that, on the 12th of the then instant month, *Langford* advanced 10,000*l.* to *Maberly*; and, on the 19th, *Langford* transferred, into *Maberly's* name, 17,900*l.* consols and 15,000*l.* reduced; and *W. Leader* transferred, into *Maberly's* name, 25,000*l.* three and a half and 14,000*l.* four per cent; and *Maberly* covenanted to pay and transfer, to *Langford* and to *Leader* respectively, the money and bank annuities so lent, and, by way of security, to mortgage all his lands in *Addington* and *Croydon* (except the *Springpark* estate) and his leasehold tenements in *Marylebone*, and his share in the linen business of *Maberly & Co.*, and certain policies of assurance and other personal estate. *W. Leader* afterwards lent, to *Maberly*, two other sums, one of 12,000*l.* which was secured by an equitable mortgage of *Maberly's* leasehold house in the *Regent's Park* and a deposit of the lease, and another of 25,000*l.* which was secured by bills of exchange.

On the 13th of January, 1828, *William Leader* died, having, by his will appointed *John Masterman*, *Colonel William Leader Maberly*, the son of

John Maberly, *Edward Temple Booth* and *Robert Langford*, his [*355] executors; and made his son, the defendant *John Temple Leader*, his residuary legatee, who thereby became entitled to the debts due to his father's estate from *J. Maberly*.

In 1830 *Robert Langford* died. On the 7th of May, 1831, *John Temple Leader* attained the age of twenty-one years. He had not been brought up to mercantile business, but had been educated at *Oxford*, as a gentleman commoner at *Christ church*; and, during the long vacation, made tours in *France*, *Norway* and *Ireland*, for pleasure and improvement. On the 9th of May, 1831, *John Maberly*, *John Baker Richards* and *John Temple Leader* signed

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the memorandum of the 9th of May, 1831, set forth in the bill by which the partnership between Maberly and Richards was dissolved; and, in consideration of 104,000*l.*, Maberly's share was to be given up to Mr. Leader. Maberly was no longer to use the name of the firm; but Messrs. Richards and Leader consented that the name of the firm should not be changed, nor the retirement of Mr. Maberly published in the Gazette, till the 31st of December then next. This arrangement was made with the concurrence of William Leader's surviving executors. The debts due from Maberly to Leader's estate, were considered to be satisfied. The bills of exchange for 25,000*l.* were given up, and the sum of 28,500*l.* was paid by or on behalf of John Temple Leader, to Maberly, who signed a receipt for it dated the 9th of May, 1831. The arrangement was made at a meeting of John Temple Leader, John Masterman, J. Maberly, Mr. Richards, Mr. Freshfield, jun., Mr. Lancelot Holland, and Mr. Booth. The bill charges that, before the 3d of January, 1832, Mr. Freshfield, the surviving trustee of the Scotch property, had no notice of the dissolution of the partnership between Maberly and Richards. That charge, however, "is expressly disproved [*356] by Freshfield in his answer to the 36th interrogatory, who states that the exhibit L. was delivered to him, as surviving trustee and solicitor for Mr. Richards, on the 10th of May, 1831. Freshfield, jun., in his answer to the 9th interrogatory, says he delivered it to his father on the 9th of May.

The effect of this arrangement was to leave the leasehold house in the Regent's Park unincumbered and at the disposal of Mr. Maberly. The arrangement was made for full valuable consideration, deliberately and fairly. It had been proposed and discussed in the lifetime of William Leader, and was matured by his executors; and there is nothing to impeach it. The arrangement, which, at first, rested in agreement, was afterwards perfected by formal conveyances; and Mr. Leader and the parties claiming under Mr. Richards, during the years 1835, 1836, 1837 and 1838, expended nearly 90,000*l.* in various improvements upon the works in Scotland, as Edwards, who was examined in February, 1839, proves in his answer to the 18th interrogatory.

In the month of June, 1828, Mr. Maberly was indebted to his son, Colonel William Leader Maberly, in the sum of 12,300*l.*; for which he gave the Colonel a common money bond, dated the 28th June, 1828, payable in twelve months. In November, 1830, Colonel Maberly married Miss Prittie. A settlement was made on the marriage, by indenture dated the 12th of November, 1830, by which the bond was assigned to George Robert Smith and George Ponsonby Prittie, upon certain trusts declared by that indenture. By an indenture dated the 1st of July, 1831, made between John Maberly of the one part, and Prittie and Smith of the other "part, and [*357] reciting a lease for a term of years of the house in the Regent's Park, an assignment of it to Maberly, the bond and the marriage settlement, and that Prittie and Smith had applied to Maberly for payment of the 12,300*l.*, but,

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it not being convenient to him to comply with their request, he had agreed, as a further security, to assign the house, with the fixtures, goods and furniture mentioned in the schedule, Maberly assigned the house for the residue of the term, with the furniture, fixtures and things in, about and belonging to the house which were mentioned in the schedule, to Prittie and Smith, upon trust to sell and satisfy the bond, and pay the surplus of the proceeds, if any, to Maberly, and, until sale, to receive the rents and apply them in payment, first, of the interest and next of the principal due on the bond. This indenture was executed by Maberly on the 1st of July, 1831.

After the 9th of May, 1831, Maberly carried on his business of a banker, in London, till the 2d of January, 1832, when he stopped payment there, and, in Scotland, till a few days after, when he stopped payment there also. On the 3d of January, 1832, the first public announcement of the dissolution of his partnership with Richards, was made, by inserting, in the London Gazette of that day, an advertisement of the 9th of May, 1831; and circulars, dated the 2d of January, 1832, were sent to the Scotch correspondents, informing them of the dissolution, and that the business of linen manufacturers would be carried on by Richards and John Temple Leader, under the firm of Richards & Co. On the 26th of January, 1832, a *fiat* in bankruptcy was issued against Maberly, upon the petition of Thomas Peters, on a debt [*358] contracted before the end of 1830. Under *that *fiat* Maberly was declared a bankrupt, and the plaintiffs were appointed his assignees.

The plaintiffs have filed their bill against Mr. Leader, and against other parties entitled under Mr. Richards, (who is dead,) claiming, in effect, to be entitled to that moiety of the partnership which was given up by Maberly to Mr. Leader, and to have accounts taken of the profits, and payment made to them; and they allege that they are entitled to relief on these grounds; namely, that the execution of the indenture of the 1st of July, 1831, was an act of bankruptcy; and that, up to the 3d of January, 1832, Maberly, by consent of Mr. Leader, was the reputed owner, and had the possession, order and disposition of the share taken, by Mr. Leader, under the agreement of the 9th of May, 1831. These propositions are stated, several times, in the bill, and were contended for, by the plaintiffs' counsel, in argument at the bar. If either of them fails, the plaintiffs have no title to relief.

It is said that the execution of the indenture of the 1st of July, 1831, was an act of bankruptcy, because it was a fraudulent grant or conveyance of Maberly's lands, tenements, goods or chattels, within the meaning of the 3d section of the 6th Geo. 4, c. 16. The words of the act being: "that if any such trader shall make, or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or make, or cause to be made, any fraudulent gift, delivery or transfer of any of his goods or chattels, every such trader making, or causing to be made, any of the acts, deeds or matters aforesaid, with in- [*359]. tent to defeat or delay his *creditors, shall be deemed to have there-

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by committed an act of bankruptcy." Now it so happens that this section has received a construction in a court of law, which I see no ground for disputing. I refer to the case of *Belcher v. Prittie*.^(a) There the present plaintiffs brought *trover* for the title deeds of the house in the Regent's Park, against Mr. Prittie and Mr. Smith. Most of the facts in that case were the same as the facts in this case, but all of them were not precisely the same; and, therefore, the decision of that case is not a decision of this case. But the law laid down in that case, is the law which must be applicable to the present case, namely, that, in order to make the assignment of the 1st of July, 1831, an act of bankruptcy, it must be shown that it was executed by Maberly in contemplation of bankruptcy, and was executed by him spontaneously, and not as yielding to the solicitation and request of the party who had a right to demand it of him. The plaintiffs expressly charge that the assignment of the 1st of July, 1831, was fraudulent and made for the purpose of giving Colonel Maberly's trustees an undue and unlawful preference over Maberly's other creditors; and that a letter of the 13th of June, 1831, from Maberly to his solicitor, Mr. Walford, (which was proved in the action, and has been proved in this cause,) was written and directions for the assignment were given, by Maberly, voluntarily and of his own accord, and without any previous demand being made. Now Maberly has been examined in this cause and says, in his answer to the fourth interrogatory: "I did not make such assignment spontaneously. William Leader Maberly called upon me at my house when I was ill. He stated that he had heard from Mr. Masterman that I had sold my 'interest in the linen concern, and that various [*360] securities and a sum of money had been transferred and paid to me; and therefore, he particularly requested that I would assign over the Regent's Park premises to his wife's trustees; and he wished the bond to be discharged; and he added, you have so many things to do you will forget it; and he said let me beg of you to go immediately, to Walford, for the purpose of giving him directions to prepare the assignment. I promised I would as soon as I could go out; and I did, accordingly, give Mr. Walford instructions to prepare the assignment." And so he did, by sending, to Walford, the letter of the 13th of June, 1831. This evidence of Mr. John Maberly is confirmed by the answer of Colonel Maberly to the 12th interrogatory. Colonel Maberly says: "The evening before I mentioned the subject to my father, a conversation took place, between the said G. R. Smith (one of the trustees of the Colonel's settlement) and myself, as to the propriety of my father's giving some further security for the sum of 12,300*l.*, secured by the bond, in consequence of his property having been released from William Leader's claims upon it; and it was agreed I should have an interview with my father the following morning, and propose to him to give us a security upon his house and furniture in the Regent's Park, as we considered they were somewhere about the sum secured by the bond. I accordingly saw my father the next

(a) 10 Bing. 408.

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day at his house, where he was confined to his bed with the gout; and then I made the said proposition to him. He, at first, hesitated to comply with it; but, upon my pressing it, and stating that I was anxious for it to be done, as the money secured by the bond constituted the settlement which I had made upon my wife, he acceded to the application, and, at my request, pro-
 [*361] mised to give Messrs. *Walford directions to prepare the requisite instruments." This is also confirmed by Mr. G. R. Smith in his answer to the 12th interrogatory. That gentleman, after stating that he and Colonel Maberley agreed that the Colonel should make the application to his father, and that the Colonel reported that he had made it, says: "I repeated the application to John Maberley afterwards. We were then both members of the House of Commons; and we were in the almost daily habit of meeting; and he confirmed the consent which he had expressed to his son." And Mr. Thomas Walford, in his answer to the 13th interrogatory, distinctly proves that, in consequence of the note of the 13th of June, he waited upon John Maberley, and afterwards prepared the assignment of the 1st of July, 1831. From this evidence, which is not contradicted, it appears that the assignment was not voluntarily made. The son, with the concurrence of one of his trustees, applied to the father when he was ill, and pressed him to make the assignment; and the trustee repeated the application. This was moral pressure, having regard to the relation in which the parties stood to each other. The assignment was not made hastily, but deliberately. Mr. Walford says: "I have no doubt but that I must have seen the said John Maberley several times (on cross-examination, he says two or three times) between the times of my first receiving his instructions to prepare the said assignments, and his execution of it; as the deed was not executed by him till the 1st of July, 1831." Mr. Maberley, in his answer to the fourth interrogatory, says: "I did not at the time of executing the said indenture (meaning the assignment) contemplate bankruptcy; nor did I execute the same with an intention to defeat or delay
 [*362] any of my creditors in obtaining payment of the debts then owing by me to them." William Masterman and *Mr. Freshfield, jun. in answer to the 21st interrogatory, prove that Maberley was in very good pecuniary credit in the months of May, June, and July, 1831. The plaintiffs allege and insist that, when Maberley executed the indenture of the 1st of July, 1831, he was in embarrassed circumstances, and would have it inferred that Maberley, because he was embarrassed, contemplated bankruptcy. In order to make out the embarrassment, the plaintiffs have proved the refusal to pay the two bills drawn by De Silva; the withdrawing from Masterman's and placing in Oxley's hands the moneys mentioned in the plaintiff's exhibits 13 and 14; the balance sheets (exhibit 17,) the failure of the Terceira loan, and, especially, the loss incurred by the speculation in the French funds. De Silva's bills were presented for payment on the 11th of July, when special reasons were given in answer; which appear on the exhibits 11 and 12. From what Mr. Freshfield, jun. says, in answer to the 30th interrogatory, it appears there

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were special reasons for not paying the bills, and that, in order to prevent foreign attachment by the bill holders, the expedient was adopted, on the 11th or 13th of July, 1831, of transferring Maberly's money from Masterman's to Oxley's, and the dispute terminated in negotiation. All this might have been fairly done by an unembarrassed man, and certainly does not prove either contemplation of bankruptcy or embarrassment. The balance sheets show the deficiency to have been less on the 30th of June, 1831, than it was on the 30th of April, or on the 1st of January. As to the Terceira loan, nothing is said about it in the amended bill. But, from a passage in Mr. Leader's answer, it seems that something was said about it in the original bill. Both plaintiffs and defendant, however, have entered into evidence respecting it, and, from Easthope's evidence, it appears that, on the 9th of June, *1831, it had in Maberly's judgment, entirely failed. But thought [*363] it failed as a source of profit, there is no proof that Maberly lost by it.

As to the speculation in the French funds, it appears, from the Marquis De la Valette's evidence, that Maberly arrived in Paris in May, 1831, and was, in June, introduced, by the Marquis, to Franchessin. According to Weyer's evidence and the contracts A. and B., the purchases of French rentes by Franchessin for Maberly, were made on the 3d and 4th of June. On the 6th or 7th of June, Maberly returned to London. On the 10th of June, there was a continuation which was before Franchessin could have received Maberly's letter of the 11th; which letter directed that no steps should be taken, as to continuation, till Maberly directed what he thought best. That continuation made by Franchessin, seems to have been without Maberly's authority. Maberly in his answer to the 5th interrogatory, states that he believes it was so. Maberly then wrote the letter of the 23d of June, in pursuance of which Franchessin sold the rentes on the 25th, at a loss of nearly 18,000*l*. Before the 29th of June, Maberly paid, on account of the loss, one sum of 5000*l*., and another of 4000*l*.; and, on the 29th of June, he gave a bond, to Franchessin and the Count d' Isbal, for 8838*l*., to be paid in eighteen months by equal monthly instalments; and, on the 26th of July, 1831, he paid the first instalment. Applications were afterwards made, by La Valette to Maberly, for payment of the instalments overdue, but without success. Maberly thought Franchessin had acted wrongly. What happened after the 1st of July, is of little importance. Taking the evidence in the strongest way, the utmost that it can amount to, is that Maberly felt a difficulty in paying 8838*l*. on the 29th of June. But so little ground is there for inferring from that circumstance, that Maberly then *contemplated bank- [*364] ruptcy, that La Valette says that, on his second journey to London on the 27th of June, he found Maberly very busily engaged on the subject of a Belgian loan, the treaty for which, according to Mr. Freshfield junior's answer to the 21st interrogatory, was going on in November, 1831. When the time for advertising the dissolution arrived, Maberly struggled to have it postponed. He was anxious to go on as he had done.

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I think it is plain, upon all the evidence taken together, that Maberly did not, in the year 1831, contemplate bankruptcy, but meant to carry on his numerous affairs, and, in fact, did carry them on as he had formerly done, till the beginning of 1832, excepting only the linen business; and, more especially that he did not contemplate bankruptcy on the 1st of July, 1831.

As to order and disposition under the 72d section of the 6 Geo. 4, c. 16, it is clear, upon the evidence, that the clause in the memorandum of the 9th of May, 1831, postponing the notice of the dissolution of Maberly's partnership with Richards, was introduced with reference to his connection with the borough of Abingdon, for which place, as Mr. Graham proves, he had been chosen member in April, 1831, and which he was desirous to represent again; and which, for that purpose, he visited in September, 1831. Though, in fact, the linen business was carried on, under the firm of Maberly & Co. till the 2d of January, 1832, in pursuance of that clause, it is proved that, after the 9th of May, 1831, Maberly did not interfere in the linen business, and did not give any order or direction as to the management of it. The business was carried on under the superintendence of Mr. Richards. George [*365] Edwards, a witness for the plaintiffs, proves that, after the middle of 1831, the practice of sending a weekly statement of the business to Maberly, was discontinued. The reason assigned was that Maberly took no interest in it; and did not wish to see it. Edwards does not believe that Maberly ever came to the counting house of the linen establishment after the 9th of May, 1831. Upon the face of the transaction it was very unlikely that Maberly would interfere. If he had attempted to do so, he would, at once, have been stopped by Mr. Richards, who was upon the spot, though Mr. Leader was absent. With respect to the property vested in Mr. Freshfield, Maberly could make no disposition of it without Freshfield's co-operation; and Freshfield had notice of the transaction of the 9th of May. Therefore, I do not see what order and disposition Maberly had of the share sold to Mr. Leader. The utmost that it could have amounted to was this: that, according to the present state of the law of this court, he might have received some debts from debtors to the firm of Maberly & Co. who had no notice of the dissolution. But, if there were no act of bankruptcy on the 1st of July, 1831, the consideration of this point is unnecessary.

It has been said, however, that, at all events, there ought to be an inquiry or an issue; especially because the facts relating to the dealings with Franchessin were not before the jury in the action of *trover*, but have been lately discovered. The action was commenced in Trinity term, 1832, and judgment for the defendants was signed on the 1st of February, 1834. The charge in the bill is that, in or about May, 1837, Franchessin, for the first time, applied to prove under the fiat, and that the plaintiffs had not nor had either of them, previously to Franchessin's applying to prove, any knowledge or notice of the speculations in the French funds. Mr. Gordon, [*366] in answer to the 77th interrogatory, says that Franchessin first

 1839.—Stillwell v. Mellersh.

applied to prove on or about the 17th of March, 1837; and, in answer to the 78th interrogatory, says that, previously to the application by Franchessin to prove, the plaintiffs had not obtained any accurate knowledge or notice of Maberly's speculations in the French funds. This falls very far short of the charge in the bill. And what was the real truth? Maberly, in answer to the 8th interrogatory, says: "I left England in the early part of the year 1832; and, I believe, before the month of April in that year, the plaintiff Alexander Brymer Belcher, asked me if there was not a large debt due, to some French persons, for stock transactions. I said yes there was; and he replied he had so heard. I did not mention it to the other plaintiffs or either of them, because I did not consider it a legal debt; and I did not mention it to Belcher till he asked me the question, for the same reason. The payment of the 9000*l.* appears in my banker's book, and the same sum also appears in my account relating to stock transactions and marked with the letter C.; which book and account were delivered up by me to, and are now, as I believe, in the possession of Belcher, as the official assignee." The plaintiffs therefore (for the knowledge of one is the knowledge of all,) in April, 1832, had some knowledge of these French speculations which they might have matured into full information by examining Maberly, who was then in England. They chose, however, without further inquiry, to bring the action of *trover*. That failed, and then, on the 6th of December, 1837, they filed their present bill. On the trial of the action Maberly and his confidential clerk, Edwin Young Bartley, a material witness, were examined. Since then they have both died. The laches of the plaintiffs has made it impossible to have any further inquiry or "an issue tried in a fair manner; and, upon the whole of the case, my deliberate judgment is that the bill should be dismissed with costs. [367]

 STILLWELL v. MELLERSH.

1839; 28th November.—Practice; Vendor and Purchaser; Sale under Decree; Execution of Conveyance.

The conveyance of an estate sold under the decree, had been settled by the Master, and one of the defendants was made a party, but refused to execute it. The court refused an application, by the purchaser, that the plaintiffs should procure the defendant to execute the conveyance.

AN estate, in the proceeds of which the plaintiffs were interested, had been sold under the decree in the cause; and W. Mellersh, one of the defendants, was made a party to the conveyance to the purchaser, which had been settled by the Master. Mellersh, having refused to execute the conveyance, the purchaser now moved that the plaintiffs (some of whom were infants, and others, married women) might be ordered to procure him to execute it, within ten days from the date of the order to be made on the motion, and that the costs of the motion might be paid out of the fund in the cause.

 1839.—Stillwell v. Mellersh.

Mr. *Jacob*, in support of the motion, relied on the following passage in 2d Smith's Pract. 213; "If a purchaser, after having obtained an order to pay in his purchase money and to be let into possession, experiences any difficulty in obtaining possession of the premises, it is not the practice for the purchaser to proceed against the person in possession, but he should apply, to the vendor's solicitor, to procure possession for him; and, if he refuses, he should serve a notice of motion that the vendor may procure possession to be delivered to him within a given time, and that the costs of the application may be paid by him, or out of the estate."

Mr. *Knight Bruce* and Mr. *Shelbeare*, for the plaintiffs, said that Mr. Smith cited no authority for the position laid down by him, and that [*368] the application was "wholly unprecedented and contrary to the usual course of the court."

Mr. *Chandler*, for J. S. Stillwell one of the defendants, said that Mellersh had parted with all his interest in the estate, and, therefore, his execution of the conveyance would be mere surplusage.

THE VICE-CHANCELLOR:—I do not think that it is unwise, in the purchaser, to ask that the conveyance may be executed by all the persons whom the Master has thought to be proper parties; for, otherwise, a future purchaser might object to the title.

In this case, however, the notice of motion asks, not that Mellersh, who is a party to the suit, may be ordered to execute the conveyance; but that the plaintiffs, some of whom are married women and others infants, may be ordered to procure his execution of it within a given time. The case put by Mr. Smith, is quite different from the present; and I have no recollection of any such order as is now asked, that is, that the plaintiffs may procure another party to the suit to execute a conveyance, having been ever made by the court; but it seems to me that the application is new in point of form, and unreasonable on the face of it: and, therefore, I shall refuse it with costs.^(a)

(a) The purchaser afterwards made a similar application to the Lord Chancellor, except that the notice of motion concluded thus: "or that such other order may be made as the court may think proper for procuring the execution of the conveyance."

The Lord Chancellor said that the Vice-Chancellor was right in refusing the application which had been made to him: but, in consequence of the concluding words of the notice, his Lordship ordered Mellersh (who had been served with notice of the motion) to execute the conveyance.

1839.—Kerr v. Rew.

*LEE v. SHAW.

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1839: 28th November.—New Orders; Construction; Accounts and Inquiries.

The 5th order of May, 1839, merely enables the court to direct such inquiries as must be made prior to the discussion of the question in the cause, but not to prejudice or decide that question. Therefore, where a bill is filed for an account, the court will not, under the 5th order, direct the account to be taken.

THIS was a suit for the administration of a testator's estate. The plaintiff was the residuary legatee, and the defendant was the administrator, *cum testamento annexo*, of the deceased's estate.

The plaintiff now moved, under the 5th order of May, 1839, for a reference to the Master to take an account of the testator's personal estate and effects received by the defendant, or which, without his wilful neglect or default, he might have received, and also of the testator's funeral and testamentary expenses, debts, and legacies; and that the Master might be directed to advertise for creditors, and to ascertain the residue of the estate.

Mr. Shadwell, appeared in support of the motion.

Mr. Anderdon, for the defendant, said that the plaintiff sought to obtain, by motion, an order to the same effect as the decree which ought to be made at the hearing of the cause: that the object contemplated by the fifth order was not to supersede the hearing of the cause; but to authorize the court to direct such preliminary inquiries to be made as would enable the court to make a more perfect decree, at the hearing, than it could otherwise have made.

THE VICE-CHANCELLOR:—I understand this order to mean, merely, that, where there are preliminary matters which must be ascertained prior to the discussion of the question in the cause, the court may, on [*370] motion, direct the necessary inquiries to be made; but it cannot decide or prejudice any question in the cause. Therefore, when a bill is filed for an account, if the court, under this fifth order, were to direct the account to be taken, it would decide the question in the cause, which can not be done except by the decree at the hearing of the cause.(a)

KERR v. REW.

1839: 3d December.—Discovery; Pleading; Parties.

The decision in *Irving v. Thompson*, ante, vol. 9, p. 17, approved of by the Lord Chancellor.

A GENERAL demurrer was put into the bill in this case, which involved precisely the same question as was decided in *Irving v. Thompson*, reported ante, vol. 9, p. 17.

(a) See *Strother v. Dutton*, ante, 288. [*Topham v. Lightbody*, 1 Hare, 289.]

 1839.—*Gilbert v. Bennett.*

Mr. *Knight Bruce* and Mr. *Willcock* appeared in support of the demurrer, and Mr. *G. Richards* and Mr. *Calvert*, in support of the bill.

The demurrer was allowed without argument, it being the intention of the plaintiff to take the case, by way of appeal, before the Lord Chancellor.

The appeal was heard in February, 1840; and, on the 22d of that month, the order allowing the demurrer, was affirmed. His Lordship, at the conclusion of his judgment, said that the Vice-Chancellor's decision in *Irving v. Thompson*, was conformable to principle and to all authority.

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GILBERT v. BENNETT.

1839; 29th November.—Will; Construction.

Testator gave all his property to his wife and two other persons, in trust for the undermentioned purpose, namely, to pay the income to his wife for the education and support of his children by her; and, after her death, the property to be divided among his children: and he gave his furniture, plate, &c., to his wife, absolutely. Held that the children were not entitled to the trust property on their father's death; but that their mother was entitled to the income, for her life, she maintaining and educating the children out of it.

J. BENNETT made his will, dated the 28th of March, 1823, in the following words:

"I, John Bennett, of Greenwich in the county of Kent, silversmith, do give and bequeath, unto my dear wife, Elizabeth Sinnock Bennett, Mr. George Smith, wine merchant, of Park row, Greenwich, and Mr. George Sargent, of Battle in the county of Sussex, linen-draper, in trust, all my freeholds, leaseholds, funded or other property, whether goods, chattels, stocks in trade or other of what kind soever it may be: my intention being to comprise, in this bequest, every kind of property that I may die possessed of, leaving to her, my said wife, and said trustees *in trust for the undermentioned purpose*, viz. to pay over all the rents, profits, &c., arising from the leasehold and freehold property, unto my said wife for the education and advancing in life of any children she may have born by me, and also to dispose of and receive all my personal property, of what kind soever it may consist, for the same purpose, and likewise for the income and maintenance; but none of my said freehold or leasehold property to be disposed of or sold, but the income arising out of it to be applied as above to their maintenance and support and the advancement in life and support of my child or children; and, *after her death*, the whole of the said property in trust, either freehold, leasehold, or any other property of mine or arising out of the management of this trust, to be divided equally, share and share alike,

[*372] among my said children male or female, share and share alike, "in equal proportions: but it is my will that whatever furniture, plate for the use of my house, not being part of my stock in trade, books, furniture, china or other things being for the use or ornament of my dwelling house,

1839.—*Gilbert v. Bennett.*

be my said wife's for her own use and benefit, subject to no control of the said trust who are above named as joined with her for the preservative of my other property for my children after her decease: and further that, in order to discharge my said trust for the sums of money received annually or in any way for rents or interest, that the receipt of my said wife in her own handwriting, and that only, shall be a discharge for them from liability to my said child or children for the sum or sums of money so received; and my said wife's receipts so given shall be considered as their full and complete discharge from all future responsibility for the sum or sums so named in it: and further it shall and is lawful for my said trust, out of any and every part of my personal property, consisting of securities for money, stock in trade, the lease of my house I reside in, book debts or the good will of my business, to pay off any sum or sums of money owing by me; and further to borrow money on security of my freehold and leasehold property to pay any portion, or secure the payment of any portion of the debts I may owe at my decease, should the disposal of the above stock in trade, book debts, &c., be insufficient; but not to borrow money on the said leasehold and freehold estates for no other purpose than to pay the said debts owing at my decease."

The testator died in February, 1829, leaving his wife and four children by her surviving him.

The bill was filed by one of the testator's daughters and her husband, against the widow and other children *and the question was [*373] whether, under the will, the children became absolutely entitled to their father's property on his decease, or whether the widow was entitled to the income of it for her life, subject to her maintaining and educating the children thereout.

Mr. *Wigram* and Mr. *Haldane*, for the plaintiffs, said that the testator had directed that the whole of the income of his property should be applied for the benefit of his children, and that he did not intend his wife to take any thing, except his furniture and the other articles specifically bequeathed to her: that the whole of the property was given, to her and two other persons, *in trust*; which excluded her from taking a life interest, by implication (as it would be contended she did) under the words: "and after her death." They cited *Broad v. Bevan*,^(a) and *Woods v. Woods*.^(b)

Mr. *Knight Bruce*, Mr. *Jacob*, Mr. *Koe*, Mr. *Heberden*, and Mr. *Steele*, appeared for the defendants: but

THE VICE-CHANCELLOR, without hearing them, said, that the judgment of the Lord Chancellor in *Woods v. Woods*, was in favor of the wife taking in this case: and that, taking the whole of the will together, it would be extraordinary to hold that the children alone were to be supported out of the income of the testator's property and that the widow was to take no part of it; whereas the natural construction of the will was that the testator intended

(a) 1 Russ. 511, note.

(b) 1 Myl. & Cra. 401.

1839.—*Strickland v. Strickland*.

the whole of the income to be paid to his wife, for her life, and to impose on her the burden of maintaining and educating the children out of it.(a)[1]

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*STRICKLAND v. STRICKLAND.

1839; 3d and 4th December.—Stat. 3 and 4 Will. 4, c. 106; Heir; Marshalling of Assets. Under the 3 and 4 Will. 4, c. 106, s. 3, an heir to whom lands are devised by his ancestor, takes them as devisee, to all purposes; and, therefore, the pecuniary legatees are not entitled to have the assets marshalled as against him.

THE question raised on the argument of a demurrer in this case, was whether the pecuniary legatees of the testator in the cause, who died after the 31st of December, 1833, were entitled to assets marshalled as against the defendant Sir George Strickland, who was the testator's heir at law, and also the devisee of his estates at Easton and Righton in Yorkshire.

Mr. *Knight Bruce* and Mr. *Shadwell*, in support of the demurrer, said that the 3 and 4 Will. 4, c. 106, s. 3, declared expressly, that, when any land should be devised, by any testator dying after the 31st of December, 1833, to his heir, the devise should operate, and the heir should take as devisee and not as heir; (b) and, therefore, the declaration, asked by the bill, that Sir George Strickland took the estates at Easton and Righton by descent and not

by devise, was directly contrary to the act: that there was an equal

[*375] intention on the part of the testator, in favor of the devisee and "the

(a) See *Hammond v. Neame*, 1 Swans. 35; *Bird v. Hunsdon*, 2 Swans. 349; and *Berkley v. Swinburne*, ante, vol. 6, p. 613.

(b) "And be it further enacted that, when any land shall have been devised by any testator who shall die after the 31st day of December, 1833, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and, when any land shall have been limited, by any assurance executed after the said 31st day of December, 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate, or part thereof."

[1] Under a gift by a testator to his wife, of his residuary personal estate, to the intent that she might dispose of the same, for the benefit of herself and their children in such manner as she might deem most advantageous, the wife does not take an absolute interest. *Wigram, V. C.*, after referring to a number of authorities, says: "I cannot but consider these authorities as raising a formidable obstacle to the plaintiff's claim to an absolute interest in the property of the testator. At the same time, I have no hesitation in stating, that to whatever extent the widow or family of Mr. R. [the testator] may have an interest in his estate, after satisfying the paramount claims of creditors, the court will not deprive the widow of the honest exercise of the discretion which the testator has vested in her, or refuse its assistance to inquire into or to sanction any reasonable arrangements which she may desire to make. Further than this I cannot go in the present state of the case." *Raikes v. Ward*, 1 Hare, 445. See further, *Hadow v. Hadow*, 9 Sim. 438, 441, n. 1; *Crockett v. Crockett*, 1 Hare, 451, stated in the editor's note 1 Keen, 86, where other cases on the subject are mentioned

 1839.—*Strickland v. Strickland.*

pecuniary legatees; and, consequently, the latter were not entitled to have the assets marshalled, as against Sir George Strickland, who must be considered, to all intents and purposes, as the devisee of the estates at Easton and Righton. *Scott v. Scott*,^(a) *Herne v. Meyrick*,^(b) *Clifton v. Burt*.^(c)

Mr. Jacob and Mr. Sidebottom, in support of the bill, said that the act referred to, was passed, merely for the amendment of the law of inheritance; that it did not provide that the heir should take as devisee for all purposes: and that the rules respecting the marshalling of assets were not intended to be affected by it: that the 3 and 4 Will. 4, c. 104, (to render freehold and copyhold estates assets for the payment of simple contract debts,) was passed on the same day: and the Legislature, if it had intended to make any alteration in those rules, would have done so by that act. *Galton v. Hancock*.^(d)

THE VICE-CHANCELLOR:—The 3d section of 3 and 4 Will. 4, c. 106, enacts that land devised to the heir, shall be considered to have been acquired by him as devisee, and not by descent; and it then proceeds to declare that, when any land shall have been limited, by any assurance, to the person or the heirs of the person who shall thereby have conveyed it, such person shall be considered to have acquired the land as a purchaser by virtue of the assurance, and shall not be considered as entitled thereto as his former estate or part thereof. Consequently, if a person seised of land by descent *ex parte materna*, were to execute a conveyance limiting property [376] to the use of himself and his heirs, he would be considered thenceforth as taking the land by purchase, and the course of descent would be altered. I can not, therefore, but think that Sir George Strickland must be considered as having taken the estates at Easton and Righton, as devisee, to all intents and purposes.

That view of the question seems to me to be strengthened rather than otherwise, by the circumstance that the 3 and 4 Will. 4, c. 104, was passed on the same day as the 3 and 4 Will. 4, c. 106: for the Legislature seems to have taken care that the laws respecting inheritance, should not be altered, without, at the same time, making the lands of deceased debtors assets for payment of simple contract, as well as specialty debts.

Demurrer allowed.

(a) Amb. 383, Blunt's edit. (b) 1 P. W. 201. (c) Ibid. 678. (d) 2 Atk. 424, 427, 430.

 1839.—*Newlands v. Paynter*.

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*NEWLANDS v. PAYNTER.

1839; 2d December.—*Feme Coverts; Separate Property.*

Testator bequeathed all his property to his daughter, (a single woman,) in terms amounting to a gift to her for her separate use, and appointed her sole executrix. She married after her father's death; and a sum of stock, part of the property bequeathed to her, was assigned to trustees, in trust for her separate use, for life, and, if she survived her husband, in trust for her absolutely, and if not, then in trust as she should appoint by will, and subject thereto, in trust for her husband: but the settlement did not notice any other part of the property. Held, that the husband did not become entitled in his marital right, to the property remaining unsettled, but was a trustee of it for his wife; and, therefore, it could not be taken in execution under a judgment recovered against him.

JOHN PETER REINA, by his will dated in 1833, bequeathed to his daughter, Mary Sarah Reina, all his property whatsoever, and appointed her sole executrix of his will; and directed that any property he might have given or should give to her, should not be liable to the interference or control of any person or husband she might be married to, or liable to his then present or future debts, but that her receipt alone should be a discharge for all the money or effects he might give or leave to her.

Mary Sarah Reina proved her father's will; and, shortly afterwards, married William Newlands. On her marriage, a settlement was made of 6000*l.* bank stock, part of the property bequeathed to her by her father. The remainder of that property consisted of a leasehold house in Southwark, in which she and her husband had resided ever since their marriage, and of the furniture, plate and certain other articles therein.

The defendant Holmes having recovered judgment and issued execution in an action brought by him against Mr. Newlands, the bill in this cause was filed, by Mrs. Newlands, against her husband, Holmes, and the [*378] Sheriff of Surrey, stating the facts above mentioned, and that *the plaintiff had no property except what had been bequeathed to her by her father's will, or had been purchased by her out of the income of that property; and submitting that her husband was a trustee of the house and the goods and chattels therein, for her separate use; and praying for an injunction to restrain the sheriff from seizing the house and the goods and chattels therein, under the writ.

The injunction was afterwards granted, and

Mr. Jacob and Mr. Bethell, for the defendant Holmes, now moved to dissolve it. They said that the property was bequeathed to the plaintiff absolutely, and that she was appointed executrix of the will: that the marriage (which took place after the testator's death) vested the property in question absolutely in the husband: that a portion of the property bequeathed by the will, was settled on the marriage, but no stipulation was made as to the remainder of it; and, therefore, the presumption was, that the parties intended

1839.—*Newlands v. Paynter*.

the marital right to prevail as to all the property except that portion of it which was comprised in the settlement.

Mr. *Knight Bruce* and Mr. *James Russell* appeared for the plaintiff: but

THE VICE-CHANCELLOR without hearing them, said:—There cannot, I think, be any doubt that the plaintiff's father did intend, by his will, to create a trust for the separate use of his daughter, as to the property which he bequeathed to her, although he has not expressed that intention in a formal and technical manner: and I apprehend it is equally clear that, when he *died and his daughter proved his will, she became at law, the absolute [*379] owner of all the property of a personal nature which passed by his will; and that, when she married, she did, at law, give to her husband, the complete dominion over the whole of that property, except that portion of it which was settled on the marriage. But then the question is whether a husband, when he marries a woman who takes personal property under such a bequest as this, does not subject his marital rights and marital powers to that trust which was affixed on it by the will. I cannot but think that the legal rights and powers which the husband, in such a case, acquires over the property, are subjected to the trust affixed on it by the will.

The settlement of the 5000*l.* bank stock, which was made on the marriage, is not a settlement of it to the separate use of the wife, to the same extent as she was entitled under her father's will; but, on the contrary, it is a reduction and limitation of the interest which she had, in that property, under the will: for it vests the stock in trustees, in trust for the separate use of the wife for her life, and, if she survives her husband, it is to belong to her absolutely: but, if her husband survives her, then she is to have only a testamentary power of disposition over it; and so much as she may not so dispose of, is to go to her husband. It is quite clear, therefore, that the husband is let in to participate, for his own benefit, in the bank stock, to the prejudice and in derogation of the right and interest which the wife had in it under her father's will. Where a husband, by virtue of his marriage settlement, derives an interest in a portion of his wife's property, but gives her nothing whatever in return, and the settlement is totally silent as to any relinquishment, by the wife, of her rights *over the rest of her property, it would be strange [*380] indeed to hold that the husband, under such circumstances, became absolutely entitled to all his wife's property not comprised in the settlement.

My opinion is, taking the will and the settlement together, that the husband, as to any right or interest which he has acquired, in that character, over his wife's property, is a trustee for her; and that the leasehold house and the goods and chattels in it, are not seizable in equity, although they may be at law, under the execution which has issued against the husband; and the motion to dissolve the injunction, must be refused.(a)[1]

Mr. *Paynter* appeared for the sheriff.

(a) See 4 *Myl. & Craig*, 408.

[1] Lord *Cottenham*, December 5, 1839, discharged the orders made by the Vice-Chancellor in

 1839.—Harrison v. Borwell.

HARRISON v. BORWELL.

1839: 6th December.—Evidence; Legacy.

Under 36 Geo. 3, c. 52, s. 27, a copy of an entry in the stamp office books, of payment of the duty on a legacy, is evidence of payment of the legacy; but the copy must be proved in the usual way.

In this case, the plaintiff, in order to prove that the testator in the cause left assets, tendered, in evidence, a copy of an entry, in the stamp office

this cause, and made a modified order restraining the sheriff from selling. See 4 Myl. & Cr. 413. His Lordship, January 22, 1840, decided two very important cases as to the rights of a married woman over property given or settled to her separate use, *dam sola*. *Tullett v. Armstrong*, and *Scarborough v. Borman*, 4 Myl. & Cr. 337, 407. S. C. 1 Beav. 1. In consequence of these decisions, the principal case was, in February of the same year, again moved before the Lord Chancellor; 4 Myl. & Cr. 414; and it was held, that personal chattels bequeathed to a single woman for her separate use, but without the intervention of any trustee, cannot be seized in execution by a judgment creditor of an after taken husband: and it is to be observed that in this case there was no clause against anticipation. Mr. Justice Story says in relation to this subject, 2 Equity Jurisprudence, § 1381; "There is no doubt that when, from the terms of the gift, settlement or bequest, the property is expressly, or by just implication designed to be for her separate and exclusive use, (for technical words are not necessary,) the intention will be fully acted upon; and the rights and interests of the wife sedulously protected in equity. But the question which most frequently arises is, what words are sufficiently expressive of such a purpose; for the purpose must clearly appear beyond any reasonable doubt; otherwise the husband will retain his ordinary, legal and marital rights over it." In a subsequent passage (§ 1384) he says: "A distinction was formerly taken between the case of a gift or bequest to an unmarried woman generally, and not in the contemplation of an immediate marriage, or as a provision for that event. For, it was said, that if a gift or bequest should be made to an unmarried woman, to be at her own disposal, or for her sole and separate use, or independent of her husband, the title would vest absolutely in her as owner; and the property would not, upon her subsequent marriage, be held by her in any other manner, than her other absolute property; but it would be subject to the marital rights of her husband. This distinction has, however, been since qualified, if not entirely overruled, and the doctrine seems now well established, that property may be secured to an unmarried woman, or a married woman, with a clause against anticipation, and in such a case it will be good against the marital rights of any future husband. And the same doctrine seems to be applicable to every case, where property is given to the separate use of a woman, whether married or unmarried at the time, without any such clause; for, in such a case, if no other agreement is made between the parties, the future husband upon his marriage, is deemed to adopt the property in the state in which he finds it, as her separate property, and he is bound, in equity, not to disturb it." So, in *Shirley v. Shirley*, 9 Paige, 364, Mr. Chancellor Walworth, referring to the case, 4 Myl. & Cr. 408, said; "That where personal chattels were bequeathed to a *feme covert* for her separate use, or were bequeathed to a single woman free from the control of her future husband, the Court of Chancery would protect her interest therein against the creditors of her husband, although no trustee was named in the will of the testator to hold them for her separate use. But that where they were bequeathed to her generally, without any such restriction, and had been reduced to possession by the husband with her consent, they became his property in equity as well as at law." In *Langton v. Herten*, 1 Hare, 560, Wigram, Vice-Chancellor, said: "The general rule of law certainly is, that a judgment creditor can take in execution that which belongs to his debtor, but cannot take the property of other persons, although it may be in the possession of the debtor as trustee. I do not understand that it was argued, that a judgment creditor can take in execution property of which his debtor was merely the trustee. And when this court has once established, that the equitable ownership may be in one person, and the legal ownership in another, the court must interpose where it is necessary to protect the equitable ownership, and for that purpose I am not aware that the court

1839.—*Harrison v. Borwell.*

books, of payment of the duty on a legacy given by the testator.(a)
 *A witness deposed that the copy was made and signed by the [381]
 comptroller of stamps, and was compared by him with the original
 in the presence of the witness, and that, to the best of the witness' belief, it
 was a true copy.

Mr. *Jacob*, for the defendant, contended, first, that the document produced
 was not evidence, under the legacy duty act, in any case except that speci-
 fied in the act: secondly, that secondary evidence was not admissible, unless
 it was shown that primary evidence could not be procured, which had not
 been done in this case; and, thirdly, that in no case was a copy admissible,
 unless it was proved to be a true copy, by a person who had compared it
 with the original.

Mr. *Knight Bruce*, for the plaintiff, said that a copy of the entry in the
 stamp office books, was made evidence by the act: that those books were
 public documents belonging to the crown, which the officers of the crown
 could not be compelled to produce; and that the comptroller of stamps, like
 the chirographer of fines, was the proper officer to make copies from them.
Phill. on Evidence, 3d edit. 338.

THE VICE-CHANCELLOR:—The act must, I think, be construed to mean
 that a copy of the entry, in the books of the commissioners of stamps, of
 payment of the duty on a legacy, shall be evidence of that fact for all pur-
 poses. But, as there is nothing in the act, which provides that a copy
 of an entry in those books made by a particular person, shall *be evi- [382]
 dence of the original, the copy must be proved in the regular way,
 that is, by a person who has himself compared it with the original. This
 copy, therefore, is not evidence.

Statute of Limitations; Pleading; Defendant.

A defendant who has answered, cannot have the benefit of the statute of limitations, at the hear-
 ing, unless he has insisted on it in his answer.

Another objection taken, by Mr. *Jacob*, in this case, was that the plaintiff's
 demand was barred by the statute of limitations.

ever refuses its interposition. I may refer to the case of *Newlands v. Paynter*, as one of the latest
 reported instances in which its protection was resorted to, and in which Lord Cottenham, applying
 the principle against a judgment creditor in the case of personal chattels, (the furniture of a house,)
 in the most distinct terms affirmed, that which cannot indeed be doubted is the law, that equitable
 property must be protected. And when it is once decided, that property ostensibly belonging to a
 debtor, but in truth held by him in trust for another, is to be protected, the question in every case
 must be, whether the equitable interest is in any other person than the debtor."

(a) By the 27th sect. of 36 Geo. 3, c. 52, (for repealing certain duties on legacies and shares of
 personal estates, and for granting other duties thereon in certain cases,) it is enacted, that no re-
 ceipt for any legacy, in respect whereof any duty is imposed by the act, shall be received in evi-
 dence, unless the same shall be stamped as required by the act; and that no evidence whatsoever
 shall be given of any payment of such legacy, without producing such receipt duly stamped as
 aforesaid, unless the actual payment of the duty thereby imposed, shall first be given in evidence:
 provided always, that a copy of the entry, in the books of the commissioners of stamps, of the
 payment of such duty, shall be admitted as evidence thereof.

1839.—*Burles v. Popplewell.*

Mr. *Knight Bruce* replied that a defendant could not avail himself of the statute, unless he either demurred or pleaded to the bill, or claimed the benefit of the statute, in his answer, which the defendant had not done in the present case.

The Vice-Chancellor held the rule to be as stated by Mr. *Knight Bruce*, and said that the reason of it was that the plaintiff might be put on his guard, and might have an opportunity of discovering something which would avoid the bar created by the statute.

Mr. *Girdlestone*, Mr. *Purvis*, Mr. *James Russell*, Mr. *Jeremy*, Mr. *Faber*, and Mr. *Renshaw* were also counsel in the cause.[1]

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*BURLES v. POPPLEWELL.

1839; 6th December.—Executor; Injunction.

To an action brought by a creditor of a testator, the executors pleaded the decree in a suit for the administration of the testator's assets. The plea was held to be bad in law, and judgment was given for the plaintiff at law. The court restrained him from enforcing his judgment against the testator's assets, but not against the executors personally.

THIS was a creditors' suit, and the usual decree had been made in it.

The executors now moved for an injunction to restrain Hall, a creditor of the testator, from enforcing a judgment obtained by him in an action against them for the recovery of his debt. The executors, instead of applying for the injunction in an early stage of the action, pleaded the decree to it; but the plea was held to be bad, and, thereupon, judgment was given for the plaintiff in the action.

A question having arisen as to whether the form of the judgment was such as to render the executors liable personally,

Mr. *Jacob*, who appeared in support of the motion, said that though the judgment did not affect the executors immediately, yet it might do
[*384] so ultimately : (a) that the executors had been relying on the decree, and had endeavored to avail themselves of it by pleading it to the

[1] The defence of the statute of limitations must, in equity, as well as at law, be presented, by pleading, in the first instance; either by plea of the statute or by alleging it in the answer; and, (in which respect there is a difference between proceedings at law, and in equity,) if the objection is apparent on the face of the bill itself, by demurrer. *Monypenny v. Bristol*, 2 Russ. & M. 117. *Phillips v. Prevost*, 4 Johns. Ch. Rep. 215. *Hoare v. Peck*, 6 Sim. 51; *Story's Eq. Plead.* § 434, 751. *Crutcher v. Trabel*, 5 Dana's (Kentucky) Rep. 82. *Whitney v. Whitney*, id. 331. *Humbert v. The Rector &c of Trinity Church*, 7 Paige, 195. *Dunlap v. Gibbs*, 4 Yerges's (Tennessee) Rep. 94. Am. Ch. Dig. Limitations, Statute of, VI.; Pleading; Demurrer, II.

(a) Mr. *Williams*, in his *Treatise on the Law of Executors*, vol. 2, p. 1223, [a useful work, Lord Langdale says, 1 Keen, 721, "on the Law of Executors,"] thus points out the course of proceeding to enforce a judgment obtained, against an executor, for a debt due from the testator; "After the plaintiff has obtained a judgment against an executor, *de bonis testatoris*, there are two modes enforcing it: first, by *feri facias* or *scire fieri* inquiry: second, by an action of debt on the judg-

1839.—*Burles v. Popplewell.*

action, but the plea had been held to be bad; and, although it was bad in point of law only, yet the court of law would assume that the executors had had assets, and had either eloiigned or wasted them; and a writ of "*scire fieri* would be issued, to the sheriff to levy the debt *de bonis* [*385] *testatoris, et si non de bonis propriis*; and the executors would be unable to protect their own property from the force of the writ; though, so far from having any assets of the testator, his debts were much greater than the value of his estate at the time of his death: consequently, the case fell within the principle of *Brook v. Skinner*,^(a) *Dyer v. Kearsley*,^(b) and *Fielden v. Fielden*.^(c)

Mr. Knight Bruce (with whom was Mr. Koe) appeared for Hall, the plaintiff at law, and admitted that he intended to proceed against the executors personally.

THE VICE-CHANCELLOR:—In *Kent v. Pickering*,^(d) I proceeded on what Lord Eldon is reported to have said in *Brook v. Skinner*, namely, that where a decree has been made in a suit for the administration of a deceased debtor's estate, if the plaintiff at law recovers a judgment *de bonis testatoris*, this court will not suffer execution to be taken out on such judgment; but if he recovers *de bonis testatoris et si non, de bonis propriis*, the court cannot interpose to protect the executors from any liability to which they may have subjected themselves. The rule of this court as I apprehend, is that, if the executor does, at law, so manage the matter as to make himself personally liable, this court will leave him to be dealt with at law as the court of law

ment, suggesting a *devastavit*.—First, as to proceeding by *fieri facias* or *scire fieri* inquiry: If the sheriff returns, as he may do if he pleases, not only *nulla bona*, but also a *devastavit*, to a *fieri facias de bonis testatoris* sued out on a judgment obtained against an executor, the plaintiff, according to the ancient practice, sued out execution immediately against the defendant by *capias ad satisfaciendum* or *fieri facias de bonis propriis*: and so he may, it should appear, at this day. And it seems that the sheriff runs no great risk by returning a *devastavit*, for the judgment and no assets to be found, will be sufficient evidence of a *devastavit* in an action against him for a false return.

"But if the sheriff returns *nulla bona* generally, without also returning a *devastavit*, the ancient course was to issue a special writ for the sheriff to inquire by a jury whether the defendant had wasted any of the goods of the deceased; and if a *devastavit* were found, and returned by the sheriff, a *scire facias* issued for the defendant to show cause why the plaintiff should not have execution *de bonis propriis*; to which *scire facias* the defendant might appear, and plead. But now, for the sake of expedition, the inquiry and *scire facias* are made out in one writ, which is called a *scire fieri* inquiry; reciting the judgment, *fieri facias*, and return of *nulla bona*, and after suggesting a *devastavit*, commanding the sheriff to cause the debt or damages and costs to be made of the goods of the testator or intestate, if, &c., and if not, then, if it shall appear by inquisition, that the defendant hath wasted the goods of the deceased, to give notice, to the defendant, to appear in court at the return of the writ, to show cause why the plaintiff ought not to have execution *de bonis propriis*. But the most usual mode of proceeding is by action of debt on the judgment, suggesting a *devastavit*. This action may be brought upon the judgment, against the executor, upon a bare suggestion of a *devastavit* without any writ of *fi. fa.* first taken out upon the judgment. The action is, in form, an action of debt in the *debet* and *detinet*, and the judgment is *de bonis propriis*." [Et vide, *Lee v. Park*, 1 Keen, 721, 722.]

(a) 2 Mer. 491, note. (b) Ibid. 482, note. (c) 1 Sim. & Stu. 255 (d) Ante. vol. v. p. 569

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will permit :[1] but this court will not suffer any judgment that may be recovered at law, to interfere with its own decree.

[*386] "In this case, I think that the executors, instead of pleading the decree at law, ought to have applied at once for an injunction : but, as they thought fit to adopt a different course, the plaintiff at law is entitled to have the benefit of his judgment as against them ; but this court will restrain him from using it against the assets of the testator ; and, therefore, I shall grant an injunction to restrain him from proceeding against the assets, but not to restrain him from proceeding against the executors personally.[2]

WILLIAMS v. OWEN.[3]

1839 ; 18th December.—Mortgage ; Conditional Sale.

W. conveyed an estate to O. absolutely, as in pursuance of a sale : and, by a separate instrument, O. agreed to reconvey the property on W., repaying the consideration money and the expenses of the conveyance (which O. had paid) within a year ; and O. was at his option, either to retain the intermediate rents, or to be paid interest. The agreement bore the same date and purported to be executed on the same day as the conveyance ; but that fact was not admitted in the answer, and there was no evidence of it. A. was an attorney and prepared the conveyance. O. paid the expenses of it, and was immediately let into possession, and the consideration money was, very nearly the full value of the estate.

Held, nevertheless, that the transaction was in fact a mortgage, and that W's heir, was, long after the year had expired, entitled to redeem the estate.

By indentures of lease and release of the 13th and 14th of June, 1821, and by a fine, Richard Williams, a solicitor, and his wife, in consideration of 550*l.*, paid to Williams by the defendant, conveyed twelve cottages and a piece of land or garden ground, situate near the town of Carnarvon, to the defendant, who was a grocer, in fee. The conveyance was absolute, and purported to be made in pursuance of a contract for sale of the premises. The 550*l.* was in part made up of a sum of 200*l.* due, on bond, from Williams to [*387] the defendant. *Upon the execution of the conveyance, the defendant entered into the possession or receipt of the rents and profits of the premises. By articles of agreement dated the same 14th of June, made between the defendant of the one part, and Williams and his wife of the other part, after reciting that Williams and his wife had that day executed to the defendant, an absolute conveyance of the fee simple and inheritance of the premises, in consideration of 550*l.* paid to Williams by the defendant, and that, upon the treaty for the sale of the premises, it was mutually agreed between the parties that, in case Williams, his heirs or assigns, should pay

[1] He might plead a false plea in the suit at law, and thus gain time to make his application to a court of equity. *Fielden v. Fielden*, 1 Sim. & Sta. 255 ; 1 Keen, 721 ; 2 Keen, 5, n. 1.

[2] Vide *Lee v. Park*, 1 Keen, 715, 721. It is remarkable that that case, although of an earlier date, (1836,) is not alluded to in the text.

[3] The decree in this case was reversed by Lord Cottenham, C.

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to the defendant the like sum of 550*l.* within twelve calendar months from that day, and also the sum of 13*l.*, being the sum laid out by the defendant for preparing the conveyance of the premises, then the defendant would re-convey the premises to Williams, his heirs or assigns: It was witnessed that, in case Williams, his heirs, executors, administrators, or assigns, should pay or cause to be paid, to the defendant, the sums of 550*l.* and 13*l.* within twelve calendar months from the date of the agreement, then the defendant for himself, his heirs, executors and administrators, agreed that he would reconvey the premises to Williams, his heirs, appointees or assigns, or consent that the conveyance bearing even date with the agreement, might be cancelled and made void to all intents and purposes: and it was further agreed that the defendant should retain the rents from the day of the date of the agreement to the day of payment of the 550*l.* instead of interest, provided he preferred the same to lawful interest; that the rents should be apportioned from the 4th of August, then next, and received from that day, by the defendant; and the defendant engaged that, if the 550*l.* was paid on or before the 4th of August, 1822, the conveyance should be cancelled, and the premises be reconveyed to Williams in the [*388] manner before mentioned.

The defendant, in his answer, said he believed that he did not execute the agreement on or about the same day as that on which Williams executed the release; but, on what day in particular, he could not set forth, except that he believed he executed it some days after the date of the release; and that he could not set forth the day on which the release was executed by Williams, or the day on which he himself executed the agreement.

In August, 1824, Williams died, intestate, leaving the plaintiff, who was then an infant, his eldest son and heir.

The bill was filed within a few days after the plaintiff attained twenty-one, insisting that the transaction above mentioned was intended, by the parties, to be a mortgage and not a sale, and praying to redeem the premises. The answer insisted that the transaction was, and was always intended, by the parties, to be an absolute conveyance or purchase.

Two surveyors, who were examined for the defendant, deposed that, in the year 1821, the fair yearly rent of the cottages was 50*l.*, subject to deductions for repairs and loss of rent by default of payment of rent by the tenants, who were poor laborers; and that, at the time when the witnesses were examined, the fair yearly rent was about 47*l.*, subject to the same deductions; and that, at the same times, the values of the premises, to be sold, were 548*l.* and 468*l.* respectively. Another witness for the defendant deposed that, in 1821, the *plaintiff's father gave directions to John Evans, [*389] his agent or attorney, to sell or to contract for the sale of the premises, and that the plaintiff's father prepared the conveyance of the premises to the defendant, and that Evans perused and engrossed the deeds on the part of the defendant.

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Mr. *Wakefield*, and Mr. *Koe*, for the plaintiff, cited *Manlove v. Ball*,^(a) *Baker v. Wind*,^(b) *Sevier v. Greenway*.^(c)

Mr. *Knight Bruce* and Mr. *G. Richards*, for the defendant: It appears, by the evidence, that 550*l.*, which was the consideration for the conveyance, very closely approached the full value of the property: it would have been imprudent, therefore, to lend so large a sum, on a mortgage.[1] The universal practice is not to advance more than two-thirds of the value of the mortgaged estate. Williams, the conveying party, was an attorney, and prepared the deeds: he must have known how the transaction was to be carried into effect, supposing that it was intended to be a mortgage and not a sale. The expenses of engrossing the deeds and all the other expenses of the transaction, were paid by the defendant, except that the grantor, being an attorney, prepared the drafts and made no charge for them. In a mortgage transaction, the mortgagee never pays any part of the expense; but the whole of it is borne by the mortgagor.[1] The amount of the money paid, the form of the conveyance, and the mode of paying the expenses, are all in favor of [*390] a sale, and not a mortgage, being intended. Besides, the party *to whom the conveyance was made, was immediately let into possession, and has continued in possession ever since: in short, all the circumstances of the case (by which questions of the like nature have, in all former instances, been decided,) except the articles of agreement, tend to show that a sale was intended. The question then is whether, in the face of all probability, those articles (which, it is important to observe, are not shown to have been executed at the same time as the deeds) inevitably stamp, on the transaction, the character of a mortgage. One of the first rules in construing instruments, is to intend that the parties meant what is legal: but the plaintiff's view of this case, makes the whole transaction illegal and void, and makes the parties amenable to a criminal prosecution: for, by the agreement, an option between rents and interest, is given to the defendant, which makes the transaction usurious, if it was intended to be a loan. Again, on the face of these articles, there is no mutuality or reciprocity between the parties: the defendant has not the remedies for compelling payment of his money, which a mortgagee usually has. *Ensworth v. Griffiths*;^(d) *Davis v. Thomas*;^(e) *Goodman v. Grierson*;^(f) *Butler's Notes on Co. Litt.* 205, a, note 96; *Mellor v. Lees*;^(g) *Floyer v. Lavington*;^(h) *Fulthorpe v. Foster*;⁽ⁱ⁾ *Barrell v. Sabins*;^(k) *Howard v. Harris*;^(l) *Coote on Mortgages*, 28, *et seq.*

(a) 2 Vern. 84.

(b) 1 Vez. 160.

(c) 19 Ves. 413.

(d) 5 Bro. P. C. 184, Tomlyn's edit.

(e) 1 Russ. & Myl. 506.

(f) 2 Ball. & Beatt. 274.

(g) 2 Atk. 494.

(h) 1 P. W. 268.

(i) 1 Vern. 476.

(k) Ibid. 268.

(l) Ibid. 33, 190.

[1] So, it was the opinion of some of the Judges of the Supreme Court of the United States, that "excessive inadequacy of price would, in itself, furnish irresistible proof that a sale could not have been intended." *Conway's Executors, &c. v. Alexander*, 7 Cranch, 218.

[2] Such is the usual course of business in New York.

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We submit that the transaction in question was not a mortgage, but a sale; and that, under the articles of agreement, the vendor [391] was entitled to repurchase the estate within a given time. This is a case in which parol evidence is admissible; and, at all events, the court cannot come to the conclusion that the transaction was a mortgage, without further inquiry: and we are ready to submit to any inquiry that the court may think fit to direct.

Mr. Wakefield, in reply:—In *Davis v. Thomas*, the defendant, having acquired the fee in September, 1820, granted a lease of the property, to the plaintiff, in January, 1821; and the lease contained a clause of repurchase. That case, therefore, does not apply; as it was a clear case of repurchase. Besides, the observations of Lord Brougham, C., in that case, seem to make against the defendant. His Lordship says: "Upon the other question, can I reasonably hold that, where a man has mortgaged an estate, and, two years afterwards, has made a conveyance of that estate and then again, three months subsequently, upon obtaining a lease of the same estate from the purchaser, procures to be endorsed, upon that lease, by way of indulgence, a power to repurchase the property on certain terms,—can I reasonably hold that, because he obtains this power of repurchase, all the different instruments form parts of one conveyance?" His Lordship, therefore, puts his decision on the ground that all the deeds were not executed at the same time. Here the conveyance and the agreement were both executed at the same time, as is evident from the date and also from the language of the agreement; and the defendant, in his answer, does not positively state the contrary. In *Ensworth v. Griffiths*, the mortgagee agreed to sell and convey the premises to the mortgagor: therefore, it was a clear case of repurchase. In this case, the word used "in the agreement is, recon- [392]vey. The case of *Goodman v. Grierson* is contrary to all the former cases in which a collateral agreement has been held to give, to the transaction, the character of a mortgage: for, in none of those cases, was there any mutuality or reciprocity; on the absence of which Lord Manners' judgment is founded. The cases referred to by Mr. Butler, do not authorize the conclusion which he draws from them.

With respect to the valuations, they were made more than twenty years after the transaction took place; and they do not include the garden ground. The circumstance that the expenses of the conveyance were paid by the grantee, has been treated as immaterial in all the cases in which the question now in discussion, has arisen. As to the option given, to the defendant, between rents and interest, the court can not presume that the defendant will prefer that alternative which will make the whole transaction void.

THE VICE-CHANCELLOR:—The agreement to redeem need not be made at the same time as the conveyance; as appears from the judgment of Sir W. Grant, M. R.:(a) and, if that decision be right, I am bound by it,

(a) In *Servier v. Greenway*.

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and I do not see how I can avoid deciding that the plaintiff, in this case, is entitled to redeem the tenements comprised in the deed of June, 1821.[1]

[*393]

*DOVER v. GREGORY.

1839: 18th December.—Will; Construction; Charge of Debts.

Testator expressed an intention to dispose of all his worldly effects, and directed all his just debts and funeral expenses, to be fully discharged *by his executor thereafter named*: and, after giving several legacies, he devised all his copyhold lands, to his son J. A., and left all the rest and residue of his estate and effects, unto and to the use of his son John A., whom he thereby appointed sole executor and residuary legatee. Held that, taking the whole of the will together, the words were sufficient to pass the fee in the copyholds, and to charge them with the testator's debts.

JOHN AYER, the elder, by his will dated the 28th of October, 1822, after declaring his intention to dispose of all his worldly effects, ordered and ordained that *all his just debts* and funeral expenses and the charges of proving his will, should be fully discharged *by his executor thereafter named*; and, after giving several pecuniary legacies, he gave and devised to his son, John Ayer, all his copyhold lands and houses at Dunnington and Murton, all which said copyhold hereditaments and premises had been duly surrendered to the use of his will: and he gave and left all the rest and residue of his estate and effects whatsoever, or wheresoever, or of what nature or kind soever, unto and to the use of his said son, John Ayer, whom he thereby appointed sole executor and residuary legatee.

The testator died in August, 1824, leaving his son his customary heir. The testator was not seised of any real estates except the copyholds mentioned in his will and his personal estate was insufficient to pay his debts. John Ayer the son died in 1836.

The bill was filed by a creditor of John Ayer the elder, against the devisees and incumbrancers of John Ayer, the younger; and the question was whether, by the will of John Ayer the elder, the copyholds were charged with the payment of his debts.

Mr. *Jacob* and Mr. *R. Atkinson*, for the plaintiff:—It is admitted that, where a testator has directed, in general terms, that his debts shall [*394] be paid, the debts are *charged upon his real estates: but it is said that that is not so, where, as in this case, the testator has directed his debts to be paid by his executor. In *Henvell v. Whitaker*(a) the testator commenced his will by directing that all his just debts and funeral expen-

(a) 3 Russ. 343.

[1] When the transaction shall be deemed a mortgage, or conditional sale, see further, 1 Russ. & Myl. 514. n. 2, 3. Am. Ch. Dig. Mortgage, I. Raymond's (Maryland) Ch. Dig. 342, 347. As to the rule, "once a mortgage, always a mortgage," see 1 Russ. & Myl. 514. n. 1. Am. Ch. Dig. Mortgage, III.

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ses should be fully paid and satisfied by his executor thereafter named : and then, after giving legacies and an annuity, he gave all his real and personal estate to his nephew, W. Whitaker, absolutely, and appointed him executor of his will. Now, in that case there was this peculiarity, namely, that the testator expressed that the property given to his nephew, should be subject to the legacies and annuity, omitting the debts. The Master of the Rolls said that, where a testator directs that all his debts and funeral expenses shall be fully paid by his executor thereafter named, it must be intended that he had then fully determined who that executor should be ; and that the will was to be construed as if he had said : "I direct that my just debts and funeral expenses be fully paid and satisfied by my nephew, W. Whitaker, whom I hereinafter name my executor ;" and that, in such a case, the obligation to pay the testator's debts and funeral expenses, would be a condition imposed on the nephew, to be satisfied as far as all the property which he derived under the will, would extend. In a note to that case, there is an extract, from the Registrar's book, of *Finch v. Hattersley* ;(a) in which the testator, after directing all his debts and funeral expenses, to the value of twenty shillings in the pound, to be paid by his executrix thereafter named, gave his real and personal estate to his wife, for her life, and at the end thereof, he willed that they should be divided, by her, among such of his children as should be then living ; and he appointed her "ex- [*395] cutrix of his will : and it was held that the testator's real estates were charged with the payment of his debts and funeral expenses. It is observable that, in that case, only a life interest in the real estates, was given to the wife, and the fee was given to the children : but, in the present case, the fee is given to the son, or, if it is not given, it is suffered to descend to him ; and we must take it for granted that the testator knew that his son was his heir. However, it would be difficult to hold, in this case, that the will does not give the fee to the son : for the testator begins his will with declaring his intention to dispose of the whole of his property ; and then, after giving all the residue of his personal estate to his son, he appoints him the sole residuary legatee of his will. Those words would be surplusage if the testator did not intend his son to take something else under them. Besides, a direction to pay debts, is always an indication of intention that the party should take a sufficient estate to pay the debts ; which he would not do if a life interest only were given to him ; for he might die in a few weeks after the testator. We submit, therefore, that John Ayer, the son, took the fee in the copyholds, subject to the payment of the testator's debts. *Graves v. Graves*,(b) *Mirehouse v. Scatfe*,(c) *Bridgen v. Lander*,(d) *Awbrey v. Middleton*,(e) *Alcock v. Sparhawk*,(f) *Barker v. The Duke of Devonshire*,(g) *Wilce v. Wilce*,(h)

(a) Ibid. 345, note.

(d) 3 Russ. 346, note.

(g) 3 Mer. 310.

Vol. X.

(b) Ante, vol. viii. 43.

(e) 2 Eq. Ab. 497.

(h) 7 Bing. 664.

(c) 2 Myl. & Cr. 695.

(f) 2 Vern. 228.

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Doe v. Tofield,(a) *Hardacre v. Nash*,(b) *Pitman v. Stevens*,(c) *Ronalds v. Feltham*,(d) *Shallcross v. Finden*,(e) *Smith v. Coffin*.(f)

[*396] "THE VICE-CHANCELLOR:—In *Henvell v. Whitaker*, Sir John Leach held that, in all cases where property is given by the will, to the party who is directed to pay the debts, the property so given is charged with that which the party is directed to pay.[1] I was one of the counsel in that cause: and I do not recollect any case in which there was a greater spirit of litigation; and I have no doubt that, if the decision had been thought wrong, it would have been appealed from.[2]

Mr. *Knight Bruce* and Mr. *Purvis*, for some of the defendants:—We humbly submit that the decision in *Henvell v. Whitaker*, is erroneous: but it is not necessary for us to question that decision, as the present case may be decided against the plaintiff, without impeaching the authority of that case.

If a testator at the commencement of his will, says, "I direct all my debts to be paid," without more, everything that he subsequently gives, is subject to that preliminary charge: but that is not the case where he directs his debts to be paid in a particular way, or by a particular person, as by his executor. *Powell v. Robins*,(g) is the case which points out the distinction which we are contending for. In *Warren v. Davies*,(h) it was decided that a direction that the testator's debts should be paid by his executors, does not amount to a charge on a real estate devised to one of them. The case of *Wasse v. Heslington*,(i) seems to bring the point to its true principle.

There the decision was that, where a testator directs his debts and [*397] funeral expenses to be paid by his *executors, it is *prima facie*, to be considered that he means the payment to be made by them out of the funds which come to their hands as executors: whether he intends that all the property which he gives to his executors, shall be subject to the payment of his debts and legacies, must be gathered from the whole will. That case, therefore, was decided on a principle which is quite inconsistent with the ground on which *Henvell v. Whitaker* was decided. Why is a direction to do that which is the duty of the executor to do, to amount to a charge on an estate which he takes as a beneficial devisee? Sir John Leach, at the conclusion of his judgment in *Wasse v. Heslington* says: "in the case referred to, it appeared to me to be manifest, from the whole will, that the testator intended to subject all his property given by his will to the executors, to the payment of his debts and funeral expenses. It appears to me in

(a) 11 East. 246.

(b) 5 T. R. 716.

(c) 15 East. 505.

(d) Turn. & Russ. 418.

(e) 3 Ves. 938.

(f) 2 H. Black. 444.

(g) 7 Ves. 209.

(h) 2 Myl. & Keen, 49.

(i) 3 Myl. & Keen, 495.

[1] "It is clear upon the authorities, that where there is a direction in the will, that the debts should be paid by a particular person, and afterwards property is given to him, he takes it subject to the payment." Sugden, Ld. Chan.; *Leaphier v. Despard*, 1 Conn. & Law., 304.

[2] See also what the Vice-Chancellor says in regard to that case, in *Graves v. Graves*, 8 Sim. 54. 3 Russ. 348, n. 1.

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this case, to be equally manifest that he had not that intention." His Honor, therefore, corrects the generality of the language used by him in *Henvell v. Whitaker*, and states that the ground on which he decided that case, was the intention of the testator, collected from the whole of his will.

If the testator in this case had directed his debts, &c., to be paid by his son, John Ayer, then, it may be conceded that the debts would have been charged on the copyholds. But the testator does not mention his son's name: he mentions the character without the name: and then he makes a separate and distinct devise, of all his copyhold lands, to his son Joseph Ayer, without mentioning his character of executor. It was said that the clause by which the testator appointed his son his residuary legatee, would be surplusage, unless it was held to pass the fee in copyholds. The expression, "residuary legatee," has no meaning except as applied to personal [*398] estate: it is very commonly found in wills; and the testator used it as descriptive of what he had done by giving his residuary estate to his son.

Mr. *Loftus Wigram* for some of the defendants who were incumbrancers on the estates of John Ayer the younger:—The decision in *Henvell v. Whitaker*, must be considered as corrected by Sir John Leach, in *Wasse v. Heslington*. The utmost however, that that case decides, is that, where a testator directs his estates to be paid by his executor, and the executor takes property under the will, an obligation is imposed on him to pay the debts to the extent of that property. Here the son did not take more than a life interest in the copyholds, under the will. He took the fee as heir to his father. If he had not been heir, he would not have taken more than an estate for his life; and it cannot be established, upon this will, that his father intended him to take any greater estate. *Henvell v. Whitaker*, therefore, has no direct application to this case. The word "effects" in the introductory clause, cannot have the effect of passing lands. *Camfield v. Gilbert*.^(a) It is begging the whole question to say that the son takes the fee in the copyholds, because the testator has charged them with payment of his debts. It was said that the words "residuary legatee," must be taken out of their ordinary meaning and applied to real estate, or else they would be surplusage: but it may be asked why did the testator insert the words, "by my executor," in the direction for payment of his debts, except for the purpose of confining the payment of his debts to his personal estate. Those words are surplusage unless they are held to have been used with that view.

*Mr. *Simons* appeared for the other defendants. [*399]

THE VICE-CHANCELLOR:—I perfectly well recollect that the case of *Henvell v. Whitaker*, was argued, with great earnestness, on both sides; and I must say that, in my opinion, the decision in that case is right.

I am willing that this will should be construed according to the intention of the testator. First of all, there is a plain intention that the executor should

(a) 3 East, 516.

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pay the debts, and the funeral expenses, of course : and it does not amount to an evidence of intention that he is not to pay the debts, because he is to pay the funeral expenses. And, as the testator says: "I order and ordain that all my just debts and funeral expenses, and the charges of proving this my will, shall be fully discharged, by my executor hereinafter named," he denotes an intention that his executor should pay his debts, and should pay them by the means which the testator has supplied him with, either by a gift of property or by suffering it to descend.

If the heir had been a stranger, there would have been sufficient, in the will, to enable him to take the fee. There is an intention that he should pay the debts; and the fact that the testator gives the copyholds without words of inheritance, shows that he meant that the debts should be paid out of the copyholds. The court, in construing a will, is bound to give a meaning to every word, if it can; and not to reject any word as being surplusage, if it can be avoided.[1] I admit that the expression, "residuary legatee," ordinarily, would apply to a person who is to take the undisposed of personal estate.[2] But, where the testator has given all the rest "and residue of his estate and effects whatsoever or wheresoever, or of what nature or kind soever, unto and to the use of his son, John Ayer, and then says, "whom I hereby appoint sole executor and residuary legatee of this my will," those words may be fairly construed to mean that he intended his son should take all his property, of every description, which he had not before given.

I think that I am bound by the case of *Henvell v. Whitaker*, to hold that the debts in this case are charged on the copyholds.[3]

LENOX v. LENOX.

1839; 20th December.—Will; Construction; Conditional Bequest.

Testator bequeathed 4000*l.* in trust for his daughter, (a single woman,) for her life, for her separate use, independently of any husband with whom she might intermarry, and, after her death, in trust for her children, and, if there should be no children, then, *if she should survive any husband with whom she might intermarry*, in trust for her, her executors, &c.; but if her husband should survive her, then in trust as she should, by will, appoint, and, in default of appointment, in trust for her next of kin, as if she had died intestate, and without having married. The daughter died a spinster. Held that the words: "if my daughter shall survive any husband with whom she may intermarry," were words of condition and not of mere limitation, and, consequently, the residuary legatees, and not the daughter's executor, became entitled to the 4000*l.* on her death.

SAMUEL LENOX, by his will dated the 4th of April, 1835, gave the sum of

[1] Vide *Oddie v. Woodford*, 3 Myl. & Cr. 614, and n. 2, *ibid.*

[2] Vide *James v. James*, 4 Paige, 117; *King v. Strong*, 9 Paige, 94; Am. Ch. Dig., Devise, III, IV.

[3] Vide *Graves v. Graves*, 8 Sim. 43; *Sands v. Champlin*, 1 Story's Rep. 376, 383. 3 Russ. 348, n. 1; 2 Myl. & Cr. 707, n. 1; 709, n. 3. *Braithwaite v. Britain*, 1 Keen, 206, 222, n. 1.

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4000*l.* to trustees, in trust to invest it in the usual securities, and to pay the dividends, interest, and yearly produce thereof into the proper hands of his daughter, Ann Lenox, during her life, or to any person or persons whom she should, from time to time, by note or writing under her hand, appoint to receive the same, to the intent that the said dividends, interest, and yearly produce might be enjoyed by his said daughter, Ann Lenox, [*401] during her life, for her sole and separate use, independently of *any husband with whom she might intermarry*: and he declared that his said daughter should have no power to anticipate, alien or assign the said dividends, interest, and yearly produce, or any part thereof, before the same should, from time to time, become due and payable; and that, immediately after the decease of his said daughter, the trust fund should be in trust for all or any one or more of *her children, grandchildren, or other issue*, (such grandchildren or other issue to be born in her lifetime) as she should at any time, or from time to time, during her life, by any deed or deeds, to be executed by her in the presence of two or more witnesses and to be attested by the same witnesses, or by her last will and testament or any codicil or codicils thereto to be signed and published by her in the presence of and to be attested by two or more witnesses, appoint, and, in default of such appointment, in trust for all her children, if there should be more than one, in equal shares, as tenants in common, their respective executors, administrators and assigns; and in case any one or more of the said children, being a son or sons, should die under that age without having been married,^(a) then as to as well the original share or shares of the said trust fund belonging to the child or children respectively who should so die as aforesaid, as also the share or shares thereof to which the said child or children respectively might become entitled under that trust, in trust for the other or others of the said children, and, if more than one, to take as aforesaid, his, her or their executors, administrators and assigns, or in case there should be only one child of his said daughter, then in trust for such only child, his or her ex- [*402] ecutors, administrators and assigns; but in case there should be no child of his said daughter, or no such child who, being a son, should attain the age of twenty-one years or be married, then, as to the trust fund, if his said daughter *should survive any husband with whom she might intermarry*, in trust for his daughter, her executors, administrators or assigns, for her and their own absolute use and benefit; but if the husband of his said daughter should survive her, then in trust for such person or persons, &c., as she, by her last will and testament in writing, or any writing in the nature of her last will and testament, or any codicil or codicils thereto, to be respectively signed and published by her in the presence of and attested by two or more witnesses, should, notwithstanding her coverture, appoint, and, in default of such appointment, in trust for the person or persons who at her decease would have become entitled thereto under the statute for the distribution of the

(a) The above is a correct copy of the will, as set forth in the brief.

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effects of intestates, if the said Ann Lenox had died possessed thereof, intestate, *and without having married* ; provided that, notwithstanding the trusts and provisions thereinbefore contained in favor of the children, grandchildren and issue of the said Ann Lenox, it should be lawful for her at any time, or from time to time, by any deed or deeds to be executed by her in the presence of and to be attested by two or more witnesses, or by her last will and testament in writing, or any writing in the nature of her last will and testament, or any codicil or codicils thereto, to be respectively signed and published by her in the presence of and attested by the like number of witnesses, to appoint, to or in trust for *any husband with whom she might intermarry*, all or any part of the interest, dividends or yearly produce of the trust fund, to be payable to such husband, during his life, or [*403] *any less period. The testator then gave the sum of 16,000*l.* to the same trustees, upon trust to divide the same between his four daughters, Barbara Isabella Lenox, Margaret Lenox, Maria Lenox, and Jesse Lenox, in equal shares, as and for their respective portions ; and he declared that the share or portion of each of the same four daughters should be held, by the trustees, upon the same or the like trusts, and with and under and subject to the same or the like powers, provisoes and declarations for the benefit of each daughter and her children, issue and appointees, as were thereinbefore declared concerning the sum of 4000*l.* thereinbefore bequeathed in trust for the benefit of his daughter, Ann Lenox, and her children, issue and appointees, and including the like power of appointing in favor of a husband, and the like ultimate trusts for the benefit of the persons who, at the decease of the said Barbara Isabella Lenox, Margaret Lenox, Maria Lenox, and Jesse Lenox, respectively, would have been entitled thereunto under the statutes for the distribution of the effects of intestates if they respectively had died possessed thereof intestate and without having been married, or as near to such trusts, powers, provisoes and declarations as might be. The testator then directed the income of the portions of his four last named daughters, to be applied for their maintenance and education during their minorities : and he then gave the sum of 7243*l.* to the trustees, upon trust to invest it in the usual securities, and to pay the income to his wife for her life, and after her decease, upon trust, as to the capital, for his sons Samuel Lenox, Thomas James Lenox and John Lenox, and his five daughters Ann Lenox, Barbara Isabella Lenox, Margaret Lenox, Maria Lenox and Jesse Lenox, in equal shares, as tenants in common ; and if his son John Lenox should die under the age of [*404] twenty-one years, or *any of them, the said Ann Lenox, Barbara Isabella Lenox, Margaret Lenox, Maria Lenox and Jesse Lenox, should die under that age without having been married, then, as to the share or shares, as well original as accruing, of the said John Lenox and of his said daughters so dying under the age as aforesaid, upon trust for the others of them his said three sons and five daughters in equal shares as tenants in common : and he declared that the share or shares, original and accruing, of his daughter Ann Lenox, of the said trust moneys, stocks, funds and securi-

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ties, should, after the death of his wife, be held, by the trustees, upon the same trusts, and with, under and subject to the same powers, provisoes, and declarations for the benefit of herself and her children, issue and appointees, as were thereinbefore declared concerning the legacy of 4000*l.* thereinbefore bequeathed upon trust for the benefit of his daughter Ann Lenox, and her children, issue and appointees, and including the like power of appointing in favor of a husband; or as near to such powers, provisoes and declarations as might be; and that the share or shares, original and accruing, of each of his daughters, Barbara Isabella Lenox, Margaret Lenox, Maria Lenox and Jesse Lenox, of the said trust moneys, stocks, funds and securities, should be held by the trustees, upon the same trusts, and with, under, and subject to the same powers, provisoes, and declarations, for the benefit of his four last named daughters respectively, and their respective children, issue and appointees, as were thereinbefore declared or referred to concerning their respective shares of the 16,000*l.* hereinbefore bequeathed in trust for the benefit of his four last named daughters and their respective children, issue and appointees, and including the power of appointing in favor of a husband, or as near to such powers, provisoes and declarations as might be. The *testator [*405] then gave his residuary estate to the same trustees, in trust, as to one moiety, for his son Thomas James Lenox, his executors, &c., and as to the other moiety, for his son, John Lenox, and to be transferred or paid to him on his attaining twenty-one.

The testator died in June, 1836. In March, 1839, Ann Lenox (having attained twenty-one) died intestate and a spinster. Her mother, Margaret Lenox, took out administration of her effects.

The bill was filed, by Thomas James Lenox and John Lenox, against Margaret Lenox and the trustees and executors of the will, praying that it might be declared that, by the death of Ann Lenox without having been married, the legacy of 4000*l.* bequeathed in trust for her, and also her share and interest in the 7243*l.*, subject to the life interest of Margaret Lenox in that sum, had fallen into the testator's residuary estate.

Mr. Knight Bruce and Mr. K. Parker, for the plaintiffs:—The question is what is the effect of the words: "if my said daughter, Ann Lenox, shall survive any husband with whom she may intermarry." We contend that they are not words of limitation, but of condition; and, therefore, as Ann Lenox never married, the ultimate limitation in trust for her, her executors &c. did not take effect: but the 4000*l.*, and one-eighth of the 7243*l.*, fell, on her death, into the residue. In *Gulliver v. Wickett*,(a) *Mackinnon v. Sewell*,(b) and *Murray v. Jones*,(c) the words on which the question turned, **prima facie* imported condition; but were, in fact, nothing [*406] more than words of limitation: if, however, as in the present case, the words clearly import a contingency, the court is bound to give effect to

(a) 1 Wilson, 105.

(b) Ante, vol. 5. p. 78 and 2 Myl. & Keen, 202. [S. C. Coop. Sel. Cas. 224.]

(c) 2 V. & B. 313.

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them. *Davis v. Norton*,^(a) *Doe v. Shippard*,^(b) *Swayne v. Smith*,^(c)—[The Vice-Chancellor: The testator seems to assume that his daughter would marry, and to treat it as doubtful whether she would survive her husband or not.]—The intention which we impute to the testator is a reasonable one, namely, to give his daughter income only, if she did not marry. He did not mean to sever the capital of the sums in question, from the bulk of his property, except in the event of her marrying.

Mr. *Wigram* and Mr. *Prendergast*, for Margaret Lenox, the personal representative of Ann Lenox:—The testator, in the limitations which he has made of the property in dispute, has provided for every event that could happen, except one: and the question is whether the omission to provide for that event, is not a mere oversight. The trust for the separate use of Ann Lenox, and all the other trusts declared of the property, show that the testator's sole object was to protect his daughter from the marital right; it was immaterial to him whether she married or not. What difference could it make whether she had a husband who died in her lifetime, or whether she never had any husband at all? In short, the words: "if my said daughter shall survive any husband with whom she may intermarry," mean nothing more than: "if my said daughter shall die without leaving any husband her surviving." *Jones v. Westcomb*,^(d) *Mackinnon v. Sewell*,^(e) *Prestwidge v. Groombridge*,^(f) *Aiton v. Brooks*,^(g) *Murray v. Jones*,^(h) *Meadows v. Parry*.⁽ⁱ⁾ In every one of those cases, the words, in their natural sense, were purely conditional.

THE VICE-CHANCELLOR:—The question on this will, is: can it be collected to be the testator's intention that the *corpus* of the legacy, should pass away from his estate, otherwise than by reason of the fact of marriage.

Mr. *Knight Bruce*, in reply:—In the cases cited for the defendant, no motive could be found for the testator having made the property to go over in the event specified, and not in the event that happened: but, if you can collect any probable reason why the testator should direct the property to go over in one event, and not in the other, then the words are held to be words of condition, otherwise they are mere words of limitation. The majority of parents, when they provide for their daughters, do not mean them to take the capital unless they marry. I, therefore, show a reasonable ground for holding the words in this case, to be words of condition and not of limitation. *Davis v. Norton* was decided on the principle which I have stated. *Doe v. Shippard* is a case of the same description. There Lord Mansfield, C. J., says: "There may be a reason why the testator might not intend the limitations over to take place except in the event of the daughter's surviving her husband, viz. to secure the estate in tail to his grandson, Hewitt Shippard, against
[*408] any *preference his daughter might show to her issue by any sub-

(a) 2 P. W. 390.

(b) 1 Doug. 75.

(c) 1 Sim. & Stn. 56.

(d) Proc. Ch. 316.

(e) Ubi supra.

(f) Ante, vol. 6, p. 171.

(g) Ante, vol. 7, p. 204.

(h) Ubi supra.

(i) 1 V. & B. 124.

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sequent husband. If she did not survive him, there could be no danger of that sort, as the estate would descend to Hewitt Shipphard. This bears no resemblance to the famous case of *Jones v. Westcomb*; for, there, the intention was clear that, failing the child, the estate should go over to the devisees in all events." The same doctrine is recognized in *Swayne v. Smith*. There Sir John Leach, V. C., says: "It is not very easy to find a satisfactory reason why the testatrix should have intended that the three legatees of the three sums of 360*l.* stock, should take if the sister died without child or husband, having been married; which would be the effect of this will; and that the same legatees should not take, if the sister died without child or husband, not having been married. But courts of justice are not at liberty to act, upon conjecture, against the clear expressions of a will. And this lady has told us, in plain words, what legacies are to take effect, in the event of her dying unmarried; and I can not intend that she meant more than she has expressed."

THE VICE-CHANCELLOR:—The simplest of all the cases, is *Jones v. Westcomb*; and all the others are, in fact, founded upon it. There, a man possessed of a long term of years, devised it, to his wife, for life, and, after her death, to the child she was then *enceinte* with; and, if the child died before it came to the age of twenty-one, then he devised one-third part of the term to his wife, her executors and administrators, and the other two-thirds, to two other persons. The fact was that the wife was not *enceinte*; and the question was whether she was entitled to the one-third of the term. There was nothing to prevent the wife from taking, except the fact of a child being alive to take it *from her: and it was immaterial, in effect, whether the tes- [*409] tator said that, in case no child should live to attain twenty-one, or if the child should die before attaining twenty-one, the ultimate limitation should take effect.

In a case where the meaning of the testator clearly is that the ultimate limitation should take effect on the failure of a preceding gift, and that gift does fail, but the language in which the limitation over is expressed, does not, in terms, apply to the event which has happened, there, in my opinion, the limitation over should take effect. But you can not read this will without seeing that marriage was the event which the testator contemplated; and that the circumstance of the legacy passing away from the bulk of his property, was to depend on the fact of his daughter thereafter marrying. It might have been different if she had been married. The trusts which the testator has declared of the legacies in question, are, first, for the separate use of his daughter for her life, next, for the benefit of her children, and then he describes the failure of children on the supposition that there was a marriage. In my opinion, therefore, the testator did not mean that the legacies should go to the executors or administrators of his daughter in the event of there being a failure of children by her under any circumstances; but, it seems to me that his general intention was that the *corpus* of the legacies should not go away from

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the bulk of his estate except in case of her marrying; and that, in order to mark that intention, he says: "if my said daughter, Ann Lenox, shall survive any husband with whom she may intermarry, then in trust for my said daughter." I must take it, therefore, that the testator in this case, has [*410] himself described the very event on the happening of which he *intended the *corpus* of the legacies to go over; and, under the circumstances of the case, I must hold that they belong to the residuary legatees.[1]

 TANNER v. SMITH

1840 : 15th January.—Vendor and Purchaser; Conditions of Sale; Construction.

One of the conditions of sale provided that, if the purchaser should raise objections to the title which the vendor should not be able or willing to remove, the vendor should be at liberty to rescind the contract, and that all objections which should not be taken, in writing, within ten days after the delivery of the abstract, should be considered as waived. Held, that the condition referred to the first delivery of objections, and, if the vendor expressed his willingness to answer them, he could never afterwards rescind the contract.

THE bill was filed, by the vendors of an estate against the purchaser, for a specific performance of the contract between the parties, and for an injunction to restrain an action brought by the defendant against the plaintiffs, to recover the deposit.

By one of the conditions of sale, the abstract was to be delivered to the purchaser, or his solicitor, within twenty days after the sale; and, by another condition (the 7th) it was provided that, if the purchaser should raise objections to the title, which the vendors should not be able or willing to remove, and the purchaser should insist upon such objections, the vendor should be at liberty, by writing under his hand, to rescind the contract, on repaying, to the purchaser, his or her deposit money, without interest or costs; and that all objections which should not be taken, in writing, within ten days after the delivery of the abstract, should be considered as waived.

The abstract was delivered within the twenty days; and, on the 9th [*411] of March, which was the 10th day after, the *defendant sent, to the plaintiff, several objections, in writing, to the title as shown by the abstract. On the 12th of March, the plaintiff informed the defendant, that they should have no difficulty in removing the objections; that a further abstract would be delivered within a few days, and that ten days more would be then allowed for making objections to the title. On the 9th of May, the further abstract was delivered; but previously thereto, the time for completing the sale had expired, and the defendant had commenced his action.

The motion for the injunction was now made; and one question was, what construction ought to be put upon the 7th condition of sale.

[1] Vide *Hawkes v. Baldwin*, 9 Sim. 355. *Franks v. Price*, 3 Beav. 182, 209. 1 Sim. & Sta. n., 60. 1.

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THE VICE-CHANCELLOR:—With respect to the 7th condition: I confess that it appears to me to be a new condition; but it must be looked at fairly and receive a reasonable construction; and that, in my opinion, is that, when objections to the title have been delivered within the ten days, then the vendors shall have the power of determining which of two courses they will adopt, that is, whether they will endeavor to remove or answer the objections, or whether they will put an end to the contract altogether. If they are either unwilling or unable to remove the objections, then they must pay back the deposit money, without either interest or costs.

There seems to me to be nothing very unreasonable in the condition as so construed: but it would be very unreasonable to hold that, after the objections have been sent in, and the vendors have expressed a willingness to remove them, they shall be at liberty, at any time afterwards, to rescind the contract.[1]

*My opinion, therefore, is that the construction which ought to be [*412] put upon this 7th condition, is that, if the vendors once elect to answer the objections, they are, for ever thereafter, precluded from exercising the option given to them, by that condition, to rescind the contract.[2]

[1] "During the argument of *Tanner v. Smith*, 15th January, 1840, the Vice-Chancellor of England having expressed an opinion to the effect which is reported, (10 Sim. 411,) that when objections are delivered, the vendor, under the 7th condition had then the opportunity of deciding whether he was able and willing to remove them, the following observations passed:—Mr. Jacob—The vendor may deliver a supplemental abstract, which may fail still to make out his title. Vice-Chancellor—It seems to me a condition which is capable of being exercised at one time only. When objections are delivered and the vendor says 'I am able and willing to remove them,' he cannot afterwards rescind the contract. Mr. Jacob—If he at that time thinks himself able, and proves not to be able, may he not afterwards exercise the option? Vice-Chancellor—My opinion is, that the 7th condition applies to the mode in which the vendor chooses to deal with the objections. If he says that he is able and willing to remove them, he is excluded at any time afterwards, whether upon the same objections or future objections, from availing himself of that condition to rescind the contract on the ground that he is not able or willing. Rep. MS." *Morley v. Cook*, 2 Hare, 109, n. (a.)

[2] The above decision, and the points therein decided, underwent much discussion in a later case, before Wigram, V. C. *Morley v. Cook*, 2 Hare, 106, which was as follows: A condition of sale was, that in case the purchaser should raise objections to the title which the vendor should not be able or willing to remove, the vendor might rescind the contract, on notice and repayment of the deposit to the purchaser; and objections not delivered within fourteen days after the delivery of the abstract to be treated as waived, in which respect time was to be essential. The purchaser returned the abstract with queries within the fourteen days, and the vendor answered the queries. The purchaser on the same day objected to the answers. The correspondence on the subject of the title continued for several weeks, and then the vendor gave notice that he rescinded the contract. It was held; that the continuance of the treaty for the completion of the title, after the first objection of the purchaser, was a waiver of the condition as to the rescinding of the contract; that such a condition of sale ought to be discouraged; and ought not to receive a construction oppressive on the purchaser; and that the vendor's right to rescind the contract under the condition must be co-extensive with the purchaser's right to object to the title under the same condition. In his judgment in this case, the Vice-Chancellor says; "The plaintiff has in this case insisted, that according to the judgment of the Vice-Chancellor of England, in *Tanner v. Smith*, upon a condition very similar to the present, the vendor must at once elect between one of two

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Mr. Knight Bruce supported the motion; and Mr. Jacob, Mr. Wray and Mr. Humphrey opposed it.(a)

courses, when objections to the title are taken; first, waive his right to insist upon the condition enabling him to rescind the contract; or, secondly, put an end to the contract, and thereby relieve the purchaser, as well as himself, from the pendency of it. On behalf of the vendor it was argued, that the question of the effect of the consideration did not, in fact, judicially arise in the case of *Turner v. Smith*; the bill in that case having been brought by the vendor, who could not have insisted, by his own bill, upon exercising his right to rescind under the condition. My own impression (having been counsel in the appeal motion) is, that the question did distinctly arise, and that it was decided by the Vice-Chancellor in the way which the plaintiff has contended. The argument for the purchaser in that case was, that, under the condition in question, the vendor had a right to rescind the contract at any time before the decree, and that it would be unjust that a vendor retaining such a right should keep the deposit. The Vice-Chancellor held, that the vendor was not in a situation to rescind the contract. He said the condition was waived by the vendor, and he granted the injunction to restrain the action for the recovery of the deposit, thereby deciding against that construction of the condition for which the vendor now contends. It was with reference to that argument that Lord Cottenham said, 'This case shows the inexpediency of hearing the merits of a cause upon motion;' and he said, that whether the vendor did or did not retain the right to rescind the contract, (not having rescinded it upon the first objection,) he had reserved to himself 'the right to contend that he was in a position to rescind the contract to the latest moment; and that it would be unjust to allow a vendor, in such circumstances, to keep the vendee's money in his pocket. Lord Cottenham's judgment however, neither overruled nor disapproved of the Vice-Chancellor's opinion of the construction and effect of the condition.' The opinion of Vice-Chancellor Wigram, is too long to admit of much further extract from it, valuable as it is, in relation to the present topic; therefore only two or three of the closing sentences will be introduced. At the conclusion he says: "But I am bound to come to that conclusion which, with reference to the majority of cases, appears most consonant to justice. Proceeding upon that principle I have no hesitation in saying that conditions of sale like those before me, (the meaning of which no purchaser knows until *ex post facto* decisions of a court of justice informs him of it,) ought to be discouraged, and that I am but offering such discouragement by putting a strict construction upon them in favor of a purchaser, and by holding that they are not to have a construction which might subject purchasers to great expense and inconvenience at the mere will of a vendor; that the 6th condition in this case ought to have that construction which the Vice-Chancellor put upon a similar [the 7th] condition in *Tanner v. Smith*; that a treaty between the vendor and purchaser for the completion of the title by the former, after the purchaser's objections have been taken to the abstract, ought to be deemed a waiver of that condition; and that in equity, as at law, the condition once waived is gone forever. I have reason to know, that the Vice-Chancellor remains of the opinion correctly attributed to him in *Tanner v. Smith*, and that he intended to re-assert the same opinion in the late case of *Cutts v. Thody*." By conditions of sale, all objections to the title were to be taken within twenty-eight days from the delivery of the abstract, which, if not removed within fourteen days, the vendor was to be at liberty to annul the contract, on payment of the deposit, but without costs. The purchaser having made an objection which was not removed, the vendor gave notice to annul the contract. The objection being held valid, the court considered the vendor entitled to avail himself of the condition; but was of opinion that if, in giving the notice to annul, the defendant had sought improperly to escape from the performance of a duty, which, by the nature of the contract, he was bound to perform, it would have been invalid. *Page v. Adam*, 4 Beav. 269. Where the conditions of sale provided, that all objections to the title disclosed by the abstract, not taken within a certain time after delivery of the abstract to the purchaser should be deemed to be waived, it was held, that the time for objecting was not to be computed from the time of the delivery of an imperfect abstract; and that the purchaser was not precluded from taking an objection which arose out of evidence called for before the expiration of the time fixed. *Blacklow v. Laws*, 2 Hare, 40.

(a) The injunction was granted by the Vice-Chancellor: the Lord Chancellor, however, dis-

 1839.—*Evans v. Pilkington.*

EVANS v. PILKINGTON.

1839; 23d December.—Will; Construction.

Testator directed his trustees to invest the proceeds of his real and personal estate, and to accumulate the interest *until the youngest child of his brother should attain twenty-one*, and then to stand possessed of the trust fund and its accumulations, in trust for *all the children of his brother who should be then living*. The brother had seven children, and all of them were living at the date of the will, and at the testator's death. All the children, except the second, died, and none of them, except the eldest, the second, and the fourth, attained twenty-one. The fifth was the last that died. Held that the trust for accumulation did not continue until the seventh child would have attained twenty-one, if living, but that it ceased on the death of the fifth child, and that the second child then became entitled to the trust fund.

SAMUEL JONES, by his will dated the 25th of May, 1825, directed his trustees to invest, as soon as conveniently might be after his decease, the moneys to arise from the sale of his real and leasehold estates and the residue of his personal estate, in the usual securities, and, *in the mean time and until the youngest child of his brother, Thomas Jones, [413] should attain the age of twenty-one years*, to accumulate the interest and dividends thereof, in the way of compound interest; and, when and so soon as such youngest child of his said brother, Thomas Jones, should attain his said age of twenty-one years, to stand possessed of and interested in the said rest, residue and remainder of the said trust moneys, and the stocks, funds and securities in or upon which the same and the accumulations thereof, should be respectively invested, in trust for *all and every the children and child of his said brother, Thomas Jones, who should be then living*, or the issue of such of them as should be then dead, such issue respectively to take their parents' share, and to be divided amongst them, if more than one, in equal shares and proportions, and, if there should be but one such child, then in trust for such only child, or his or her issue, and if there should be no issue of his said brother, Thomas Jones, who should live to attain the said age of twenty-one years, or should die under that age leaving issue, then in trust for the person or persons (other than and except the testator's brother Joseph Jones or his issue) who under and by virtue of the statutes made for the distribution of the personal estates of intestates, would then be entitled thereto.

The testator died on the 17th of December, 1827. At the date of the will and at the testator's death, seven children of the testator's brother, Thomas Jones, were living, that is to say, Stedman Richard Samuel Jones, his eldest child, Elizabeth Jane Stedman Jones, his second child, Samuel Huddart Owen Glendower Jones, his third child, Frederick Arthur Jones, his fourth child, Alfred Tudor Jones, his fifth child, Caroline Angelina Jones, his sixth child, and Rosa Matilda Jones, his seventh child: and their father,

resolved it, but as the reporter has been informed, on a ground quite independent of the 2d [7th] condition; as to the effect of which, his Lordship did not express any opinion. [This statement is confirmed by Wigram, V. C. who was of counsel on the appeal. See *supra*, n.]

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[*414] who died in *September, 1834, had not afterwards any other child.

Stedman Richard Samuel Jones attained twenty-one on the 20th of May, 1829, and died on the 15th of October, 1834. Elizabeth Jane Stedman Jones attained twenty-one on the 12th of May, 1833. Samuel Huddart Owen Glendower Jones died on the 17th of June, 1833, under twenty-one. Frederick Arthur Jones attained twenty-one on the 12th of January, 1837, and died on the 15th of February following. Alfred Tudor Jones died on the 17th of May, 1837, under twenty-one. Caroline Angelina Jones died on the 18th of June, 1828, under twenty-one; and Rosa Matilda Jones died on the 2d of July, 1828, under twenty-one. All the deceased children died intestate and without having been married; and Elizabeth Jane Stedman Jones took out administration to her four deceased brothers.

Elizabeth Jane Stedman Jones married Thomas Evans; and, by the settlement on their marriage, dated the 17th of November, 1834, she assigned all legacies and sums of money and shares of trust moneys, stocks, funds and securities, and proceeds of real and personal estate, to which she was or might become entitled under or by virtue of the testator's will, and also all her share and interest of and in the personal estate of her brother Stedman Richard Samuel Jones (except her life interest in a legacy of 1500*l.* given by the testator's will,) to William Moore, Edward Hardwicke, and David Evans, upon certain trusts for the benefit of herself and her husband and the children of their marriage.

The bill was filed by Thomas Evans and Elizabeth Jane Stedman, his wife, and their children and the trustees of their marriage settlement, alleging that, in consequence of the several events therein and hereinbefore [*415] stated, the plaintiffs were advised that the whole *of the residue or surplus of the moneys which had been produced by or from the real and personal estate and effects late of the testator Samuel Jones, and all the stocks, funds and securities wherein the same had been invested, had become and were then subject and liable to the trusts or provisions of the settlement, discharged from all trusts or directions for accumulation contained in the testator's will, and ought to be transferred, by the surviving trustee of the will, to the trustees of the settlement; and the bill prayed for a declaration to that effect, and that the trust funds might be transferred accordingly.

The defendant, Pilkington, who was the surviving trustee of the will, said, in his answer, that he had declined to transfer the trust funds to the trustees of the settlement, or to apply the interest, dividends and annual income thereof according to the trusts of that deed, inasmuch as he had been advised that it was doubtful whether, according to the true construction of the will, the trusts for accumulation therein contained, were at an end, and whether they would not continue until the time when the youngest child of Thomas Jones would, if living, have attained twenty-one; (a) and whether any person would

(a) The time at which the youngest child would have attained twenty-one, did not appear.

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attain a vested and absolute interest in the trust property or any part thereof, until that period.

Mr. *G. Richards* and Mr. *John Wilson*, for the plaintiffs, said that by the will, cross remainders were, in effect, created amongst the children of Thomas Jones, the testator's brother : and they cited *Ford v. Rawlins*.^(a)

Mr. *Knight Bruce* and Mr. *T. H. Hall*, for the defendant Pilkington, the surviving trustee of the will, submitted that the trust for accumulation would not cease, until the seventh child of Thomas Jones would have attained twenty-one. [*416]

THE VICE-CHANCELLOR :—In my opinion, the trust for accumulation ceased, and the trust fund became absolutely vested on the death of Alfred Tudor Jones ; for, when he died, there was no other child of Thomas Jones who could either attain twenty-one, or die under that age leaving issue.

Declare that, on the death of Alfred Tudor Jones, the plaintiff Elizabeth Jane Stedman Evans and her trustees, became entitled to the fund in question in this cause : and it is ordered that the defendant do transfer the same, to the plaintiffs, W. Moore, Edward Hardwicke and David Evans.

Reg. Lib. A. 1839, fo. 1542.

 BENNETT v BAXTER.

[*417]

1840 : 17th January.—New Orders ; Solicitor.

The prosecution of a decree in a creditors' suit, having been taken from the plaintiff, and committed to another creditor under the 56th order of 1828, the plaintiff's solicitor was ordered to allow that other creditor's solicitor to inspect and take copies of all the papers in the cause, in his possession.

THIS was a creditors' suit ; and the usual decree had been pronounced in it.

The plaintiff and his solicitor having failed to prosecute the decree with due diligence, the Master, under the 56th order of 1828, had committed the prosecution of the suit to another creditor. A motion was now made, on behalf of that creditor, that the solicitor of the plaintiff might be ordered to allow the solicitor of the substituted creditor, at all seasonable times and upon giving reasonable notice, to inspect and take copies of and extracts from the several drafts, briefs, decree, orders, letters, copies of letters, documents and papers relating to, or made in the cause, in his possession.

The motion was supported by an affidavit stating that applications had been made, by or on behalf of the party making the motion, to the plaintiff's solicitor, for information as to the state of the proceedings, and for liberty to inspect the documents, which had been refused.

Mr. *Girdlestone*, in support of the motion :—There is no case which precisely governs the question. It must be decided on principle. Two princi-

(a) 1 Sim. & Stu. 328.

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ples are established by the cases : one is that, if a solicitor is discharged by his client, he is not compellable to afford facilities towards the prosecution of the suit by the production of the documents on which he has a lien : the other is that, if the solicitor discharges himself, he cannot, on the ground of his lien, withhold the documents. *Heslop v. Metcalfe.*(a)

[*418] *The present case falls within the principle of *Heslop v. Metcalfe.*

It is through the default of the plaintiff and his solicitor that he is discharged. It is in vain to arm the Master with power to take the prosecution of a decree from a dilatory party, and commit it to another party interested in the suit, if the solicitor of the party making default can, by refusing access to the papers in the cause, set the court at defiance. The general order would, by that means, be rendered nugatory.

Mr. *G. Richards*, contra :—*Heslop v. Metcalfe* was a case between the solicitor and his own client. Here the applicant is a mere stranger. There is no privity between the solicitor and the present applicant, who is under no responsibility for costs to the solicitor. The papers are the papers of the client, or of the solicitor, by virtue of his lien. What jurisdiction has the court to order the plaintiff or his solicitor to part with the possession of their own documents ; and if not to part with them, why should an inspection of them be directed ? It is a new application ; and the circumstance that no precedent can be found after the General Orders have been in operation ever since 1828, shows that it has been felt, in practice, that such an application could not be sustained.

Mr. *Girdlestone*, in reply :—The absence of a precedent proves nothing. It is not correct to say that there is no privity in this case. The solicitor is the officer of the court, and as such, he is amenable to the jurisdiction of the court. When he obtains a decree for creditors, he, virtually, undertakes to prosecute it duly to a termination. He voluntarily assumes the character of solicitor for all the creditors who may come in and prove under the [*419] decree. No *prejudice can ensue to the solicitor from granting the application. He has his lien on the fund for his costs. Will he relinquish that lien ? If not, he is protected. But the solicitor of the substituted party, can do nothing without the office copies of the bill, answers, decree, states of facts, and other documents. Is he to be driven to take new office copies ? If so, the estate, and, consequently, the plaintiff himself will pay twice over for them, and the office copies of the proceedings, when obtained, may not afford all the information necessary to the due prosecution of the suit.

THE VICE-CHANCELLOR :—I do not remember the point ever to have occurred before ; and therefore the question must be decided on principle.

Now I have already decided, in *Heslop v. Metcalfe*, (and my decision has been affirmed by the Lord Chancellor,)[1] that, where the solicitor of a plain-

(b) Ante, vol. 8, p.622.

[1] Vide 3 Myl. & Cr. 183.

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tiff refuses, improperly, to proceed with the suit on behalf of his client, he cannot withhold the papers in the cause, from his client's new solicitor; but ought to deliver them up, so as to enable the new solicitor to proceed with the suit; without prejudice, however, to his own lien for costs. The question then is whether there is any substantial difference between the case of a solicitor who has discharged himself, and that of the solicitor of a plaintiff who, by his own course of conduct, induces the court to take from him the prosecution of the suit, and to commit it to another party, who employs another solicitor. The Master must be deemed to have exercised a sound discretion in making the order to which effect is now sought to be given, his decision having been acquiesced in.

*The principle of *Heslop v. Metcalfe*, which is substantially the [*420] same case as the present, is that the solicitor who has possession of the documents in the cause, holds them for the benefit of the plaintiff; and where, by reason of the plaintiff's default in prosecuting the decree in the cause, the prosecution of it has been committed to another party, the solicitor ought not to be permitted to increase the expenses of the suit, by compelling that party to take, *de novo*, office copies of the proceedings which have taken place in it.

I shall, therefore, make an order in the terms of the notice of motion. The costs of the party applying, must be costs in the cause; but I shall give no costs to the solicitor against whom the application is made.[1]

BROWNE v. LOCKHART.

1840: 21st January.—Advancing Cause; Costs.

The costs of a motion to advance a cause, under the 4th order of May, 1839, ordered to be paid by the plaintiff.

THIS was a foreclosure suit against the devisee of the equity of redemption of the mortgaged estate.

Under the 4th order of May, 1839, the cause had been advanced, on an application made by the plaintiff and opposed by the defendant.

A question having arisen as to whether the costs of the application, like the other costs of the suit, ought to be borne by the defendant, or paid by the plaintiff,

The Vice-Chancellor said that the advancing of a cause, was in the nature of an indulgence to the plaintiff, *and, therefore, the costs of [*421] the application ought to be paid by him.(a)

[1] Vide 9 Sim. 514, n. 1. 3 Myl. & Cr. 190, n. 1.

(a) But see *Carthens v. Barclay*, ante, p. 273.

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Mortgagor and Mortgagee ; Foreclosure ; Inspection of mortgage deed.

A mortgagee is not bound to produce his mortgage deed to the devisee of the mortgaged estate, until payment of principal and interest, notwithstanding the devisee may be ignorant of the amount of the interest, the time of payment, and all the other particulars of the security.

The cause now came on to be heard.

It appeared, by the answer, that in November, 1836, half a year's interest on the mortgage having become due, the defendant's solicitors gave notice, to the plaintiff's solicitors, that the amount of it was in their hands, and that they were ready to pay the same on a proper receipt being given ; but, in reply to that notice, the plaintiff's solicitors claimed a larger sum to be due for interest than was afterwards claimed by them : that some time was consumed in the correspondence between the solicitors of the two parties with respect to the amount of interest due and other matters connected with the mortgaged estate ; and, on the 17th of February, 1837, a year's interest having become due the defendant deposited the amount in the hands of his solicitors ; who, thereupon, wrote a letter to plaintiff's solicitors, dated the 11th March, 1837, offering to pay over the money to the plaintiff, on being allowed to inspect the mortgage deed, which, they said, neither themselves nor the defendant had seen. The letter concluded thus : " we shall, therefore, be obliged by your making, at our expense, a copy for us, and allowing us to compare it with the original."

The reason alleged, in the answer, for making this request, was that the defendant's solicitors were desirous, before they paid over the money [*422] deposited with them, of "being satisfied that the sum deposited was the amount due, and also of ascertaining the proper times of payment of the interest, and such other particulars connected with the security and the hereditaments comprised in it, as it concerned the defendant's interest, as devisee of the equity of redemption to know ; and that the defendant and his solicitors were more especially desirous of obtaining authentic information as to what hereditaments were comprised in the mortgage ; as the defendant had reason to believe that some property, in addition to that which he was entitled to as devisee, was included in it. The answer further stated that the defendant had been always ready and willing, and had repeatedly offered, by his solicitors, to pay the interest, on the terms mentioned in the letter ; but the plaintiff's solicitors had refused to comply with those terms, and that, after a lengthened correspondence, in which the defendant's solicitors offered to pay the interest immediately on the production of the mortgage deed, and which offer was not accepted, the plaintiff filed the bill in this cause, of which his solicitors gave notice to the defendant's solicitors, by a letter of the 8th of January, 1838. The answer concluded by submitting that, under the above circumstances, the plaintiff ought to pay the defendant's costs of the suit, or, at any rate, the defendant ought not to be compelled to pay the plaintiff's costs.

The only question in the cause was that raised by the answer, as to the costs of the suit.

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Mr. *G. Richards* and Mr. *Lowndes*, for the plaintiff, said that a mortgagee was not bound to produce his mortgage deed to the mortgagor or any person claiming under him, except on payment of the principal and interest due on the mortgage.

Mr. *Knight Bruce* and Mr. *Lloyd*, for the defendant, said that, [*423] as the defendant was not the original mortgagor, but the devisee of the mortgaged estate, he was, of necessity, ignorant of the contents of the mortgage deed, and that he had a right to inspect that deed for the purposes mentioned in the answer, and, in particular, in order to ascertain whether there was not another estate than that devised to him, comprised in the security, which would be liable to contribute to the payment of the principal and interest: that no application for payment of the principal had been made to the defendant; and the defendant could not have paid it without giving the plaintiff six months notice of his intention so to do. *Latimer v. Neate*.(a) *Anon.*(b) *Cases and Opin.*, vol. 2, p. 52. *Powell on Mortgages*, Coventry's edit., p. 335, note.

THE VICE-CHANCELLOR:—As I understand the answer, the defendant's solicitors, in November, 1836, gave notice to the plaintiff's solicitors, that some interest was in their hands. Then there was a dispute about the amount due for interest; and then, on the 11th of March, 1837, that letter was written to the plaintiff's solicitors, which is set forth in the answer, and by which the defendant's solicitors asked to have a copy of the mortgage deed made at their own expense. Nothing further seems to have been done; and one important fact seems to have been omitted, namely, payment of interest. Then, on the 9th of January, 1838, a letter was written to the defendant's solicitors, which announced the filing of the bill. Now the question is whether that was not perfectly right.

The interest had actually become in arrear. I do not apprehend [*424] that the plaintiff, the mortgagee, was bound in the year 1837, to permit the mortgagor to take a copy of the mortgage deed. I never understood that to be the rule. I admit that it is the usual practice for a mortgagor, when he intends paying off the mortgage, to give a proper notice of his intention so to do; but, I apprehend that there is no law of this or any other court which requires that to be done: it rests entirely upon custom: and the custom is founded on this, namely, that it is but fair that the party who has lent his money upon the security, should have a reasonable opportunity before the transaction is put an end to, of finding some other security on which he may lay out his money when it has been repaid to him.

I do not think that the case of *Latimer v. Neate*, has any bearing upon the present case. That case, as I collect it from the Lord Chancellor's judgment was this: a bill had been filed, and the defendant had not refused to give the discovery, but did, by his first answer give some discovery: and,

(a) 4 Clark & Fin. 570.

(b) Mealey, 246.

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that not being thought sufficient, exceptions were taken to the answer, and then a further answer was put in; and that further answer also purported to give a discovery, but it happened that the discovery which professed to be full, differed from the discovery given by the first answer, and then, on application to the Court of Exchequer to produce certain documents, it was said: "by the very information you give, you make us suspect its accuracy; for the information is not consistent with itself; therefore, in order that we may have that full discovery which you, by submitting to answer the interrogatories, show you think you were bound to give, the documents [*425] must be produced." "That I see is stated by the Lord Chancellor, at some length; and it appears to me to be a very good reason why the House of Lords should affirm the order made in the Court of Exchequer.

With respect to the case cited from Mosley: in the first place, Mosley is not a reporter of very great authority: and I confess that it seems to me to be most extraordinary that, after a decree *nisi* for a foreclosure had been made, an application should be made, by the mortgagor, that the mortgagee should produce his deed, in order that it might be laid before a conveyancer, to enable him to draw an assignment of the mortgage to some person, who might be disposed to lend the money to pay off the first mortgage: and, what is still more unaccountable, the court granted the motion. I apprehend that such an application would not be listened to at the present time. It does not quite tally with our notions of the right of the mortgagee to keep his deeds to himself, until the moment arrives when the mortgagor appears with the principal and interest in his hand; and then the mortgagee is not bound to part with the deeds, before he has received his money: at least, it must be a simultaneous transaction.

If there was such a great desire, on the part of the mortgagor in this case, to pay the interest, why did he not, as soon as the bill was filed, apply to the court for an order, under the statute (7 Geo. 2, c. 20,) to have an account taken of the principal and interest due on the mortgage. Instead of taking that step, he allowed the suit to go on to a hearing in the usual way. My opinion is that the decree should be made in the common form.

Mortgagor and Mortgagee; Foreclosure; Costs; Trustee.

Where a trustee for a mortgagee, is made a defendant to a foreclosure suit, the plaintiff must pay his costs, and add them to his own.

[*426] "J. Walsh, a trustee of a term in the mortgaged estate, for better securing, to the plaintiff, the principal and interest, and, subject thereto, to attend the inheritance, having been made a defendant, it was insisted, for the defendant Lockhart, that the trustee ought to have been made a co-plaintiff in the suit, and, therefore, his costs ought not to be thrown on Lockhart.

The Vice-Chancellor said that Walsh might have objected to being made a

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co-plaintiff; and, therefore, the plaintiff ought to pay his costs, and then add them to his own, which must be paid by Lockhart.

CLAPTON v. BULMER.

1840: 24th January.—Will; Construction: Nearest of kin of my own family.

Testator bequeathed his residue to trustees, in trust to pay an annuity to his wife, and, subject thereto, in trust for his daughter for life, and, after her death, in trust for her children. Provided that, if his daughter should die without leaving any issue, then the trustees should pay 3000*l.* as she should appoint: and, if his wife should survive his daughter and his daughter should die without issue, then that the trustees should pay 2000*l.* to his wife, and assign the residue of the trust moneys unto the nearest of kin of his own family for ever. The daughter survived the wife, and died without leaving issue. Held that the next of kin of the daughter were entitled to the fund.

WILLIAM JOHNSON, by his will dated the 26th of August, 1811, after giving legacies to John Alexander Mackenzie, the plaintiff Richard Clapton, Richard Cranmer, the defendant John Martin Bulmer, and various other persons, and appointing his wife, Bexey Amelia Morris Johnson, and his daughter, Amelia Rebecca Johnson, executrixes of his will, disposed of *the residue of his personal estate in the words following: "And all [*427] the rest, residue, and remainder of my moneys in the public funds, and of all other my personal estate, whatsoever and wheresoever, not hereinbefore disposed of, I order and direct my executrixes to lay out the same, in the names of the before named John Alexander Mackenzie, Richard Clapton, the said Rev. Richard Cranmer, and the said John Martin Bulmer, or the survivors or survivor of them, at interest, upon government securities, who thereupon, shall stand possessed thereof, upon trust and to and for the several intents and purposes hereinafter expressed and declared of and concerning the same, that is to say, upon trust that they, my said trustees, John Alexander Mackenzie, Richard Clapton, Richard Cranmer, and John Martin Bulmer, and the survivors and survivor of them, and the executors and administrators of such survivor, shall and do fully authorize and empower my said dear wife, during her natural life, in case she shall so long continue my widow but not otherwise, to receive so much of the interest and dividends and annual produce of the said stocks, funds and securities, and of all other the residue of my personal estate, as the same shall, from time to time, become due and payable, as, together with the dividends of the several sums of 500*l.*, four per cent. bank annuities, and 350*l.* three per cent. bank annuities, particularly mentioned in the settlement made on my marriage with my said wife, bearing date on or about the 26th day of April, 1781, will make up one clear annuity or yearly sum of 150*l.*, and to apply the same for her own proper use and benefit; and upon this further trust, to pay the surplus of the said interest, dividends and annual produce of the trust moneys aforesaid (after payment of the said annuity or annual sum before mentioned,) unto my said

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daughter, Amelia Rebecca Johnson, for and during the term of [*428] *her natural life, or otherwise permit and suffer her to receive the same; but, in case of the death or intermarriage of my said wife, then I direct that the whole of such interest, dividends and annual produce as aforesaid, be paid to my said daughter, for her life, in like manner: provided always, and I do hereby further declare my will and mind to be that the interest, dividends and annual produce of the said stocks, securities, trust moneys and premises, which I have by this my will given to and ordered and directed to be paid to my said daughter, during her natural life, shall be for her sole and separate use and benefit, and that the same or any part thereof, shall not be subject or liable to the debts, control, intermeddling or engagements of any husband she may marry, and that the receipt of my said daughter, whether married or unmarried, without her husband, or any other person or persons whom she may appoint to receive the same, shall be a good and sufficient discharge to my said trustees for the said interest, dividends and produce, or so much and such parts thereof, as shall be therein acknowledged and expressed to have been received; and, from and after the decease of my said daughter, then upon this further trust, that they, my said trustees, and the survivors and survivor of them, and the executors and administrators of such survivor, shall and do assign and transfer the said funds hereinbefore mentioned (subject, nevertheless, and chargeable with the payment of the said annuity hereinbefore by me given to my said wife, in case the same shall, by virtue of this my will, be then due and payable) unto all and every the child and children of my said daughter, lawfully begotten, to be equally divided between them, if more than one, share and share alike, and, if there be but one such child, then the whole to go to such one child." The [*429] will then contained directions *and provisions as to the payment and vesting of the shares of his daughter's children, and for their maintenance during their minorities; and then proceeded as follows: "Provided always, and I do declare my will and mind to be that, in case my said daughter shall happen to die without leaving any issue, then I will and direct that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, upon the decease without issue as aforesaid, (a) raise and pay the sum of 3000*l.* to such person or persons as she, my said daughter, shall, in and by her last will and testament or any writing purporting to be her last will and testament, or any codicil thereto, nominate, give, direct or appoint; and, in case my said wife shall happen to survive my said daughter, and my said daughter shall die without issue as aforesaid, *then* I will and direct that my said trustees, or the survivors or survivor of them, and the executors or administrators of such survivor, do and shall, also, upon the decease of my said daughter and such failure of issue as aforesaid, to raise and pay, out of the said trust moneys, the further sum of 2000*l.* unto my said dear wife, to and for her own use and benefit; and I

(a) So in brief.

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will and direct that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall assign and transfer the residue of such trust moneys and of my personal estate, unto *the nearest of kin of my own family for ever*.

The testator died on the 1st of April, 1812, leaving Bexey Amelia Morris Johnson, his widow, and, Amelia Rebecca Johnson, his only child him surviving. Bexey Amelia Morris Johnson died in 1827, without having *married a second husband, leaving her daughter, Amelia Re- [*430]becca Johnson (who, afterwards married the defendant Percival White) her surviving.

Amelia Rebecca White made her will dated the 9th of September, 1834, and thereby, in exercise of the power given to her by the testator's will, directed the trustees thereof, immediately after her decease without issue, to pay or transfer to her husband, Percival White, his executors, &c., the sum of 3000*l.* directed to be levied and raised by the testator's will, together with the interest, dividends and annual produce thereof, to and for his and their own absolute use and benefit; and she appointed P. White and H. H. White executors thereof. The testatrix died in October, 1837.

The bill, which was filed by Richard Clapton, the surviving trustee of the testator's will, against J. M. Bulmer and P. White, alleged that Bulmer was the nephew of the testator's mother, and that, at the death of Amelia Rebecca White without issue, he was the cousin and sole next of kin of the testator, and that, as such, he claimed the whole of the funds in which the testator's residuary estate had been invested: that P. White alleged that, according to the true construction of the will, the intention of the testator was that his residuary estate should go to his nearest of kin who should be living at the time of his death, and that consequently, his daughter, Amelia Rebecca White, took a vested interest in the residuary estate, and that he, P. White, as her legal representative, was then entitled thereto. The bill prayed that it might be declared which of the two defendants, or what other persons or person were or was entitled to the testator's residuary estate.

*In pursuance of the decree made at the hearing of the cause, [*431] the Master found that Amelia Rebecca White was the next of kin of the testator at the time of his death, and that the defendant John Martin Bulmer was his next of kin at the time of the death of A. R. White, and also was the next of kin of A. R. White and the testator at the time of the death of A. R. White, and that A. R. White died without leaving any issue, and that the defendant Percival White was the personal representative of Bexey Amelia Morris Johnson, and also of Amelia Rebecca White.

The cause now came on to be heard for further directions.

Mr. *Stinton* appeared for the plaintiff.

Mr. *Jacob*, Mr. *G. Richards* and Mr. *Keene* for the defendant, Bulmer:—
The question is, what is the effect of the ultimate limitation in the testator's will, to the nearest of kin of his own family for ever. At the date of the will,

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the testator had a wife and only one child, a daughter; and the daughter was his sole next of kin at his death. The defendant Bulmer was the next of kin of the testator at the death of the daughter, and he was also the next of kin of the daughter at her death. We contend that, under the ultimate limitation in the will, he is entitled to the testator's residuary estate. That limitation was to take effect on the death of the daughter, who was the testator's sole next of kin, without issue; the testator, therefore, was contemplating the death of his daughter and failure of her issue. The limitation is not: "to *my* nearest of kin," but: "to the nearest of kin of my [*432] family," that is, "to the nearest of kin of the persons, 'whoever they may be, who are members of my family.'" *Marsh v. Marsh*,^(a) *Jones v. Colbeck*,^(b) is a good deal like the present case. There the testator, after declaring trusts of his residuary estate in favor of his daughter and her children, directed that, after the decease of his daughter and her children, in case they should all die under twenty-one, the residue should go and be distributed amongst his relations, in a due course of administration. The daughter was the sole next of kin of the testator at his death. She died without leaving any issue: and the court held that the next of kin of the testator living at the death of the daughter, and not the personal representative of the daughter, were entitled to the residue. Here the testator has directed his residue to be distributed at the death of his daughter; and, in addition to that, he has given her a disposing power over a portion of the residue. That circumstance is wanting in *Jones v. Colbeck*; and therefore, this case is stronger than that, in favor of holding that the next of kin of the testator at the death of the daughter, is entitled to the residue. In *Briden v. Hewlett*^(c) the testator gave all his goods, chattels, &c. to trustees, in trust for his mother for life, and, after her death, to such persons as she should, by her will, appoint, and, in default of appointment, to such person or persons as would be entitled to the same by virtue of the statute of distributions. The testator's mother was his sole next of kin at his death. She died intestate: and the question was whether her personal representative, or the testator's cousins, who were his next of kin at her death, were entitled to the property. The court decided in favor of the testator's next of kin at [*433] the death of his mother. That case also wants the strong circumstance of there being a portion of the fund carved out for the benefit of the tenant for life. In *Elmsley v. Young*,^(d) the limitation was to such person or persons as should, *at the time of the decease of the said P. Elmsley*, the settlor, be his next of kin: and the Lords Commissioners, on appeal from the decision of Sir John Leach, held that the tenant for life, who was the next of kin of the settlor at his death, was entitled. In *Butler v. Busk-nell*,^(e) the testator declared trusts, of certain portions of his residue, for his daughters for their lives, and after their deaths, for their children; and in

(a) 1 Bro. C. C. 293. See Bell's edit note 4.
 (d) 2 Myl. & Keen, 80 and 750.

(b) 8 Ves. 38. (c) 2 Myl. & Keen, 90.
 (e) 2 Myl. & Keen, 232.

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case there should be no child who, being a son, should attain twenty-one, or, being a daughter, should attain that age or marry, then for such person or persons who should happen to be his next of kin according to the statute of distributions. One of the daughters died without issue, and Sir John Leach, Master of the Rolls, held that the testator's next of kin at the death of the daughter, and not his next of kin at his own death, were entitled. There his Honor says: "In the case of *Elmsley v. Young*, which was recently before the court, I took occasion to examine, very fully, all the authorities on this point; and I then referred to a case of *Briden v. Hewlett*, which, in the language used by the testator, resembles the present case. One of the propositions then laid down by me, was that, where a testator gives property over, to his next of kin, after the death of a tenant for life without issue, the court must look at the whole will to ascertain who are the next of kin intended, by the testator, to take. In *Elmsley v. Young*, the ultimate limitation was made, expressly, to those persons who should be the settlor's next of kin at his death: so that there could be no question [*434] that the tenant for life, who answered that description, was entitled.

In *Briden v. Hewlett*, there was no express designation of the next of kin at the death of the testator; but the gift was to the testator's widow, for her life, with remainder as she should appoint, and, in default of appointment, to such person or persons as would be entitled by virtue of the statute of distributions; and I was of opinion, looking to the intention of the testator to be collected from the whole will, that the testator meant his next of kin living at the death of the tenant for life." Sir John Leach then lays down the following rule: "Where a testator gives property to a person for life, with remainder to his children, and, if he should die without children, then over to his next of kin, it is not a probable intention that he should mean to include, as one of his next of kin, the person upon whose death without issue he has expressly directed that the property should go over." Still less probable is it where, as in the present case, the tenant for life was the testator's sole next of kin at his death, and a portion was carved out of the residue and given to her to appoint.

Mr. *Knight Bruce*, for the defendant White:—The party for whom I appear, is the representative of the testator's widow as well as the representative of the daughter: and one question that arises, in this case, is whether there is not an intestacy, or, in other words, whether the event in which there is a gift to the next of kin, has happened.

It is obvious that the testator contemplated the marriage of his daughter, as a probable event. He, first, provides for her and her children, and then, in the event of her dying without issue, he gives her power to dispose *of 3000*l.*, whether she survives her mother or not. Then the testa- [*435] tor takes up the event of his wife surviving his daughter, and says: "In case my said wife shall happen to survive my said daughter and my said daughter shall die without issue, then I will and direct that my said trustees do

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and shall, also upon the decease of my said daughter and such failure of issue as aforesaid, raise and pay, out of the said trust moneys, the further sum of 2000*l.*, unto my said dear wife, to and for her own use and benefit, and I will and direct that my said trustees do and shall assign and transfer the residue of such trust moneys and of my personal estate, unto the nearest of kin of my own family." There is, therefore, no disposition of the capital of the trust fund except in the event of the wife surviving the daughter. That part of the passage which I have read from the will, which follows the words: "and I will and direct," is controlled by the double contingency of the wife surviving the daughter and the daughter dying without issue. The testator intended to exclude his wife from sharing in the capital; and, with that view, he provides that, if she survives his daughter, the capital shall go to the nearest of kin of his own family, meaning his next of kin who share in his blood. That view of the will, makes the whole of it consistent and rational: and, if the two events do cover the whole passage, it is quite clear that, under existing circumstances, there is an intestacy. *Davis v. Norton*,^(a) *Doe v. Shippard*.^(b)

Supposing, however, that there is no intestacy, and that the gift of the capital is an absolute gift, what authority is there for construing the words:

"nearest of kin," in any other than their natural sense, that is, [*436] "that they mean the next of kin of the testator at any time except his death. In every one of the cases cited, there were circumstances,

not found here, which called on the court to say that the testator did not mean his next of kin at his own death to take. If the case of *Marsh v. Marsh* were now to arise, the gift, in that case, to the testator's nearest relations, would be held to be void for remoteness; as it is a gift over after a general failure of issue. But, supposing that not to be so, Lord Loughborough's only reason for holding that the next of kin at the death of the son, and not the next of kin at the testator's own death, were entitled, was that the next of kin at the latter period, was the tenant for life of the residue: but, in subsequent cases, that circumstance has been always held not to have any effect. In *Jones v. Colbeck*, the testator contemplated a plurality of relatives; and that was the reason why Sir W. Grant held that the testator's daughter, who was his sole next of kin at his death, was not entitled. That learned Judge says: "As to the claim of the daughter, it is hardly possible the testator could mean to describe an only daughter by the terms "my relations;" directing also the residue to be distributed among those relations."^(c) It is evident, therefore, that the circumstance that the testator indicated a plurality of relatives and directed a distribution to be made, was the ground of the decision. The next case is *Briden v. Hewlett*. There the testator, in case his mother, who was his sole next of kin, should die without a will, gave all his goods and chattels to such person or persons (using a word of plurality) as would

(a) 2 P. W. 389.

(b) 1 Doug. 75.

(c) 8 Ves. 43.

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be, not will be, entitled to the same by virtue of the statute of distributions: and Sir John Leach says: "It is impossible to contend that this testator meant to *give the property in question absolutely and entirely [*437] to his mother; because he gives it to her for life, with a power of appointment. In case of her death without a will, the testator gives his property to such person or persons as would be entitled to it by virtue of the statute of distributions. Entitled at what time? The word *would* imports that the testator intended his next of kin at the death of his mother. It is clear that he intended to exclude his mother from the class who were to take in the event of her intestacy." As the ultimate limitation was to take effect in the event of the mother's intestacy, that case is clearly distinguishable from the present. Then comes the case of *Butler v. Busknell*. The language of the will, in that case, was: "And in case there should be no child or children of his daughters respectively, or if such child or children being a daughter or daughters should die under the age of twenty-one years without being married, or, being a son or sons, should die under the age of twenty-one years, then in trust for such person or persons as *should happen to be* his (the testator's) next of kin according to the statute of distributions." Sir John Leach, in his judgment in that case, speaking of his decision in *Briden v. Hewlett*, says: "One of the propositions then laid down by me, was that, where a testator gives property over to his next of kin after the death of a tenant for life without issue, the court must look at the whole will to ascertain who are the next of kin intended, by the testator, to take. In *Elmsley v. Young*, the ultimate limitation was made, expressly, to those persons who should be the settlor's next of kin at his death; so that there could be no question that the tenant for life, who answered that description, was entitled. In *Briden v. Hewlett* there was no express designation of the next of kin at the death of the testator, but the gift was to the testator's *widow [*438] for her life, with remainder as she should appoint, and, in default of appointment, to such person or persons as would be entitled by virtue of the statute of distributions; and I was of opinion, looking to the intention of the testator to be collected from the whole will, that the testator meant his next of kin living at the death of the tenant for life. Where a testator gives property to a person for life, with remainder to his children, and, if he should die without children, then over to his next of kin, it is not a probable intention that he should mean to include, as one of his next kin, the person upon whose death without issue he has expressly directed that the property should go over. In looking to the cases, it appears to me that the court always considers whether the words of limitation are words of present intention, so that they are intended to take effect as soon as the testator's next of kin, living at his death, are ascertained; or whether they import a future period, and are referable to the event upon which the gift over is to take effect. The words: "such persons as shall happen to be my next of kin," or, "such persons as shall or should be my next of kin," indicate an intention to confine the gift to such persons as shall answer the description of the testator's next of kin at the

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death of the tenant for life. I am of opinion, therefore, in this case, that it was the intention of the testator that the shares of Maria Butler should, upon her death without issue, vest in such persons as should then be his next of kin."

Now, with the exception of *Marsh v. Marsh*, I assert that no case is to be found in which the mere fact of the tenant for life (on whose death without issue the fund is given over) being the next of kin, has been held [*439] to exclude the tenant for life. One of the cases which "show that the rule cannot be as was supposed in *Marsh v. Marsh*, is *Harrington v. Harte*.(a) There the testatrix bequeathed her residuary estate to trustees, in trust for her daughter Jane Champernowne, for her separate use for life, and after her death, in trust for such persons as Jane Champernowne should, by deed or will, appoint, and in default of appointment, in trust for such person or persons *as would then*, by virtue of the statute of distributions, be entitled to the testatrix's estate in case she had died intestate. There never was an expression more calculated to try the rule than that was; and yet the counsel for the defendant admitted that, Jane Champernowne having died without making any appointment, the fund must go to such persons as were next of kin to the testatrix at the time of her death. *Doe v. Lawson*(b) and *Masters v. Hooper*(c) also show that a mere tendency for life given to one of the next of kin, operates nothing to exclude him from taking under the ultimate trust. *Pope v. Whitcombe*(d) and *Pearce v. Vincent*.(e) establish the same point.—[The Vice-Chancellor: The words in which the ultimate limitation is expressed in this case, are words which have reference to an event which is to happen at a time subsequent to the testator's death.]—The words "assign and transfer," mean nothing more than "in trust for." Lastly, with respect to the meaning of the word, "family." There is no case in which that word has been held to apply to a single person. The testator, in using that word, did not mean to designate the next of kin [*440] of any given person, but the next of kin *de "familia mea, or, de sanguine meo"*; so as to exclude his wife. *Blackwell v. Bull*.(f)

THE VICE-CHANCELLOR, stopping the reply:—I do not think that there is any chance of my deriving any benefit from a further discussion in this matter; because, according to the view I take of it, I quite agree with that set of cases which Mr. *Knight Bruce* has quoted in support of the proposition, that, if you find a gift, ultimately, of the residue of the personal estate of the testator, to his relations or to his next of kin, or in words which are tantamount, and the tenant for life of the residue happens to answer that description, it is nothing more than a paraphrastical description of the person before mentioned. If A. B. were the next of kin, it is of very little importance whether the testator says that, in the event of his dying without issue, the fund shall go to A. B., and, in the event of A. B.'s dying without issue, the

(a) 1 Cox, 131.

(b) 3 East, 278.

(c) 4 Bro. C. C. 207.

(d) 3 Mer. 689.

(e) 2 Keen. 230; and 2 Myl. & Keen. 800.

(f) 1 Keen, 176.

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fund shall go to a person whom he designates by a multitude of words which point to A. B. That is the effect of all the cases which Mr. *Knight Bruce* has adverted to.

Now I am to consider, first, whether there is an intestacy. I think it is plain that there is not an intestacy; because, after the testator has made that disposition of the residue of his property which consists in giving the daughter an interest and making a provision for her children, he proceeds in this manner: "Provided always and I do declare my will and mind to be that, in case my said daughter shall happen to die without leaving any issue, then I will and direct that my said trustees, *or the survivors [*441] or survivor of them, or the executors or administrators of such survivor, do and shall, upon her decease without issue as aforesaid, raise and pay the sum of 3000*l.* to such person or persons as she, my said daughter, shall, in and by her last will and testament in writing, or any writing purporting to be her last will and testament, or any codicil thereto, nominate, give, direct or appoint." That is one part of what he directs under the general head of the provision. And then he says: "And in case my said wife shall happen to survive my daughter and my daughter shall die without issue as aforesaid, then I will and direct that my trustees shall, upon the decease of my said daughter and such failure of issue as aforesaid, raise and pay, out of the said trust moneys, the further sum of 2000*l.* unto my wife." And then he says: "and I will and direct."

Now, Mr. *Knight Bruce* has wished me to construe that part of the will, as if the expression: "and I will and direct," was, of necessity, to be referred to that second part of his will and direction which is comprehended under the general proviso; whereas, it appears to me, that the natural construction of the words is that, having made what I will call the plain and obvious disposition of his property, namely, to his daughter and her issue, it occurs to his mind that the daughter may die without issue; and what is then to be done? He begins the proviso, and he divides what shall be done into three parts, first, by directing that, if his daughter dies without issue, 3000*l.* shall be paid as she shall appoint; and, if the wife survives the daughter, she dying without issue, then 2000*l.* shall be paid to the wife; and then he proceeds to complete the proviso by declaring that he does direct that the trustees shall *assign and transfer the residue of the [*442] trust moneys and the residue of his personal estate, unto the nearest of kin of his own family, forever. I consider, therefore, that there is no intestacy. There is a gift; and there can be no intestacy unless it is made out that those last words have no meaning: if they have the meaning which either the one or the other of the counsel contended for, then there is no intestacy.

The expression used by the testator is: "unto the nearest of kin of my own family for ever." Now, if he had meant to say his own nearest of kin, how easy would it have been to have said: "my nearest of kin." But

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it is plain he did not mean that: because, if that which is said to be a man's intention is obviously easy to execute, and the party does not execute it in the obvious and easy manner, I think it is a fair inference that he meant something else than that which is so obvious and easy. He says: "the nearest of kin," not of myself, but "the nearest of kin of my own family for ever." Now I cannot but think that if he had used the words: "in the event of the death of my daughter and failure of issue of my daughter, the trustees shall transfer the residue of the trust money to my family," that would have been a gift to the daughter. And when he says: "the nearest of kin of my own family," I cannot but think that the most natural construction of the words is that the persons whose nearest of kin are spoken of, are those persons who, according to ordinary language would be his family, that is his daughter. And I am the more inclined to think that that is the meaning of the phrase, because, though the construction has been put by courts of law, upon the words *relations*, &c., which has been established by a series of cases, beginning with the case of *Harrington v. Harte*; yet I [443] believe that, out of the "courts of law, nobody would think that that is the construction; and the multitude of cases shows the willingness to dispute the point where it is disputable.[1]

Now the words which this testator has used, are words which do not, of necessity, imply his own next of kin; and those words never having as yet received a legal construction, I will, for the purpose of construing them, look at what he has done by the former part of his will; and I find that he has given the residue of his property to his daughter for life, with remainder to her children; and then, for the obvious purpose, as I conceive, of making a disposition of his property in the event of his daughter and her issue being no longer able to enjoy it, he uses these singular terms.

Upon the whole, therefore, it appears to me not to be unreasonable to hold that, under the term: "the nearest of kin of my own family," the nearest of kin of the daughter is the party to take.(a)

(a) Percival White appealed, to the Lord Chancellor, from the above decision. His Lordship said that the Vice-Chancellor was right in deciding that J. M. Bulmer was the party entitled to take under the ultimate limitation in the will: that the person intended to be described by the words of that limitation, was, clearly, an individual who was to be ascertained at a future period: that those words admitted of two constructions, namely, either the next of kin of the daughter at her death, or the next of kin of the testator at the same period; and that, as the same individual filled both those characters, it was unnecessary to decide which of the two constructions ought to be adopted. [The case, on appeal, is reported 5 Myl. & Cr. 108, of which the foregoing note is a correct summary. The appeal was dismissed with costs.]

[1] Vide 1 Keen, 181, n. 1.

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[*444]

1840: 23d January.—Vendor and Purchaser; Title.

If A. agrees to sell an estate, and it is afterwards discovered that a small portion of it, is the property of another person; the court will not discharge the purchaser from his contract, without giving A. an opportunity of acquiring a title to that portion.

In June, 1837, the estates of John Lee the testator in the cause, who died in 1836, were sold, in lots, under the decree of the court; and Joseph Gosnay became the purchaser of lots 62, 63, and 64. In the particulars of sale those lots were described as follows: lot 62 as a moiety of a plot of freehold building land situate on the north side of the Wakefield Ings road and adjoining to the fair ground, containing 2495 square yards: lot 63, as a moiety of a plot of freehold building land bounded on the east by lot 62, on the west by Denby-Dale road, and containing 1400 square yards: lot 64, as a moiety of a plot of freehold building land bounded on the east by lot 65, on the west by the Denby-Dale road, on the north by the fair ground, and, on the south, by the Ings road, and containing 2600 square yards. By the second condition of sale, it was stipulated that the purchasers should, within six weeks from the delivery of the abstract of title, deliver, in writing, at the office of Mr. T. Taylor, the vendors' solicitor, all objections, if any, to the title; and that all objections not delivered by that time, should be considered as waived. The 12th condition provided that if any mistake, error or mis-statement should be made in the description of the property or any other error should appear in the particulars of sale, such mistake, error or mis-statement should not annul the sale, but a compensation or equivalent should be given or taken as the case might require, such compensation or equivalent to be settled by the Master.

On the 19th of July, 1837, the Master's report as to Gosnay's purchase, was confirmed. On the 22d of March, 1838, the abstract of the vendors' title to the lots, were delivered to Gosnay. In June, 1838, he presented a petition praying to be discharged from his purchase, on the ground that the auctioneer had put up the lots to be bid for at so much per square yard; and that he was thereby induced to believe that he was bidding for the entirety, and not a moiety only of a square yard. In December, 1838, the petition was heard by the Vice-Chancellor, who granted the prayer of it; but, in May, 1839, the Lord Chancellor, on appeal, dismissed it with costs.

On the 6th of June, 1839, the plaintiff gave notice of motion that Gosnay might be ordered to pay his purchase money into court. On the 9th of November, following, Gosnay gave a cross notice of motion that he might be discharged from his purchase, and that the contract entered into by him for the purchase of the three lots, might be rescinded, the vendors not having a title thereto at the time of the sale; and that the plaintiffs might pay to him

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his costs and expenses of confirming the report and investigating the title to the lots, and of the motion.

It was stated in the affidavits for the purchaser, that the lots in question adjoined the Wakefield Ings turnpike road on the south side; and that the whole of that side of the lots which was two hundred yards in length, consisted of a piece of ground (a) to which the testator had no right or title whatsoever, but which, as to so much of it as was comprised in lot 62, belonged to

J. H. Smyth, Esq., and, as to the remainder, to the trustees of the late [*446] Joseph Hargrave, Esq. It appeared from the affidavits of the vendors, that for the last nine years, if not longer, the testator and those claiming under him, had been in quiet possession of the whole of the lots: and the vendor's solicitor deposed that he did not know or believe that any part of lots 63 and 64, belonged to Hargrave's trustees.

In October, 1839, which was some months after the vendors had been informed by the purchaser, of the alleged defect in their title, their solicitor sent to the purchaser's solicitor, an abstract of Mr. Smyth's title to that part of the piece of ground which belonged to him and which formed part of lot 62, and, at the same time, informed the purchaser's solicitor, that, for the purpose of preventing any further litigation and expense, the vendors had entered into a contract with Mr. Smyth for the purchase of a moiety of that portion of the piece of ground which belonged to him, and which formed part of the lot 62: but no new title was shown to that part of the piece of ground which was alleged to belong to Mr. Hargrave, and which was comprised in the two other lots.

The original and cross motions now came on to be heard.

Mr. *Knight Bruce* and Mr. *Metcalfe* appeared in support of the former; and Mr. *Wakefield* and Mr. *Bethell*, in support of the latter, said:—When a person agrees to sell property which is not his, the contract cannot be enforced either at law or in equity. Sir E. Sugden in his *Treatise on the Law of Vendors and Purchasers*, says: "where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor has it in his power by the ordinary course of law or equity, to make himself [*447] so; *though the owner offer to make the seller a title, yet equity will not force the buyer to take it; for every seller ought to be a *bona fide* contractor: and it would lead to infinite mischief, if one man were permitted to speculate upon the sale of another's estate. Besides the remedy is not mutual; which, perhaps, is of itself a sufficient objection in a case of this nature." (b) The learned author then cites *Tendring v. London*, (c) as an authority for the position laid down by him, and adds the following query: "whether there is *any* case in which a man knowing himself not to have any title, has been allowed to enforce the contract by procuring a title before

(a) It did not appear from the briefs on the motions, what was the breadth of this piece of ground; but, in one of the papers belonging to the purchaser's solicitor, it was stated to be six feet.

(b) Vol. 1, p. 207, 9th edit.

(c) 2 Eq. Ab. 680, pl. 9.

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the report." These lots were sold at so much per square yard: they were described in the particulars of sale as building ground, and as abutting on the turnpike road. It turned out, however, that the vendors had no title whatever to the ground, so far as it abuts on the turnpike road. They allege that they have contracted for the purchase of part of the slip of land to which they had no title; but they do not pretend that they have entered into any negotiation for the purchase of the remainder: and great additional delay and expense will be incurred by the purchaser, in investigating the title to that part which they say they have contracted for. Besides, the slip of land in question is the frontage of the lots. It is the most important part of the whole; and it was the inducement to the purchase. If a person who has purchased building ground, cannot have the frontage conveyed to him, he loses the whole benefit of his purchase: the remainder of the ground is valueless to him. If this slip of land is taken away, the character under which the land was sold, will be taken away.—[The Vice-Chancellor: were the vendors in possession of the slip of land at the time of the *sale?— [*448] We believe that they were.—[The Vice-Chancellor: I do not see why the 12th condition of sale should not apply to this case.]—That condition has been always held to apply to unintentional errors, and not to a case like the present. Besides, if the purchaser cannot have the frontage, the rest of the ground is of no value; and, therefore, this is not a case which admits of compensation. The court can not now give the vendors an opportunity of acquiring a title to that in which they had no interest whatever, at the time of the sale, without infringing the very wholesome rule laid down by Lord Eldon, in *Lechmere v. Brasier*.(a) There his Lordship says: "I must say that I will not extend the rule which the court has adopted, of compelling a purchaser to take the estate, where a title is not made till after the contract, to any case to which it has not already been applied. The rule has, in many instances, been productive of great hardship." In *Dalby v. Pullen*,(b) the court discharged the purchaser, although the defect in the title was actually cured at the time; and, consequently, it refused to give the vendor the benefit of the acquisition of title which had been made subsequent to the contract. A Court of Equity will never sanction that species of dealing by which a man sells the estate of another, speculating on his being able to acquire a title to it, before the cause is heard for further directions.

The Vice-Chancellor: What Lord Eldon is reported to have said, in *Lechmere v. Brasier*, applies to a case where A. has sold the estate of B.: but it does not apply to a case where that which the vendor has not, is a very small portion of the property sold.

*Mr. Knight Bruce, and Mr. Metcalfe, cited *Williams v. Carter*,(c) and said that it was not pretended that the alleged defect in

(a) 2 Jac. & Walk. 289.

(b) 1 Russ. & Myl. 296; and ante, vol. 3, p. 29.

(c) 1 Sug. Vend. 208.

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the title to a portion of lot 62, was known to the vendors until they were informed of it by the purchaser's solicitor: that it was a fallacy to say that the vendors had no title to the slip of land; for they and the testator had long had possession of it, which was a species of title: that the 12th condition was not intended to apply to fraudulent errors, but was intended to apply to unintentional ones; that Gosnay, a quarter of a year after the abstract had been delivered to him, presented a petition praying to be discharged from his purchase, on other grounds: and that it was his duty to have stated that he did not know of the present objection, at that time; but he had not done so: that the abstract, which was delivered in March, 1838, showed that he must have been aware of the objection when he presented his petition to be discharged: that the notice of motion for payment of the purchase money into court, was given on the 6th of June, 1839: and that it was not until the 9th of November in that year that the notice of motion to discharge him from his purchase, was given: that it was not pretended that the possession of any one of the lots, was necessary to the enjoyment of the others; and, therefore, Gosnay was, at all events, bound to complete his purchase as to lots 63 and 64.

Mr. *Bethell*, in reply:—It is admitted that the vendors had no title to a part of the property which they contracted to sell. The 12th condition applies only to cases which admit of compensation: but not to cases in [*450] which the vendor "has not the power of giving that which was the inducement to the purchase; for that does not admit of compensation. The slip of land was the inducement to the purchase in this case; it gave the land its quality, and constituted the whole value of the purchase.

THE VICE-CHANCELLOR:—It is said that this court will not sanction a contract made by a person to sell, to another, that which, at the time, he knows he has not. I admit, if the case is that A., with reference to an estate which he knows to belong to B., contracts to sell it to C.; that it is a very wholesome rule that this court ought not to aid such a contract. But general rules do certainly admit of variation; and, in my opinion, it would be vastly too harsh an interference with the common mode of the management of the business of mankind, if such a rule were taken to be applicable to a case where a party, apparently in the ownership and *prima facie* appearing to have a title, sells land; and it afterwards turns out that, a very small portion of it, is not his, (although he was in possession,) but is the property of another person. It would be a harsh application of the first principles of this court, were I to say that, in such a case, the contract was so radically bad that, even if the vendor could honestly procure his title to be made good by purchasing the property for himself from the rightful owner, in order that he might hand it over to the purchaser, he should not be at liberty to do so.[1]

[1] Vide 1 Russ. & M. 310, n. 1.

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I can not but think that it has happened, repeatedly, that contracts have been made for the sales of estates, in which small pieces have not been found to belong to the vendors, and they have been at liberty to deal with persons, over whom they have no control, for the *purpose of making [*451] good their title to the purchaser, with whom they have *bona fide* contracted. I am satisfied that it has repeatedly happened, although I can not mention any particular case. And I never heard that it was a received rule with gentlemen practising conveyancing, that, merely because, as to a certain portion of the estate, the vendor had not a title at the time of the sale, he might not be at liberty to make good his title, and hand over the whole of the property contracted to be sold, to the purchaser.

With respect to this particular case, it seems to me that it would be too much to say that there has been such a fraudulent dealing, such a jobbing in land, as that this court is bound to say that the contract ought to be rescinded.

I am very willing to admit that, notwithstanding the proceedings which were adopted, by this purchaser, in the year 1838, a case might be stated in which he might fairly make the objection which he now makes: but let us consider how it is on his own showing. I do not understand him to allege that there was actually any fraud: but what he represents, on his own affidavit, is, in substance, that, with respect to this little slip of land, the breadth of which I do not find anywhere stated, (the length is, but the breadth is not,) that, with respect to this little slip of land, it turned out, by admeasurement, that the quantity which the vendors undertook to sell could not be made good except by including this slip of land. And then it is alleged that, with respect to that part which bounds lot 62, it belongs to a gentleman of the name of Smyth; and, as to that part which bounds lots 63 and 64, it belongs to Mr. Hargrave. I will take it to be so. Well then, the vendors having *this objection notified to them, proceeded, immediately, to [*452] make a contract with the gentleman of the name of Smyth, for the purpose of acquiring the fee simple in that part of the slip of land which was Smyth's, and it does not appear that they may not be able to make an effectual contract with Mr. Hargrave with respect to the other portion. Now I must look at the whole together, and I am inclined to think that it will be lawful for the vendors to make good this contract with Messrs. Smith and Hargrave; and, by means of those contracts with them, enable themselves to complete the contract with Mr. Gosnay.

But supposing it should fail, I have not got circumstances enough before me now to determine, at once, that these slips of land do not fall within the 12th condition; because, it struck me that a good deal of the objection arising from the materiality of this slip of land, would depend on the very width of the slip; and, if it be of considerable extent, so as to afford a very easy means of annoyance to be practised on Mr. Gosnay by means of building and so on, it might lead to objections; but, before I am told how wide it is, (and I am

 1840.—*Tweeddale v. Tweeddale*.

certain, from the statement that is made, that it must be narrow) I can not, at once, conclude, without any further statement, that it may not be comprehended within the 12th condition of sale.

'Then there is also the circumstance which regards the second condition of sale. I am not at liberty, at present, to say how far the vendors may not be at liberty to avail themselves of that condition: and then, having nothing presented to me except that general objection which is made with reference to a case which I do not think is similar at all to the present case, I [*453] am asked to *say, at once, that this is a case in which I ought to make a peremptory order, and discharge the purchaser. It appears to me that that is asking too much: and I do not think that this application of the purchaser's ought to be favored: and, that being so, I shall refuse the application with costs.

The order directed a reference to the Master to inquire and state, to the court, whether a good title could be made to the premises comprised in the three lots, and at what time it was first shown that a good title could be made, with liberty to state special circumstances: and Gosnay's application to be discharged from his purchase, was refused, with costs.[1]

TWEEDALE v. TWEEDALE.

1840: 24th and 30th January.—Will; Construction; Cumulative Legacies; Annuity.

Testator, by his will, bequeathed sums to his four sons absolutely, and other sums to his four daughters for their lives, with remainder to their children. One of his sons afterwards died; and the testator thereupon made a codicil as follows; "In consequence of the death of my son, J. T., I have opened my will, and now wish to bequeath to my wife, 600*l.* a year; to my three sons 2000*l.* each; to my four daughters, 300*l.* a year each; and at the death of my wife, the 600*l.* a year to be equally divided amongst my four daughters. This memorandum will, I hope, be attended to in case of death before I make the legal alteration in my will." Held that the gifts by the codicil, were in addition to those by the will; and that the annual sums given by the codicil, were perpetual, and not mere life annuities.

JAMES TWEEDALE, by his will dated the 16th of November, 1820, after

[1] The above decision being made on motion, does not carry the same weight with it, as if it had arisen distinctly upon a bill for a specific performance. As to the different value of decisions, according to the different modes in which questions are presented to the court, see what is said by Lord Brougham in *Casamajor v. Strobe*, 2 Myl. & K. 723. A person contracted to sell an estate, who at the time of the contract had no legal or equitable title to it, by reason of the alienage of a party through whom he claimed; the purchaser by his own inquiries ascertained the defect of title, but did not, until after some months of negotiation with the vendor, repudiate the contract: the vendor then filed his bill for a specific performance, and pending the investigation of the title in the Master's office, obtained a grant of the estate from the crown; it was held that he was entitled to a decree. *Eyston v. Simonds*, 1 Yo. & Coll. C. C. 608. Specific performance of contract for sale of an estate in fee simple decreed in favor of a vendor who at the time of the contract was tenant for life only; the purchaser not having rejected the purchase as soon as he had ascertained the real interest of the vendor, and the vendor being able by means of the consent of the parties interested in remainder, to make a good *prima facie* title to the fee simple at the hearing. *Salisbury v. Hatcher*, 2 Yo. & Coll. C. C. 54.

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directing all his just debts, funeral expenses and the charges of proving his will to be fully paid by his executors thereafter named, gave and bequeathed unto his wife, the defendant Caroline Tweedale, the sum of 150*l*. for her immediate occasions, and all the stock of provisions, wines and liquors that *should be in and about his house at Brighton, at [*454] the time of his decease; and he also gave and bequeathed to her and her assigns for life, the use and occupation of his house with the appurtenances, and also of the household furniture, plate, linen, china and fixtures therein: and, from and after her decease, he gave and bequeathed the house, furniture and effects to trustees, their executors, administrators and assigns upon trust to be sold in such manner as they should think proper, and the produce to be by them retained and applied upon the trusts thereafter declared concerning his residuary estate; and he gave and bequeathed, to his wife and the trustees, all the residue of his goods, chattels and personal estate, upon trust to sell and convert into ready money all such parts thereof as should not consist of money or securities for money, and to call in and collect such parts thereof as should consist of moneys or securities for money, and to invest the same moneys in the usual securities; and to stand possessed thereof upon the trusts following, that is to say, as to the sum of 8000*l*. part thereof, upon trust to pay the interest thereof to his wife, for her life, and, after her decease, upon trust to stand possessed of the 8000*l*. and the interest arising therefrom, in the manner thereafter declared concerning the same: and, as to the sum of 2000*l*., other part of the principal trust estate, upon trust to pay the interest thereof to his son James Charles Tweedale, or his assigns, until he should attain the age of twenty-five years, and then upon trust to pay the same to him or them, to and for his or their absolute use and benefit; and as to the sums of 3000*l*. and 4000*l*., and 4000*l*., other parts of the principal trust estate, upon the same trusts for the benefit of his (the testator's) sons Farquharson Tweedale, the plaintiff William Hutton Tweedale, and Alexander Tweedale respectively, as *were therein- [*455] before declared respecting the legacy of 2000*l*. for his son James Charles Tweedale. Provided that in case any or either of his sons should die under the age of twenty-five years leaving issue, then that the legacy of any or either of them so dying and leaving such issue, should go to such his or their issue equally to be divided between them, if more than one, share and share alike, and, if but one, to such only child, as and when they should severally attain the age of twenty-one years, such issue taking only the share to which their, his or her own deceased parent or parents was or were or otherwise would have been entitled to; and the interest, dividends and annual produce thereof to be, in the meantime, applied for their, his or her education and maintenance respectively; but in case any or either of the testator's sons should die under the age of twenty-five years without leaving issue, then the legacy of him or them so dying without any such issue (or such part thereof as should then remain unapplied to the purposes therein-

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after mentioned) should go to the survivors or survivor of them, and the issue of any one or more of them who should be dead leaving issue, at such ages, days or times and in such manner as his or their original legacy was thereinbefore directed to be paid to him or them. The testator then provided for the advancement of his sons out of their legacies: and then declared that his trustees should stand possessed of 16,000*l.*, other part of the trust estate, upon trust to pay, to his wife, a sufficient part of the interest thereof, for the purpose of maintaining and educating his four daughters, Caroline Ann Tweedale, Emily Sophia Tweedale, Louisa Tweedale, and Susan Rose Tweedale, until they should attain twenty-one, and, when they should severally attain that age, upon trust to appropriate 4000*l.* for the benefit [456] of each of them, and to stand possessed thereof, in trust for their "separate use for life, without power of anticipation: and when they should die leaving issue, to transfer their fortunes to their respective issue equally, if more than one, and, if but one, to such only child as and when they, he or she should attain twenty-one, and the interest thereof to be, in the meantime, applied for their, his or her education and maintenance or in any other manner for their advancement in life respectively at the discretion of the trustees, together with all or such part of the principal as the trustees should think proper; and, as to the residue of the trust estate, upon trust to pay the interest thereof to his wife, Caroline Tweedale, for her life, and, after her decease, to stand possessed of such residue and also of the 8000*l.* thereinbefore appropriated for the benefit of his wife during her life, for the equal benefit of his four daughters and their respective issue, and to be payable at the same time and in the same manner as thereinbefore directed concerning their original fortunes. The testator then provided for the survivorship of his daughters' fortunes on their dying under twenty-one without leaving issue who should attain that age; and in case any of his daughters should marry with the approbation of the trustees, then he empowered the trustees to give, to the husband of any daughter so marrying for his life, the interest of the fortune of such daughter or such part thereof as the trustees, in their discretion, should think proper, in the event of his surviving his wife; and the testator lastly declared that, in case of his having any child or children after making his will or born in due time after his death, such child or children and their issue should be entitled to an equal share or shares of the fortunes thereinbefore appropriated for the benefit of his daughters and their issue, and to be payable to them in the same manner, and with the same provisions, in all respects: and he appointed his "wife and James John Farquharson, William Donaldson, and John Frazer executrix and executors of his will.

In the early part of the year 1826, the testator's eldest son, James Charles Tweedale, died unmarried, leaving property to the amount of about 5000*l.*; the interest of which, by his will, he bequeathed to his mother, for her life, and, after her death, the principal to his brothers and sisters equally.

1840.—Tweedale v. Tweedale.

On the 21st of November, 1826, the testator made a codicil to his will in the following words: "In consequence of the death of my son, James Tweedale, I have opened my will, and now wish to bequeath to my wife, Caroline Tweedale, 600*l.* a year; to my three sons, 2000*l.* each; and, to my four daughters, 300*l.* a year each; and at the death of my wife, the 600*l.* a year to be equally divided amongst my four daughters. This memorandum will, I hope, be attended to in case of death before I make the legal alteration in my will." In the year 1831, Louisa Tweedale, one of the testator's daughters, died: and, on the 6th of July, 1839, the testator died abroad. He left the defendants, Caroline Tweedale, his widow, and Farquharson Tweedale, the plaintiff William Hutton Tweedale, the defendant Alexander Tweedale, Caroline Ann Tweedale, Emily Sophia Tweedale, and Susan Rose, who had married Charles Lushington, his only children and next of kin. The defendants, F. Tweedale and Alexander Tweedale, and the plaintiff had attained the age of twenty-five years. The bill alleged that doubts had arisen as to the proper construction of the will and codicil; and that the plaintiff was advised that the benefits by the codicil given to himself and his mother and his brothers and sisters, were additional to the benefits given to them by the will; or that, *if they were substitutional for the benefits given [*458] by the will, then they were substitutional for all those benefits, and the residue of the testator's estate was wholly undisposed of: but that the widow and daughters of the testator alleged that some other construction ought to be put upon the will and codicil.

The bill prayed that the testator's estate might be administered under the direction of the court, and that the rights and interests of the plaintiff and the defendants might be ascertained and declared. The defendants submitted the construction of the will and codicil, and their rights and interests under them, to the judgment of the court.

The questions at the hearing of the cause, were, first, whether the bequests made by the codicil, were cumulative or substitutional: second, whether the annuities given by the codicil, to the widow and daughters, were perpetual or only life annuities.

Mr. Knight Bruce and Mr. G. L. Russell for the plaintiff:—The testator begins his codicil by reciting the death of his son, James Charles Tweedale. That recital affords a key to his intention: for by the death of his son, a portion of his property was set at liberty, and he was enabled and intended to increase the legacies which, by his will, he had given to his surviving sons: we submit therefore that there can be no doubt that the legacies given, by the codicil, to the surviving sons, are cumulative: and the only question upon this point is whether the incomes given, by the same instrument, to the widow and daughters, are open to the same consideration.(a) Now, by the will, the testator gives the interest *of 8000*l.* (which, at five [*459] per cent., is 400*l.* a year,) to his wife; and the interest of four sums

(a) The bill alleged that all the gifts in the codicil, were cumulative. See the preceding page.

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of 4000*l.* each, which, at the same rate, is 200*l.* a year, to his daughters. By the codicil, he gives 600*l.* a year to his wife, and 300*l.* a year to each of his daughters: it is manifest, therefore, that the provisions made for those ladies by the codicil, are substitutional for the provisions made for them by the will.

With respect to the other question, namely, whether the annuities given by the codicil, were perpetual or merely life annuities, we contend that where income is given, simply and without reference to any capital by which it is to be produced, the donee takes it for life only. Besides, in this case, the testator, when he gave the 600*l.* a year to his wife, did not add the words "for her life;" although, as he gave that sum over on her death, he clearly intended her to take it for her life only. His impression was that a gift of a certain sum per annum, was sufficient, of itself, to denote a life interest. As he had given capital to his sons, by his will; so he gave them capital by his codicil: and, as he had given income to his wife and daughters by his will, so he meant to give them income by his codicil.

Mr. *Jacob* and Mr. *Nicholl*, for the widow and sons except the plaintiff, contended that all the gifts, by the codicil, were cumulative.

Mr. *Wood*, for the testator's daughters, contended that the gifts by the codicil were, all of them, cumulative; and that the sums of 300*l.* a year each were given absolutely, and therefore each of the daughters was entitled to a capital sum producing that yearly sum. *Rawlings v. Jennings*.(a)

[*460] *Mr. *Stuart* appeared for the trustees and executors.

THE VICE-CHANCELLOR:—I take it to be quite clear that all the legacies given by the codicil are cumulative; they are totally distinct legacies.

There is nothing to assimilate this case to the case of the *Duke of St. Albans v. Beauclerk*.(b) where, owing to the identity of the things given, the legacies were held to be substitutional.

With respect to the annuities, I have always thought that, if there is a gift to A. of 100*l.* a year, simply, it is a gift to him, absolutely, of the fund that would produce the 100*l.* a year.

Mr. *Knight Bruce*, in reply:—If a testator gives 300*l.* a year in the three per cents., or the interest of a sum secured on mortgage, it is a gift of the capital; but it is not so, where, as in the present case, a mere annual sum is given, without reference to the capital. In *Rawlings v. Jennings*, there was an express reference to the funds which produced the annual sums given.

THE VICE-CHANCELLOR:—My opinion is that the words of this codicil are so unambiguous, that the legacies bequeathed by it must be held to be cumulative: but I will give you leave to look into the authorities on the question relating to the annuities.

Let the cause be placed in the paper again on Thursday next.

(a) 13 Ves. 39.

(b) 2 Atk. 636.

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**Mr. Knight Bruce*, and *Mr. G. L. Russell* referred to *Savery v.* [*461] *Dyer*, (a) in which Lord Hardwicke says: "There is a difference between an annuity existing at the time of the will, and one created by it *de novo*. If one gives, by will, an annuity not existing before, to A., A. shall have it only for life." They cited also *Neal v. Hanbury*: (b) and said that the testator, when he intended to give capital, knew how to express himself accurately; for he gave to his sons, 2000*l.* each.

Mr. Jacob and *Mr. Nicholl* contended that the daughters were entitled to nothing more than annual sums of 300*l.* and 600*l.* a year for their lives, subject, as to the 600*l.* a year, to the life interest of their mother: and they cited *Dawson v. Hearn*. (c)

Mr. Wood submitted that the annuities were given in perpetuity: and cited *Elton v. Sheppard*, (d) *Haig v. Swiney*, (e) *Page v. Leapingwell*, (f) and *Sheepshanks v. Williams*. (g) He added that the passage cited from **Ambler*, was nothing more than a *dictum* by Lord Hardwicke; [*462] and that the testator evidently thought that the 'annuity of 600*l.* a [*463]

(a) Amb. 139.

(b) Prec. Ch. 173.

(c) 1 Russ. & Myl. 606.

(d) 1 Bro. C. C. 532.

(e) 1 Sim. & Stu. 487.

(f) 18 Ves. 463.

(g) Decided by the Vice-Chancellor in 1831, but not reported. The reporter was furnished with the following note of the case:

"The said testator, James Burgis, by his will, bearing date the 8th day of September, 1820, bequeathed to his the said testator's sister, Mary Brooke, an annuity of 300*l.* for her life, and, at her death, one-sixth part of the said annuity, to the corporation for the relief of poor clergymen, &c., in Essex, and one-sixth part to the similar institution in Middlesex, and one-sixth part to the rector of Hanworth, Middlesex, in trust to promote the education of youth in that parish; one-sixth part to the vicar of Braintree, in Essex, in trust for the same purpose in that parish; one-sixth part to the Clergy Orphan School at St. John's Wood, Middlesex; and the remaining one-sixth part the said testator empowered his said sister to dispose of, by will: to Henrietta Goode Seale (eldest daughter of the Rev. Barnard Seale,) an annuity of 300*l.*; to each of the four daughters of John Blunt, Esq., of Woodford, Essex, an annuity of 50*l.*; and the said testator declared that the above annuities arising from foreign securities, might, with the consent of the respective parties interested therein, be converted into government securities, making up the respective deficiencies, if any existed by the said transfer, out of the residue of his property, taking care, first, to complete the charitable bequests; and, if there should be any surplus, he desired it might be divided amongst the several annuitants, proportionably to their respective bequests.

"Declare that the annuities by the will of the said testator given to the corporation for the relief of poor clergymen, &c., in Essex, the similar institution in Middlesex, &c., the rector of Hanworth, Middlesex, the vicar of Braintree, Essex, and the Clergy Orphan School at St. John's Wood, Middlesex, and to the said plaintiff, Henrietta Goode Sheepshanks, the plaintiff, Mary Goff Terrington, the plaintiff, Lydia Maria Hanson, the plaintiff, Elizabeth Blunt, and the plaintiff, Caroline Blunt, respectively, are perpetual annuities; and declare that the one-sixth part of the annuity of 300*l.* a year, which, by the will of the said testator, his sister, Mary Brook, was empowered to dispose by will, has lapsed and fallen into the residue of the said testator's estate; and declare that the residue of the said testator's estate is divisible between the plaintiff, Henrietta Goode Sheepshanks, the plaintiff, Mary Goff Terrington, the plaintiff, Lydia Maria Hanson, the plaintiff, Elizabeth Blunt and the plaintiff, Caroline Blunt, proportionally to their respective bequests, so that six-tenth parts of the said residue will belong to the said plaintiff, Henrietta Goode Sheepshanks; one-tenth part thereof to the said plaintiff, Mary Goff Terrington; one-tenth part thereof to the plaintiff Lydia Maria Hanson; one-tenth part thereof to the said plaintiff, Elizabeth Blunt; and the remaining one-tenth part thereof to the said plaintiff, Caroline Blunt."

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year, was perpetual and would have gone to his wife's executors, unless he had given it over, on her death.

The Vice-Chancellor, in the course of the argument, made the following observations on *Savery v. Dyer* and *Sheepshanks v. Williams*.

It is strange that any question at all should have been made in *Savery v. Dyer*. The thing given was expressly defined by the will, namely, an annuity of 50*l.* a year during the life of the executor. For the decision of the question before Lord Hardwicke, it was not necessary to say what is attributed to him in the report.

In *Sheepshanks v. Williams*, the testator, after giving several annuities, desired that, if there should be any surplus of his personal estate, it should be divided amongst the several annuitants proportionably to their respective bequests: and the court declared that the residue was divisible accordingly and that the daughters of John Blunt (to each of whom an annuity of 50*l.* was given) were entitled to share the residue equally, as between themselves: therefore, the court must have held that the annuities were perpetual; or else it would have directed them to be valued.

At the conclusion of the argument,

THE VICE-CHANCELLOR delivered judgment as follows:—I do not see any substantial difference between a gift of an annuity out of personal [*464] estate, generally, and a *gift of an annuity to be satisfied out of a particular fund: because an annuity, when it is given generally, is to be provided for out of all the personal estate: and, if a gift of 300*l.* a year out of the testator's funded property, would give to the annuitant, the absolute interest in so much of the funded property as would produce 300*l.* a year; what is the substantial difference between that gift and a gift of 300*l.* a year, simply, to be satisfied out of so much of the personal estate as would produce the sum? I confess that I do not see any difference myself. I am very much inclined to think that the true construction is that if it is given simply, it is given absolutely.

The decision in *Sheepshanks v. Williams*, seems to be a decision on the point: and, as the decree does not appear to have been made by consent, or to have been appealed from, I take it to be correct.

Declare that, according to the true construction of the will and codicil, the annuities and the legacies given by the codicil, are additional to those given by the will, and that Caroline Ann Tweedale, Emily Sophia Tweedale, and Susan Rose Lushington, are each entitled, under the codicil, to an annuity of 300*l.* in perpetuity; and that, under the codicil, they will also become entitled in perpetuity, on the death of their mother, to one equal fourth part of the annuity of 600*l.*, the remaining one-fourth part thereof having lapsed by the death of Louisa Tweedale in the lifetime of the testator.(a)

(a) William Hutton Tweedale and Farquharson Tweedale intended to appeal from the above decision so far as it declared the annuities to be annuities in perpetuity: but the appeal was compromised.—See *Blewitt v. Roberts*, post, 491.

1840.—Murray v. Tancred.

*MURRAY v. TANCRED.

[*465]

1840: 24th January.—Will; Construction; Legacy.

Testator bequeathed his residuary estate in trust for his nephew for life; and, after his death, in trust to transfer the whole to his children by any lawful marriage, on the day of their attaining the age of twenty-one. Held that the time of payment was annexed to the gift, and, therefore, none of the nephew's children would be entitled to take, unless they attained twenty-one.

ROBERT SCOTT, Esq., by his will dated the 18th of September, 1804, after disposing of a part of his real estate and giving certain legacies and annuities, gave all the rest and remainder, of his property, real and personal, in trust, in the first place, to pay the interest, dividends, rents and produce thereof to to use of his nephew Charles Scott Murray, for his life, and after his decease, *to transfer the whole of such residuary estate to his children by any lawful marriage, on the day of their attaining the age of twenty-one years*, in such shares and proportions as he, Charles Scott Murray, should have appointed by any deed or last will and testament; and, in default of such appointment, to the eldest son, if there should be one, otherwise to all the daughters, equally: and, in case Charles Scott Murray should die without issue, or if none of the issue should live to attain the age of twenty-one years, then the testator gave his residuary estate real and personal to Henry William Tancred and Henry Parnell, in equal shares, or to the survivor of them who should be living at the time such contingency took place, and their heirs, executors, administrators and assigns: and, in case neither of them should be living at that time, then the testator gave the whole of his residuary estate to William Brodie, his heirs, executors, administrators and assigns.

The testator died on the 6th of February, 1808.

By the articles made in contemplation of the marriage of Charles Scott Murray with Eliza Buller, C. S. Murray *covenanted, with the [466] trustees therein named, that, in case there should be any child or children of the marriage, he would make, do and execute such acts and deeds as should be reasonably required for making a valid appointment or appointments in favor of such child or children, in exercise of the power of appointment given to him by the testator's will over the residuary estate thereby devised and bequeathed, subject to his own life interest therein, of the portion or portions following, namely, if there should be only one such child, then the sum of 20,000*l.* for the portion of such child, or, if there should be two such children, then the sum of 25,000*l.* for the portions of such children, and, if there should be three or more such children, then the sum of 30,000*l.* for the portions of such three or more children; and, in the event of there being two or more such children, then the sum of 25,000*l.*, or 30,000*l.*, as the case might be, should, by such appointment or appointments as aforesaid, be directed to be divided between such children, in such shares and proportions as Charles Scott Murray should, by deed or will, appoint, and, in default of such appointment, then that the sum of 25,000*l.* or 30,000*l.*, as the case

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might be, should be directed to be divided between the said children in equal shares, their respective executors, administrators and assigns.

There was issue of the marriage two children, Charles Robert Scott Murray and Augusta Murray.

Charles Scott Murray made his will dated the 15th of February, 1826, part whereof was in the following words: "This is the last will and testament of me Charles Scott Murray, relative to the personal property [*467] of the late Robert Scott, now the estate of the trustees of the late Robert Scott: I give and bequeath to my daughter, Augusta, an annuity of 300*l.*, payable half yearly out of the estate of Robert Scott, for the term of her natural life; I likewise give and bequeath, to my said daughter, out of the said estate, an annuity of 300*l.*, payable half yearly while she remains unmarried; these annuities being in addition to the share she is entitled to by my marriage settlement, which, if not thereby sufficiently secured to her, I hereby give and bequeath to her."

Charles Scott Murray died on the 24th of April, 1837.

Charles Robert Scott Murray attained twenty-one pending the suit; but Augusta Murray was still an infant.

Charles Robert Scott Murray, after he had attained twenty-one, presented a petition in the cause stating that the petitioner proposed to leave three sums of stock, belonging to the residuary estate of Robert Scott, standing in the name of the Accountant General, for the purpose of paying the annuity of 300*l.* a year to the infant until she married, and the other annuity of 300*l.* a year during her life, and the sum of 12,500*l.* to which she was entitled under the marriage articles and will of her late father: and the petitioner submitted that, until Augusta Murray should attain twenty-one, the dividends of those three sums of stock would be payable to the petitioner, he being entitled to the remainder of Robert Scott's estate. The petition prayed that it might be declared whether Augusta Murray was entitled to an absolute interest in the annuity of 300*l.* for her life, and the other annuity of 300*l.* until she married, and in the 12,500*l.*, or whether she was only entitled thereto, respectively, in the event of her attaining twenty-one.

[*468] *Mr. Jacob, for the petitioner, said that, under the will of Robert Scott, Charles Scott Murray could not make any appointment in favor of his children, which would give them a vested interest before they attained twenty-one; and, consequently, the intermediate dividends of the sums of stock mentioned in the petition, belonged to the petitioner.

Mr. G. Richards and Mr. Matcham, for the infant defendant, Augusta Murray, contended that the infant defendant took a present interest in the two annuities of 300*l.* and the sum of 12,500*l.* They said that Robert Scott, in that part of his will on which the question arose, used the word *transfer*, which implied a present interest: that, according to the construction contended for on the petitioner's behalf, the infant's father could not have made a settlement on her, if she had married under twenty-one: that Robert Scott, in dis-

1840.—*Manners v. Rowley.*

posing of his property in default of appointment, to the eldest son, if there should be one, otherwise to all the daughters of Charles Scott Murray, did not mention the age of twenty-one.

They cited *Wadley v. North.*(a)

Mr. *Knight Bruce* and Mr. *G. L. Russell* appeared for the trustees.

THE VICE-CHANCELLOR:—The original testator gives his residuary estate to trustees, in trust to pay the income to his nephew, Charles Scott Murray, for his life, and, after his decease, to transfer the whole to the children of his nephew on "the day of their attaining the age of twenty-one [*469] years ; there is, therefore, no time of payment disannexed from the gift ; but the time of payment is so annexed to the gift that it is necessary for the children to attain twenty-one in order to entitle them to take any share of the property under an appointment by their father. The testator then proceeds to dispose of his property in default of appointment : but the words, "and in default of such appointment, &c.," which he uses for that purpose, do not begin a new sentence, but are governed by the preceding word "transfer." and then he gives the property over, on a failure of issue generally or in the event of none of the issue attaining twenty-one. Charles Scott Murray might, under his uncle's will, appoint the shares in which his children were to take the trust property : but he could not vary the time at which they were to take those shares ; and, as I am of opinion that no child could take a share unless it was a child who should attain twenty-one, all that can be done, at present, with respect to Miss Murray's interest, is to secure in court sufficient sums of stock to produce the two annuities of 300*l.* and the 12,500*l.* in case she shall, eventually, become entitled to them by attaining twenty-one.

*MANNERS v. ROWLEY.

[*470]

1840 ; 29th January.—Pleading ; Demurrer ; Multifariousness.

If a plaintiff has one remedy against A., and that remedy and another against B. for the same cause of suit, neither A. nor B. can demur for multifariousness, on the ground that the bill seeks to enforce both the remedies against B. and only one of them against A.

THE bill was filed, under 7 Geo. 4, c. 46, sect. 9,(b) by a joint stock banking company, in the name of one of their public officers, against persons, some of whom were members of the banking company and others were not, to recover moneys which the defendants had improperly drawn out of the bank, and applied for the purposes of an undertaking in which they were jointly engaged. The bill prayed, as against all the defendants, for an ac-

(a) 3 Ves. 634.

(b) This sect., and the sect. of 1 and 2 Vict. c. 96, after referred to, are set forth in the judgment.

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count and payment of the sums so drawn out of the bank; and as against those defendants who were partners in the bank, it further prayed that the banking company might be declared to have a lien on the shares of those defendants in the bank, for what should be found due on taking the account.

On the argument of a demurrer,

Mr. *Knight Bruce* and Mr. *Stinton*, in support of it, said that the bill was multifarious, as it prayed totally different relief against some of the defendants, from what it did against others of them.

THE VICE-CHANCELLOR:—The case made by the bill, is the same as against all the defendants. It may easily happen that the plaintiff may have one remedy with regard to one defendant, and that, with regard to another defendant, he may have that remedy and another in addition to it; [*471] and, in my opinion, one defendant has no right to complain because the plaintiff seeks to enforce, against another defendant, all the remedies which he is entitled to against that other defendant.[1]

Joint Stock Company; Construction of 7 Geo. 4, c. 46; Pleading.

A joint stock banking company, under 7 Geo. 4, c. 46, may sue, by their public officer, members of the company jointly with strangers.

Another ground on which the defendant's counsel attempted to support the demurrer, was that the bill was filed before the passing of the 1st and 2d Vict. c. 96, and that the 7 Geo. 4, c. 46, did not authorize suits to be instituted by a joint stock banking company, in the name of one of their public officers, against individuals, some of whom were members of that company and others were not; as was evident from the Legislature having thought it necessary to pass the 1st and 2d Vict. c. 96, for the purpose of conferring that authority on such companies. *Macmahon v. Upton*-(a)

Mr. *Jacob* and Mr. *Hubback*, in support of the bill, said that the act, of the 7th Geo. 4, c. 46, was, of itself, amply sufficient to support the present suit;

(a) Ante, vol. 2, p. 473.

[1] The object of the rule against multifariousness is to protect a defendant from unnecessary expense; but it would be a great perversion of that rule if it were to impose upon the plaintiff, and all the other defendants, the expenses of two suits instead of one." Lord Cottenham; *The Attorney General v. Cradock*, 3 Myl. & Cr. 94. Where the case against one defendant is so entire as to be incapable of being prosecuted in several suits, but yet another defendant is a necessary party in respect of a portion only of that case, such other defendant cannot object to the suit on the ground of multifariousness. *The Attorney General v. The Mayor &c. of Poole*, 4 Myl. & Cr. 17. As a general rule, a bill is not multifarious, when all the parties to the suit are connected in reference to the subject matter, or have a joint interest therein; nor is it multifarious because two good causes of complaint, arising out of the same transaction are joined in one suit, in which all the defendants are interested in the same claim or right, and where the relief asked in relation to each is of the same general character. *Varick v. Smith*, 5 Paige, 160. *Many v. The Beekman Iron Co.*, 9 Paige, 194. *Campbell v. Mackay*, 7 Sim. 564. S. C. 1 Myl. & Cr. 603. Story's Eq. Plead. § 271, et seq. 1 Sim. & Stu. (Am. ed.) 65, n. (c) 2 Sim. 331, n. 1. 3 Myl. & Cr. 97, n. 1. Am. Ch. Dig. Pleading, Bill. III.

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that there was a difficulty, at law, in the same person being both plaintiff and defendant in the action; and that the act of 1st and 2d Vict. c. 96, was passed in order to obviate that difficulty: that that act had made the case stronger than it was before, in equity, but was not necessary for the purpose of enabling the public officer to sustain the suit.

THE VICE-CHANCELLOR:—I must say that, before the passing of the act of 1st and 2d Vict. c. 96, I should have thought that, under the act of 7 Geo. 4, c. 46, the public officer of a joint stock banking [*472] company might have sued a person who was a member of that company, jointly with a person who was not a member of it. The 9th sect. enacts: "that all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons, who may be at any time indebted to any such copartnership carrying on business under the provisions of this act, and all proceedings at law or in equity under any commission of bankruptcy, and all other proceedings at law or in equity to be commenced or instituted for, or on behalf of, any such copartnership against any person or persons, bodies politic or corporate or others, whether members of such copartnership or otherwise, for recovering any debts, or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, shall and lawfully may, from and after the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal plaintiff or petitioner for and on behalf of such copartnership." Those words seem to me to comprehend all persons whom it may be necessary to make defendants to a suit in equity, whether they are members of the company or not. There may possibly have been some difficulty in applying the statute at law; but I think that a suit in equity between parties standing in the relation to each other which the parties to this suit do, is expressly within the words of the act.

The only question is whether I am forbidden to put that construction on the 7th Geo. 4, because the 1st and 2d Vict. contains the [*473] words, "be it enacted," I think I am not.

The act of 1st and 2d Vict, after reciting the act of 7 Geo. 4, and another act of 6 Geo. 4, proceeds thus: "And whereas it is expedient that the said acts should, for a limited time, be amended so far as relates to the powers enabling any such copartnership, not being a body corporate, to sue any of its own members, and the powers enabling any member of any such copartnership, not being a body corporate, to sue the said copartnership: be it therefore enacted that any person now being or having been or who may hereafter be or have been a member of any copartnership now carrying on, or which may hereafter carry on the business of banking under the provisions of the said recited acts, may, at any time during the continuance of this act, in respect of any demand which such person may have either solely or jointly with any other person, against the said copartnership or the funds or property thereof.

 1840.—*Manners v. Rowley*.

commence and prosecute, either solely or jointly with any other person (as the case may require,) any action, suit, or other proceeding at law or in equity, against any public officer appointed or to be appointed, under the provisions of the said acts, to sue and be sued on the behalf of the said copartnership: and that any such public officer may, in his own name, commence and prosecute any action, suit, or other proceeding at law or in equity, against any person being or having been a member of the said copartnership, either alone or jointly with any other person against whom any such copartnership has or may have any demand whatsoever: and that every person being or having been a member of any such copartnership, shall, either solely or [*474] jointly with any other person (as the case may *require,) be capable of proceeding against any such copartnership by their public officer, and be liable to be proceeded against, by or for the benefit of the said copartnership, by such public officer as aforesaid, by such proceedings and with the same legal consequences as if such person had not been a member of the said copartnership; and that no action or suit shall in anywise be affected or defeated by reason of the plaintiffs or defendants, or any of them respectively, or any other person in whom any interest may be averred, or who may be in anywise interested or concerned in such action, being or having been a member of the said copartnership; and that all such actions, suits and proceedings shall be conducted and have effect as if the same had been between strangers." Now, with respect to this act, it is very remarkable that it does not take notice, in the recitals, of the very case for which it, afterwards professes to provide, namely, the case of a company suing, in the name of their public officer, persons who are members of the company jointly with persons who are not members; consequently the reciting part of the act does not point to the very case on which the amendment is constructed.

My opinion is that I am not precluded, because the act of the 1st and 2d Vict. uses the words, "be it enacted," from holding that under the act of the 7 Geo. 4, the public officer of a joint stock banking company, may sue a person who is a member of the company, jointly with a person who is not a member.

Demurrer over-ruled.

 1840.—*Mayor and Corporation of Dartmouth v. Holdsworth.*

*FRY v. RICHARDSON.

[*475]

1840; 30th January.—*Plea and Pleading.*

Plaintiff sued as administrator. Defendant pleaded that plaintiff was not administrator, but did not deny, by answer, the usual charge as to documents. Held that the plea was not bad on that account.

THE plaintiff sued as administrator to an intestate; and the bill contained the usual charge as to the defendant having documents in his possession. The defendant pleaded that the plaintiff was not administrator; but did not deny, by answer or otherwise, the charge relating to the documents.

The Vice-Chancellor held that, as the defendant had pleaded that the plaintiff was not administrator, it was not necessary for him to deny the charge as to documents.

Mr. *Knight Bruce* and Mr. *Koe* appeared in support of the plea, and Mr. *Roll* in support of the bill.

New orders; Costs; Plea.

Under the 31st order of 1828, if a plea to the whole bill is argued and allowed, the plaintiff, although he undertakes to reply to the plea, must pay the costs of it; but the other costs of the suit will be reserved.

The plea, which was to the whole bill, having been allowed on argument, and the defendant having undertaken to reply to it, the question was whether under the thirty-first order of 1828, the costs of the plea, as well as the further costs of the suit, ought to be reserved.

The thirty-first order directs that, upon the allowance of any plea or demurrer, the plaintiff shall pay to the defendant the taxed costs thereof; and, when the plea or demurrer is to the whole bill, then the further taxed costs of the suit also; unless, in the case of a plea, the plaintiff shall [*476] undertake to reply thereto; and then the costs shall be reserved, unless the court shall think fit to make other order to the contrary.

The Vice-Chancellor said that the plaintiff might have saved the costs of arguing the plea, by submitting to it and filing a replication; and that the true construction of the order was that the costs of the plea should be paid by the plaintiff; but that the other costs of the suit should be reserved.

THE MAYOR AND CORPORATION OF DARTMOUTH v. HOLDSWORTH.

1840; 31st January.—*Production of documents; Confidential communications.*

The schedule, to a defendant's answer, of the documents in his power, contained as follows: "Letters from Messrs. K. & C., the defendant's solicitors, to Mr. F., one of the witnesses examined for the defendant at the trial of the action, bearing date, &c.:" and the defendant, in the body of his answer, stated that all the documents in the schedule, related to and were connected with the matters in question in the suit, and were prepared and written, after the institution of it, for the purpose of the defendant's defence to the suit, and for the purpose of the action between the parties to which the suit related. Held that the letters were not sufficiently characterized as being of a confidential nature, to protect them from being produced.

1840.—Mayer and Corporation of Dartmouth v. Holdsworth.

THE defendant being required, by the supplemental bill in this suit, to set forth a list of documents in his power relating to the matters in question in the original and supplemental causes, annexed a schedule of such documents to his further answer to the supplemental bill : and, in the body of the answer, he said that all the papers enumerated in the schedule, related to and were connected with the matters in question in the supplemental suit and in the original suit which was still subsisting between the parties, *and were* [*477] *prepared and written, after *the institution of the original suit, for the purpose of the defendant's defence in that and the supplemental suit, and for the purpose of an action between the parties to which such suits related, and which was mentioned or referred to in his former answer to the supplemental bill.*(a)

Amongst the documents comprised in the schedule, were certain letters which the defendant's solicitor had written to a person who was examined as a witness at the trial of the action.

On the hearing of a motion, on behalf of the plaintiffs, for the production of the documents mentioned in the schedule, one question was whether the defendant ought to be compelled to produce those letters.

Mr. Jacob and Mr. Teed, in support of the motion cited *Storey v. Lord George Lennox*.(b)

Mr. Knight Bruce and Mr. Wigram, for the defendant :—The point did not arise in *Storey v. Lord George Lennox* ; and, therefore, the [*478] Lord Chancellor said that, *if he were to give any opinion upon it, it would be extra-judicial. It is sworn, in the answer, that all the letters in question, were written by the defendant's solicitor, after the institution of the suit, and for the purpose of the defendant's defence to the suit, and for the purpose of the action : we submit, therefore, that the court cannot order them to be produced.

THE VICE-CHANCELLOR :—The court will not order letters written by a client to his solicitor, or by the country solicitor to his town agent, relating to the subject of a suit,(c) to be produced. But the letters in this case, did not pass between the client and his solicitor, or between the solicitor and his agent ; but were written, by the defendant's solicitor, to a witness who was examined for the defendant at the trial of the action. I cannot infer that they contained confidential communications merely because they were written, by the solicitor, to A. B. The case would have been different, if either the answer or the schedule had stated that the letters contained confidential

(a) The supplemental bill prayed that the defendant might make a full disclosure and discovery of all the matters therein mentioned ; that that bill might be considered as supplemental to the original bill, and that the plaintiffs might have the benefit thereof accordingly, and that the plaintiffs might have the relief prayed by the original bill ; and it prayed also for an injunction to restrain the defendant from entering up judgment on the verdict which he had obtained in the action, and from issuing execution thereon against the plaintiffs' estate.

(b) 1 Myl. & Cr. 525 ; see 537.

(c) See *Hughes v. Biddulph*, 4 Russ. 190 ; and *Vent v. Pacey*, *ibid.* 193.

1840.—Crawford v. Fisher.

communications: but I do not think that what is stated respecting them in the body of the answer or in the schedule, sufficiently gives them the character of being of a confidential nature: the plaintiff, therefore, is entitled to have them produced.[1]

*CRAWFORD v. FISHER.

[*479]

1840: 31st January and 1st February.—Interpleader; Injunction; Practice.

Where one of the defendants to a bill of interpleader is suing the plaintiff in equity, and another is suing him at law, the court will grant an injunction to restrain the suit in equity as well as the action at law.

THIS was an interpleading suit respecting a balance, amounting to 496*l.*, in the hands of the plaintiffs. One of the defendants had brought an action, against the plaintiffs, to recover that sum: and, the other defendant had filed a bill in Chancery, against them, praying that the necessary accounts might be taken to ascertain the balance, and that the amount to be found due, might be paid to him.

The plaintiffs paid the 496*l.* into court, and obtained an injunction restraining the prosecution of the suit, as well as the prosecution of the action.

The defendant who had filed the bill against the plaintiff, now moved to discharge the order for the injunction.

Mr. *Knight Bruce* in support of the motion:—Although Lord Eldon decided, in *Morgan v. Maisack*,^(a) that legal and equitable claims might be joined in an interpleading suit; yet it is not the rule that a suit in equity is to be stopped by the filing of a bill of interpleader.^(b)

*Mr. *Wigram* and Mr. *L. Wigram*, for the plaintiffs, said that, [*480] in *Warington v. Wheatstone*,^(c) the injunction granted by Lord Eldon, restrained the proceedings in the suit in equity, as well as those in the action at law.

Some doubt having been expressed as to this point, the Vice-Chancellor said that he would direct Reg. Lib. to be searched, for the order in *Warington v. Wheatstone*.

1st February.—On this day the Vice-Chancellor said that he had looked at the order in *Warington v. Wheatstone*, in Reg. Lib.: and that the order

(a) 2 Mer. 107.

(b) Lord Redesdale, in his Treat. on Plead., p. 39, 3d edition, says that, if any suits at law are brought against the plaintiff in an interpleading suit, he may pray that the claimants may be restrained from proceeding till the right is determined; and, in p. 116, his Lordship says that a bill of interpleader generally prays an injunction to restrain the proceedings of the claimants in some other court.

(c) Jac. 202.

[1] As to what papers will be ordered to be produced, and what will be deemed privileged:—see further 4 Russ. 191, n. 1; 194, n. 1; 3 Myl. & Cr. 546, n. 1; 549, n. 1.

 1840.—*Barnes v. Tweddle*.

that was made was to grant an injunction to restrain the action at law, and another injunction to restrain the suit in equity.(a)

Motion to dissolve the injunction refused.[1]

Mr. *Jacob* and Mr. *Long* appeared for the defendant who had brought the action against the plaintiffs.

[*481]

*BARNES v. TWEDDLE.

1840; 1st. February.—Dismissal; Practice; New Orders; Supplemental Answer; Exception. Where a defendant, after his answer is to be deemed sufficient, files a supplemental answer, the plaintiff is not allowed two months to except to it; but, as it cannot be excepted to without leave, it is to be deemed sufficient from the time when it is filed; and, therefore, the defendant may move to dismiss at the end of two months from the filing of the supplemental answer. A supplemental answer cannot be excepted to without leave; and, therefore it is to be deemed sufficient, *prima facie*, from the time when it is filed.

Motion, of which notice was given on the 8th of January, to dismiss the bill for want of prosecution.

The answer was filed in February, 1839. On the 5th of August, following, the defendant, who had obtained the leave of the court for that purpose, filed a supplemental answer, in order to state a fact that had occurred since he put in his former answer.

The question was whether the time at which the defendant was entitled to move to dismiss, has arrived.

By the 4th order of 1828, the plaintiff is allowed two months from the filing of the answer, to except to it; and, if he does not except within that time, the answer is, thenceforth, to be deemed sufficient. By the 16th amended order, if the plaintiff does not proceed in the cause within two months after the time when the answer is to be deemed sufficient, the defendant may, at the expiration of those two months, move to dismiss; and, by the 19th amended order, the time between the last seal after Trinity term and the

(a) The following is an extract from the order in *Warrington v. Wheatstone*, in Reg. Lib. (B.) 1820, fo. 1619: "That the plaintiffs be at liberty to pay the sum of 3000*l.*, insured on the life of Samuel Henderson, in the plaintiffs' bill mentioned, into the Bank, with the privity of the Accountant General, &c., in trust, in this cause; and it is ordered that an injunction be awarded against the defendants, Sir F. G. Fawke, and Dame Mary Ann, his wife, to restrain them from proceeding in the action at law commenced by them against the plaintiffs, as in the plaintiffs' bill mentioned; and it is ordered that all the defendants be restrained by the injunction of this court, from commencing or prosecuting any other action or actions, suit or suits, or other proceedings, against the plaintiffs, or either of them, to recover the moneys insured by the policy in the bill mentioned: and it is ordered that the said sum, when so paid into the Bank, be laid out, &c."

[1] In regard to bills of interpleader, it is not necessary to entitle the party to come into equity, that the titles of the claimants should be both purely legal. It is sufficient to found the jurisdiction, that one title is legal and the other is equitable." 2 Story's Eq. § 808; and see *Richards v. Salsar*, 6 Johns. Ch. Rep. 445.

1840.—*Barnes v. Tweddle*.

first seal before Michaelmas term, is not to be reckoned in computing the time allowed for excepting to the answer.

In this case, therefore, the time for moving to dismiss had arrived, unless the plaintiff, after he had filed his supplemental answer, was entitled to be allowed two *periods of two months each, for proceeding with [*482] the cause, in addition to the interval between the last seal after Trinity term, and the first seal before Michaelmas term.

Mr. *Knight Bruce*, in support of the motion, said that a supplemental answer could not be excepted to; and, therefore, it must be deemed to be sufficient from the time when it was filed; and, consequently, the time for moving to dismiss had arrived. *Marriott v. Tarpley*, (a) *Attorney General v. Jones*. (b)

Mr. *Jacob*, for the plaintiff:—The two answers form but one document; and the whole defence is not complete, until both of them are filed. The effect of the supplemental answer, may be to render the original answer insufficient, although it was sufficient before. The facts stated in the supplemental answer, may render it material for the defendant to answer some questions, which it was not material for him to answer before. Suppose that the defendant, in the schedule to his original answer, had set forth a list of all the documents in his possession; and then, in his supplemental answer, were to state that none of those documents were in his possession; in that case, the original answer would become insufficient. It is not correct to say that a supplemental answer cannot be excepted to.

THE VICE-CHANCELLOR:—What I decided in *Marriott v. Tarpley*, and *The Attorney General v. Jones*, was that, in computing the time at the expiration of which an answer is to be deemed sufficient, the intervals mentioned in the 19th *order are not to be reckoned: but that, in [*483] computing the two months after the answer is to be deemed sufficient, those intervals are to be taken into account.

The defendant in this case, filed his answer; and, after the time for excepting to it had passed, he filed a supplemental answer, having first obtained the leave of the court so to do: and the question is whether the plaintiff can except to that supplemental answer.

My opinion is that he cannot except to it, without obtaining special leave for that purpose.

If, according to the case put by Mr. *Jacob*, the defendant had put in his answer and stated that he had, in his custody, the documents mentioned in the schedule, relating to the matters in the bill; and then had put in a supplemental answer stating that the documents mentioned in the schedule, did not relate to the matters in the bill, there would be no statement of what documents he had, in his custody or power, relating to the matters in the bill: and I apprehend that, in such a case, if the time for excepting to the

(a) Ante, vol. 8, p. 18.

(b) Ante, vol. 5, p. 246.

 1840.—Grane v. Mitchell.

first answer had expired, the plaintiff ought to apply to the court for special leave to except; for it would be incongruous for him to except to the first answer, without leave, after the first answer is to be deemed sufficient.

Where the first answer is, by lapse of time, to be deemed sufficient, and then the defendant puts in a supplemental answer, having first obtained leave so to do; it must, *prima facie*, be taken to be an answer to which the plaintiff cannot except; and, therefore the two months from which the [*484] defendant must move to "dismiss, must be two months from the time when the supplemental answer was filed.

The 19th order speaks of the time between the last seal after Trinity term and the first seal before Michaelmas term: but, as there now is no seal before Michaelmas term, it must be taken to mean the first day of Michaelmas term.

Mr. Cooper, *amicus curiæ*, said that the Lord Chancellor had so decided.

GRANE v. MITCHELL.

1840: 1st February.—Mortgagor and mortgagee; Foreclosure.

Order made, on motion in a foreclosure suit, to the same effect as a decree, although the order could not be made under the 7th Geo. 2, c. 20, owing to some of the parties interested in the equity of redemption being infants, and consequently incapable of admitting the plaintiff's title.

CHARLES MITCHELL and his children, some of whom were infants, being entitled to a leasehold dwelling house under the will of Charles Mitchell's father, assigned it, by way of mortgage, to the plaintiff. The plaintiff, who had been for some years in receipt of the rents of the house, filed a bill of foreclosure against Mitchell and his children, alleging that 161*l.* remained due to him on the security of the premises.

A motion was now made, on behalf of the defendants, for an order to the same effect as the decree which would have been made at the hearing of the cause, C. Mitchell offering to pay, to the plaintiff, the 161*l.* together with subsequent interest and costs of the suit, and, in the meantime, that all proceedings in the suit might be stayed.

[*485] *THE VICE-CHANCELLOR:—I cannot make an order under the act 7 Geo. 2, c. 20, as the infant defendants cannot admit the plaintiff's title; (a) but I think that the court has jurisdiction to make the order independently of the statute.

As Charles Mitchell offers, by his counsel, to pay, to the plaintiff, the balance of 161*l.* which the plaintiff states, in his bill, to remain due to him for principal and interest, together with the interest subsequently become due and the costs of the suit to be taxed by the Master, I shall direct that, upon

(a) See *Lushington v. Price*, ante, vol. 9, p. 651, where the words of the act are set forth; and *Freud v. Hull*, 1 Sim. & Stu. 231.

1840.—Folland v. Lamotte.

those payments being made, the plaintiff do re-assign the leasehold premises to Charles Mitchell, *as administrator to his father*, who, in that character, will take them as part of the assets of his father and subject to the bequest in favor of himself and his children.

The interests of the children will not be prejudiced by this arrangement : for, as they claim the premises under the bequest in the will, they must take them subject to the right of the administrator to deal with them as part of the assets of the testator. If Charles Mitchell pays more than is due to the mortgagee for principal and interest, he, being the administrator, and, as such, bound to settle the account with the mortgagee, will be responsible to the infants for the excess; and, if he pays less, the infants will be benefitted by it.

Mr. *Knight Bruce* in support of the motion.

Mr. *Jacob* for the plaintiff.

*FOLLAND v. LAMOTTE.

[*486]

1840; 6th February.—Practice; Dismissal.

On the death of a sole defendant, the plaintiff filed a bill of revivor and supplement against his heir, executor and devisee, but did not obtain an order to revive. The devisee joined with the heir and executor in moving that the plaintiff might revive within a week or that the suit might be dismissed. The motion was refused, because the devisee, who was unaffected by the revivor of the suit, had joined in it.

THE original bill was filed by a sole plaintiff against a sole defendant. The defendant afterwards died; whereupon the plaintiff filed a bill of revivor and supplement against the defendant's heir, executor and devisee, who were three distinct persons. Such of the defendants as were required to answer the bill, had done so, and their answers had been replied to, but the plaintiff had not obtained an order to revive the suit.

Mr. *Wood* now moved, *on behalf of the three defendants*, that the plaintiff might obtain an order to revive within a week, or that the suit might be dismissed. He cited Mitf. Treat. p. 69, 4th edition.

Mr. *Elderton*, for the plaintiff, said that the devisee had improperly joined in the motion, as he was quite unaffected by the bill, so far as it sought to revive the suit; and that the motion ought to be refused on account of the misjoinder.

THE VICE-CHANCELLOR :—The devisee may move to dismiss; but he has nothing to do with the reviving of the suit, the bill being supplemental merely so far as it relates to him. He has, therefore, improperly joined in the motion, with the heir and executor, as against whom alone the suit can be revived.

Motion refused, with costs.

 1840.—Twopeny v. Peyton.

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TWOPENY v. PEYTON.

1840: 14th February.—Will; Construction; Bankrupt.

Testatrix bequeathed a share of her residue in trust for her nephew for life. By a codicil, after reciting that her nephew had become a bankrupt and insane, she directed the trustees to apply, during his life, the whole or such part of the interest of the fund, at such times, in such proportions, and in such manner, for the maintenance and support of her nephew, and for no other purpose whatsoever, as they, in their discretion, should think most expedient. Held that the nephew's assignees were not entitled to any portion of the provision made for him.

CATHERINE PEYTON made her will, dated the 23d of October, 1822; and, after giving several specific and pecuniary legacies, she disposed of the residue of her personal estate in the following words: "Item, after all my just debts, funeral expenses and legacies are paid, I give, to my brother the Rev. Edward Peyton, for his natural life, the interest of all the property that shall then remain belonging to me in the public funds or government securities; and, at his death, my will is that all the aforesaid property shall be equally divided between my niece Mrs. Catherine Hicks, daughter of my late brother Rear Admiral Joseph Peyton, and my nephews William Grenfell Peyton and John Strutt Peyton, as also between my nieces Catherine Smith Peyton, and Philis Harriott Peyton: but the share of my property in the public funds that will devolve to my nephew William Grenfell Peyton, on the death of the Rev. Edward Peyton, I give only the interest to my said nephew for his life, and, at his death, the principal I will to be equally divided between his surviving children." And she appointed several persons, of whom the plaintiffs Edward Twopeny and William Twopeny were the survivors, executors of her will.

The testatrix made a codicil, dated the 26th of October, 1822, which was partly as follows: "Whereas my nephew William Grenfell Peyton has become a bankrupt, and is also, from the present state of his health, incapable of the management of his own affairs: and *whereas it is my wish and intention that the provision made for my said nephew by my said will, shall be applied, *solely, for or towards his maintenance and support* during his life: Now therefore I do hereby revoke the bequest for life to my said nephew in my said will made; and I do hereby bequeath to the executors in my said will named, as trustees thereof, the interest or annual produce of that portion of my personal estate bequeathed, by my said will, to my said nephew William Grenfell Peyton, upon trust, during the life of my said nephew, to apply *the whole or such part of such interest or annual produce, at such time or times, in such proportions and in such manner for the maintenance and support of my said nephew (and for no other purpose whatsoever)* as they, my said executors, or the survivor of them, or the executors or administrators of such survivor, shall, *in their or his discretion*, think most expedient: and, subject to such trust, I do hereby confirm the

1840.—Twopeny v. Peyton.

bequest, in my said will contained, of the capital of the said trust fund to and in favor of the children of my nephew William Grenfell Peyton."

William Grenfell Peyton became bankrupt in July, 1822, and was still uncertificated. Between July, and October, of the same year, he became lunatic.

In 1823 the testatrix died. In March, 1837, Edward Peyton, the tenant for life of the residue, died.

The bill was filed by Edward Twopeny and William Twopeny, against William Grenfell Peyton, and James Arbouin, the surviving assignee under his bankruptcy.

The question was whether the assignee had any right to the provision made for William Grenfell Peyton by the codicil.

*Mr. Pole for the plaintiffs.

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Mr. Jacob and Mr. Lefroy, for William Grenfell Peyton :—At the date of the codicil, William Grenfell Peyton was both a bankrupt and a lunatic. The testatrix notices both those circumstances in her codicil, and directs the trustees to apply the income of the trust fund for the maintenance and support of her nephew, and for no other purpose whatsoever: the trustees, therefore, can not apply the income for any purpose which does not come under the words, "maintenance and support." Besides the trustees are not bound to apply the whole or even any definite portion of the income for those purposes: the amount to be so applied, is left to their discretion.

The cases of *Green v. Spicer*,^(a) *Snowdon v. Dales*,^(b) *Piercy v. Roberts*,^(c) will be cited for the assignee. But those cases are clearly distinguishable from the present: for, in each of them, the gift took effect before the donee became bankrupt; and the income of the fund was either to be paid to the donee, or to be applied for his benefit generally. The purposes of the gift were not restricted, as they are in this case, to maintenance and support.

Mr. Dickenson, for the assignee, relied on *Snowdon v. Dales*, *Piercy v. Roberts*, and *Green v. Spicer*, and said that the last case was almost the same as the present.

THE VICE-CHANCELLOR :—This case is distinguishable from those that have been cited: for, in the first place, there is a gift, in [490] the will, to the nephew for his life: and then the testatrix, in her codicil, after taking notice that her nephew had become a bankrupt and a lunatic, revokes the bequest for life to her nephew, and directs her executors, during his life, to apply for his maintenance and support, and for no other purpose, the whole or such part of the interest of that portion of the residue, which, by her will, she had bequeathed in trust for him, at such time or times, in such proportions and in such manner as they should, in their dis-

(a) 1 Russ. & Myl. 395.

(b) Ante, vol. 6, p. 521.

(c) 1 Myl. & Keen, 4.

 1840.—*Blewitt v. Roberts.*

cretion, think most expedient. In my opinion, therefore, it would be impossible for the executors to apply the income of the trust fund for the benefit of the nephew generally, or for any purpose beneficial to him, which is not comprehended under the terms, "maintenance and support." Besides the executors are not directed to apply the whole of the income for the maintenance and support of the nephew, but only such a proportion of it as they, in their discretion, should think expedient.

I am, therefore, of opinion that, in this case, a trust is created for the mere special purpose of supporting, and maintaining the nephew; and, under such a trust, the assignee can not take any interest.[1]

[*491] REGINALD JAMES BLEWITT *v.* ROBERTS and others.

1840: 17th February.—Will; Construction; Annuity; Legacy.

Testator bequeathed to his wife, 600*l.* per annum for her life, and, after her death, the said annuity to be equally divided between A., B., C., D., E., and F., or the survivors or survivor; and he bequeathed, to the same six persons, 100*l.* per annum each, during their lives, with power to leave their annuities, at their deaths, to any persons they might marry, or any children they might leave; but in case of either of them dying without exercising such power, then to the survivors or survivor. Held, by the Vice-Chancellor, that the above bequests in favor of A., B., C., D., E., and F., passed the capital of the funds producing the annuities; but the Lord Chancellor reversed His Honor's decision.

EDWARD BLEWITT made his will, dated the 12th of October, 1830, which was partly as follows: "I give to my wife, Rachael Blewitt, all my plate, linen, and furniture; and I appoint my said wife and my son, Edmund Blewitt, and Wightwick Roberts executors and trustees of this my will: and I give to my said wife 600*l.* per annum, for her life, but not to be liable to the control of any future husband, but to be paid quarterly, from time to time to her, on her receipt only, and not to be subject to any debts or assignment; and, after her death, *the said annuity to be equally divided between Ann Rogers Blewitt, Thomas Rogers Blewitt, Henry Blewitt, Georgiana Blewitt, Byron Blewitt, and Oscar Blewitt, or the survivors or survivor.* I also give to each of them, the said Ann Rogers Blewitt, Thomas Rogers Blewitt, Henry Blewitt, Georgiana Blewitt, Byron Blewitt, and Oscar Blewitt, 100*l.* per annum during their lives, to be paid quarterly, with power to leave their said respective annuities, at their deaths, to any persons they may marry, or any child or children they may leave, but in case of either of them dying without exercising such power, then to the survivors or survivor. All the residue of my property I give to my son, Edmund Blewitt, if he should survive me; but, in case of his death, to my son, Reginald James Blewitt, and, in case of his death also before me, to my daughter, Frances Mary Ann Blewitt."

[1] Vide 1 R. & M. 397, n. 1; 694, n. 1. *Hallett v. Thompson*, 5 Paige, 583. *Rippon v. Norton*, 2 Beav. 63.

1840.—Blewitt v. Roberts.

*The testator died on the 8th of March, 1832. Edmund Blewitt [*492] died in the lifetime of the testator. Henry Blewitt died in September, 1837. Rachael Blewitt died in June, 1838, and Oscar Blewitt died in November, 1838. Both Henry and Oscar Blewitt died under age, intestate and unmarried.

The question, on the hearing of the cause for further directions, was whether the bequests of the yearly sums of 600*l.* and 100*l.*, passed life annuities, or the capital of sums in the three per cents. sufficient to produce those yearly sums.

Mr. *Wigram* and Mr. *Macdonnell* appeared for the plaintiff, the residuary legatee.

Mr. *Jacob*, Mr. *Girdlestone*, Mr. *Sharpe*, and Mr. *Loftus Wigram*, for the surviving legatees, cited *Tweedale v. Tweedale*(a) and other cases.

Mr. *Torriano* for the executors, and

Mr. *Wray*, for the Attorney General, who claimed Oscar Blewitt's interest on behalf of the Crown, on the ground that he was illegitimate.

The Vice-Chancellor declared that the capital of a sum of three per cents. sufficient to answer the annual sum of 600*l.*, during the life of Rachael Blewitt, became, upon her death, absolutely vested in and divisible, in equal shares, between and amongst the defendants Ann Rogers Blewitt (who, pending the suit, married the *defendant Robert Stauffer,) Thomas [*493] Rogers Blewitt, Georgiana Blewitt, and Byron Blewitt, and Oscar Blewitt, as being the survivors of themselves and the late Henry Blewitt living at the death of Rachel Blewitt; and that, upon the death of Henry Blewitt, the capital to answer his annuity of 100*l.* became absolutely vested in Ann Rogers Stauffer, Thomas Rogers Blewitt, Georgiana Blewitt, Byron Blewitt and Oscar Blewitt, as joint tenants; and that, on the death of Oscar Blewitt, his share of the last mentioned capital, became absolutely vested in Ann Rogers Stauffer, Thomas Rogers Blewitt, Georgiana Blewitt, and Byron Blewitt, as joint tenants; and that, upon the death of Oscar Blewitt, the capital to answer his annuity of 100*l.*, became absolutely vested in the same parties, as joint tenants.

The plaintiff appealed from this decree to the Lord Chancellor.

The appeal was heard on the 4th of August, 1841; when his Lordship reversed the Vice-Chancellor's decree, and declared, in effect, that, on the death of Rachel Blewitt, the annuity of 600*l.* became vested, in equal shares, in the defendants, Ann Rogers Stauffer, Thomas Rogers Blewitt, Georgiana Blewitt, and Byron Blewitt, and in Oscar Blewitt, as tenants in common, *for their respective lives*; and that, upon the death of Henry Blewitt, his annuity of 100*l.* became vested, in equal shares, in the four last named defendants and Oscar Blewitt, as tenants in common, *for their respective lives*: and that, upon the death of Oscar Blewitt, his annuity of 100*l.* became vested, in equal shares, in the same defendants as tenants in common, *for their res-*

(a) Ante, p. 453. The Reporter has given a note of the above case, [i. e. *Blewitt v. Roberts*,] in order that the profession may judge whether it impugns the authority of *Tweedale v. Tweedale*.

1840.—Blewitt v. Roberts.

[*494] *pective lives*: and that, upon the death of each of the four "last named defendants, his or her annuity of 100*l.* would, subject to his or her power to appoint the same to any person he or she might marry, *for the life of such person*, or to any child or children he or she might leave, *for his, her, or their life or lives* (the annuity so left to vest in and be divisible among the children, equally, as tenants in common,) would vest in the survivors of the four last named parties, *for their respective lives*.^[1]

[1] The Reporters, Messrs Craig & Phillips, vouch for the accuracy of this statement of the Lord Chancellor's declaration. For a report of the proceedings on the hearing of the appeal, see Craig & Phillips, 274. A statement of the case, and some extracts from the Lord Chancellor's judgment will be found in the editor's note, 2 Keen, 621. See also, *id.* 57, n. 1. 1 Russ. & Myl. 208, n. 3. *Phillips v. Eastwood*, Lloyd & G. 296. *Westcott v. Cady*, 5 Johns. Ch. Rep. 346.

END OF PART III.

CASES IN CHANCERY

BEFORE

THE VICE-CHANCELLOR.

IBBETSON v. IBBETSON.

1848: 5th and 7th February, and 16th April.—Will; Perpetuity; Remoteness; Heir-looms.

Testator devised his reversion in fee, expectant on his decease without issue male, in his mansion house and estate at D. to his brother, for life, with remainder to his first and other sons in tail male, with divers remainders over: and he bequeathed his plate, pictures, &c., in and about his mansion house at D., to trustees, in trust to permit the same to be used and enjoyed by the person and persons who, for the time being, should be entitled to the possession of his mansion house under the settlement on his marriage, or the limitations contained in his will, until a tenant in tail of the age of twenty-one years, should be in possession of his mansion house, and then the plate, pictures, &c., were to go and belong to such tenant in tail; and he gave the residue of his personal estate to the person who, at his decease, would be beneficially entitled, in possession, to his mansion house. The testator's brother had a son born at the date of the will, and both he and his son survived the testator. Held that the trust declared of the plate, pictures, &c., was void for remoteness, so far as it was intended to take effect after the death of the brother.

SIR HENRY CARR IBBETSON, being seised of the reversion in fee simple expectant on his decease without issue male, of and in estates situate at Denton, Askwith, Otley and Weston in Yorkshire, and being seised in fee simple in possession of other real estates, made his will dated the 11th of October, 1814, and thereby charged all his estates, real as well as personal, with the payment of his funeral and testamentary expenses, debts and legacies, and gave to his wife, Alicia Mary, for her life, a yearly rent charge of 400*l*.

"in addition to the jointure of 800*l*. a year provided for her on her marriage with the testator, to be issuing out of the testator's reversion in fee simple expectant on the failure of issue male of his body of and in his estates at Denton, Askwith, Otley and Weston, and, subject thereto, he gave his reversion of and in the same estates, and all other his real estates, to Wm. Charlton and Matthew Wilson and their heirs, to the use of Viscount Lascelles and Sir Wm. Fowle Middleton, their executors, &c., for the term of 1000 years, to be computed from the day of his death, in trust for securing the yearly rent charge of 400*l*., and upon further trust (in case there should be no son or sons of his body living at his decease or born afterwards, or, being such a son or sons, all of them should die under twenty-one without leaving

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issue male.) to raise portions and provide maintenance for any daughter or daughters of the testator; and, after the determination of the term, and, in the meantime, subject thereto and to the trust thereof, to the use of the testator's brother Charles Ibbetson (who afterwards became Sir C. Ibbetson, Bart.) for his life, with remainder to trustees and their heirs during the life of Sir C. Ibbetson, in trust to preserve the contingent remainders thereafter limited, with remainder to the use of the first son of Sir C. Ibbetson in tail male, with divers remainders over: and the testator bequeathed to Wm. Charlton and Matthew Wilson, their executors, &c., all his plate, pictures, books and household furniture in and about his mansion house at Denton Park, upon trust *to permit the same to be used and enjoyed by the person and persons who, for the time being, should be entitled to the possession of his mansion house under or by virtue of the settlement made upon his marriage or of the limitations contained in his will, until a tenant* [*497] *in tail of the age of twenty-one years should be in "possession of his mansion house, and then the plate, pictures, books and household furniture were to go and belong to such tenant in tail: and the testator gave all the residue of his personal estate, after payment of his funeral and testamentary expenses, debts and legacies, to the person who, at his decease, would be beneficially entitled, in possession, to his mansion house.*

The testator died in June, 1825, without leaving any issue, but leaving Alicia Mary, his widow, and Sir Charles Ibbetson, his brother, him surviving.

Upon the testator's death Sir C. Ibbetson entered into the possession of his real estates, and possessed himself of the plate, pictures, books and household furniture in and about the mansion house at Denton Park.

In the year 1837, Sir Charles Ibbetson and Charles Henry Ibbetson, his eldest son, (who attained twenty-one in July, 1835,) suffered a recovery of the testator's estates, and settled them, by deeds dated in March of that year, on Sir Charles, for life, with remainders to Charles Henry Ibbetson and his first and other sons, in strict settlement, with remainder to the plaintiff, who was Sir Charles' second son, and his issue male in like manner.

Sir Charles Ibbetson died on the 9th of April, 1839, leaving his two sons and a daughter him surviving.

The bill was filed by the second son against Sir Charles Henry Ibbetson the eldest son, and against the testator's personal representatives and other persons, charging *that the trusts declared, by the will, of the plate,* [*498] *"pictures, books and household furniture in and about the mansion house at Denton Park was void for remoteness, and therefore, those articles constituted part of the testator's general residuary personal estate and ought to be applied in payment of his debts remaining unpaid.*

Mr. Knight Bruce and Mr. R. Atkinson, for the plaintiff:—Sir Henry Carr Ibbetson devised his real estates to his brother Sir Charles and his issue male, in strict settlement; and he bequeathed his plate, pictures, books and

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household furniture, as heir-looms, in language which forms the subject of the present discussion. Sir Charles was the residuary legatee of the testator's personal estate, as well as the tenant for life of his real estates; and, therefore, in every view of the case, he was entitled to take possession of the articles which were bequeathed or attempted to be bequeathed as heir-looms. If the bequest of the heir-looms was, as we mean to contend, void for remoteness; then they would be part of the testator's general personal estate, and, as such, applicable to the payment of his debts, some of which are secured by mortgage of part of his real estates. On the other hand, if those articles are to be considered as specifically bequeathed, they will be liable to contribute to the payment of the debts, rateably with the real estates specifically devised.

When specific chattels are bequeathed as heir-looms, it is usual to add the words, "so long as the rules of law and equity will admit," after the direction to the trustees to permit the chattels to be held and enjoyed by the person, for the time being, in possession of the mansion house. But the clause on which the present question arises, wants those words: and the tenant in tail there spoken of, is not, of necessity, to be a child either [*499] of the testator or of the tenant for life under the will; but may be any tenant in tail, however remote from the testator or from the tenant for life under the will. Therefore the trust declared by that clause, transgresses the bounds prescribed by law—[The Vice-Chancellor: What were the limitations in the settlement to which the will alludes?—They were limitations to the testator for life, with remainders to his first and other sons in tail male, with remainder to himself in fee; consequently, as the testator never had any issue, the settlement became abortive, and he was, in effect, seised in fee in possession.]

The cases of *Ware v. Polhill*,^(a) and *Lord Southampton v. The Marquis of Hertford*,^(b) seem to be decisive of the present question. In the latter case, the trust declared of the term, subject to which the estates were limited in strict settlement, was to lay out the rents in stock, and to accumulate the dividends during the minorities of the persons who, for the time being, should be tenants for life and in tail under the limitations thereinbefore contained. That trust, therefore, was liable to precisely the same objection as the trust in the present case is: it was not confined within the limits prescribed by the law against perpetuity; and, being void in its creation, the court could not give effect to it to the extent allowed by law; but held it to be void *in toto*. In that case, Sir W. Grant, Master of the Rolls, thus speaks of *Ware v. Polhill*: "In the case of *Ware v. Polhill*, where the rents and profits of leasehold estate were to go to the persons entitled to the rents of the freehold and copyhold estates; but with a *power [*500] to the trustees, at any time, with consent of the persons so entitled,

(a) 11 Ves. 257.

(b) 2 V. & B. 54.

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or, if minors, at their own discretion, to sell and invest the produce in real estate to the same uses, the Lord Chancellor held that, notwithstanding the power, the leasehold estate vested, absolutely, in the first tenant in tail from the time of his birth. The Lord Chancellor held the power of sale to be void, on the ground that it might travel through minorities for two centuries, and adds: "If it is bad to the extent in which it is given, you can not model it to make it good."^(a)

The principle upon which Sir W. Grant decided the case of *Leake v. Robinson*, also applies to the present case. There a trust was created which would have included unborn children of the testator's grandson who should attain twenty-five; and Sir W. Grant held that the court could not modify the trust, so as to confine it to the objects who were within the limits prescribed by law, for that would be making and not construing a will; and consequently the trust was void, not only so far as it exceeded those limits, but altogether. The recent case of *Mackworth v. Hinzman*,^(b) may be, perhaps, properly mentioned here. There Admiral Affleck bequeathed personalty in trust to pay the interest to his nephew, Sir Gilbert, for life; and, after Sir Gilbert's death, to his eldest son for the time being, for life; and, in case Sir Gilbert should leave no son, then to the person on whom the baronetcy should devolve: it being the testator's will that the interest should never be alienated from the title, but that each succeeding baronet should enjoy it for his life. Sir Gilbert had two younger brothers, James [501] and Robert, both of whom, *as well as Sir Gilbert himself, were living at the testator's death. Sir Gilbert afterwards died without issue; upon which James succeeded to the baronetcy. James also died without issue, whereupon the baronetcy devolved on Robert. The Master of the Rolls said that the testator's general intention was that the property should go on, to all time, with the baronetcy; that that intention must have been defeated by giving a life estate to each baronet successively; and that, for the purpose of accomplishing that intention, it must be held that Sir James took a *quasi* estate tail in the property; and that, being personalty, it was absolutely at his disposal. The case of *Tollemache v. Coventry*^(c) is very much the same as *Mackworth v. Hinzman*. There the House of Lords ultimately decided that the first member of the class to whom the property was given, took the absolute interest. Now the court will observe that the words used in this case, are not: "to permit the same to be used and enjoyed by the person or persons who, for the time being, shall be entitled to the possession of my mansion house under or by virtue of my will," but: "under or by virtue of the settlement made upon my marriage, or of the limitations contained in this my will:" and as the testator's wife was alive when the will was made, it was uncertain whether the first taker would be the issue male

^(a) 2 V. & B. 64.

^(b) 2 Keen, 658.

^(c) 8 Bligh, New Series, 547; reported, on the original hearing, under the name of *Lord Deshayes v. The Duke of St. Albans*, in 5 Madd. 232.

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of the testator and his wife, or his brother Sir Charles. This case, therefore, is not precisely similar to either of the two last mentioned authorities: for no particular individual is expressly pointed out as the first taker. Sir Charles became the first taker by the happening of a contingency.

*Supposing, however, that the trust in this case, is not altogether void [*502] for remoteness, the principle upon which those two cases were decided, would give the plate and other articles to Sir Charles, as being the first individual of a class. But, if the trust is altogether void for remoteness, then Sir Charles would take those articles as residuary legatee. In either case, therefore, he would be entitled to them absolutely: and the only difference would be that, in the one case, he would take them as specific legatee, and, in the other, as general legatee. It is necessary, however, to decide in which of those two characters he took them, in order to ascertain the order in which they are to be applied towards payment of the testator's debts.

The argument on the other side we understand to be this, namely, that the clause now under consideration, ought to be read as if it concluded with the words: "or of the limitations contained in this my will," because, either the words that follow: "until a tenant in tail of the age of twenty-one years, shall be in possession of my said mansion house, and then the said plate, &c. shall go and belong to such tenant in tail," are inoperative, and, therefore, are not to have the effect of cutting down the generality of the preceding words; or the gift is a gift of personalty in perpetuity. But that argument is at variance with every principle upon which all former cases have been decided. It amounts, in effect, to a modification of the clause. The court can not say that a clause which the testator intended to operate in a given manner shall have a different operation, because the law prevents its operating according to the testator's intention. The principle upon which Sir W. Grant decided *Leake v. Robinson*, was that the court could not say what the testator would have done, if he had been told that the *whole of his intention could not be carried into effect. We submit, [*503] therefore, that Sir Charles Ibbetson took the plate, pictures, &c. either as residuary legatee, or as specific legatee, according to the principle of *Mackworth v. Hinzman*, and *Tollemache v. Coventry*.

The plaintiff's counsel referred also to *Carr v. Lord Erroll*,^(a) *Lord Deerhurst v. Duke of St Albans*,^(b) *Marshall v. Holloway*,^(c) and Lord Eldon's observations on *Trafford v. Trafford*.^(d)

Mr. Jacob, Mr. Koe, and Mr. Hodgson, for the defendant Sir Charles Henry Ibbetson:—The plaintiff's counsel have put the case in two ways; one of which must have recently occurred to them; because it is not the way in which the bill puts it. They say, first, that the trusts declared of the chattels is wholly void for remoteness, and, therefore, the trustees held the chattels in trust for the late Sir Charles, as residuary legatee. Secondly, they say, that, if that trust is not absolutely void, then Sir Charles took the chattels abso-

(a) 14 Ves. 478.

(b) 5 Madd. 232.

(c) 2 Swans. 432.

(d) See 12 Ves. 231 and 232.

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lutely, as being the first person who became entitled to the mansion house. But we apprehend that neither of those propositions can be sustained. With respect to the first, we say that though a gift to the first person who shall be tenant in tail in possession and attain twenty-one, may be void for remoteness; yet that is not the gift in this case. The gift is, necessarily, divisible into two parts. There is, it is true, a gift to the person who shall be tenant in tail in possession at the age of twenty-one; but that is not all; [*504] because there is a complete disposition of the property during the *intervening period, up to the time when there shall be that tenant in tail. The trustees are to permit the chattels to be used and enjoyed by the person and persons who, for the time being, shall be entitled, in possession, to the mansion house, by virtue of the settlement or of the limitations contained in the will, until a tenant in tail of the age of twenty-one years shall be in possession of the mansion house; and then the chattels are to belong to such tenant in tail. So that there is, first of all, a distinct gift of the chattels for the use and enjoyment of the owners of the mansion house; and the mention of a tenant in tail in possession, is not a part of that gift; but is only the measure of the period during which the testator intended that first gift to endure. Suppose that the existence of the tenant in tail and his attaining twenty-one, are events too remote for the law to contemplate, then a gift of property until those remote events happen, is equivalent to a gift forever. Now there is no doubt that such a limitation is one which the court executes in a particular way. It is not a limitation that is followed in the exact terms in which it is expressed: for it purports that the property shall be held by all the successive occupants of the mansion house; but the court cannot give full effect to that intention; and, therefore, it executes it *cy pres*, and gives the property to the first tenant for life, and then to the first tenant in tail absolutely. The meaning of the proposition that a limitation is bad when it is too remote, is that the limitation is bad when it is made to *commence* at a period too remote; not that it is bad because it is to *end* at a period too remote. The remoteness of the event, on the happening of which the trust for the benefit of the persons in possession of the mansion house, is to end, does not vitiate that trust. If it did so, then a limitation [*505] *would be bad because it is made to end at a period which is too remote.

Several cases relating to trusts being objectionable on the ground of perpetuity, have been referred to, and particularly the case of *Leake v. Robinson*. That case decided that, where there is a gift to a class of persons to take *concurrently*, if it is bad as to some, on the ground of perpetuity, it is bad as to all; and for this obvious reason, namely, that it is impossible to determine what shares those as to whom the gift might have been good, are to take. But that objection does not arise, where, as in the present case, there is a gift to a class of persons who are not to take *concurrently*, but *successively*. Of that description are all the gifts of heir-looms: for all such gifts are gifts to

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the future owners of the settled estates as a class; and it is quite clear that, although those gifts are void as to the remoter links of the chain, yet they are good as to the nearer ones. Another class of cases, that is to say, *Lord Southampton v. The Marquis of Hertford* and *Marshall v. Holloway*, has been referred to; but those cases are totally different from this, for they depend upon a principle which is wholly inapplicable to the present case, namely, that there was a suspension of the enjoyment of the property until a period too remote. In those cases the rents of the property were to be accumulated until the happening of an event which was too remote, and, consequently, the enjoyment of the property was to be suspended until the happening of that event. Those cases, therefore, were exactly the converse of this: for here the property is to be enjoyed, by the persons in possession of the mansion house, in the meantime and until there shall be a tenant in tail in possession of the age of twenty-one. Besides, in the two last cases, there could be no apportionment *or division of the accumulations; [*506] for the whole was given to one individual and that individual could not take. The case of *Ware v. Polhill* also has been cited for the plaintiff: but we apprehend that that case and the cases which have followed it, tend to establish the distinction which we contend for. There, freehold estates were settled in strict settlement, and leaseholds were to go along with them; and a power to sell the leaseholds, was vested in trustees. The leaseholds had become vested, absolutely, in a person who was tenant in tail of the freeholds; and, according to Sir E. Sugden's view of that case^(a) the real point was that the power being one which enabled one man to sell the estate of another, was repugnant to the nature of the estate which had become vested in that other person. Indeed, it does seem extremely absurd that there should be property absolutely vested in one person, and that there should be a power of selling it, in another. After that came the case of *Boyer v. Hanning*,^(b) in which there was a power of sale over-riding estates in fee, to be exercised, by the trustees, with the consent of the tenant for life during his life, and, after his death, at their own discretion; and the power was held to be valid, so far as it was to be exercised during the life of the tenant for life. *Biddle v. Perkins*,^(c) and *Waring v. Coventry*,^(d) also seem to lead to the same result. We refer to those cases as showing that the rule is not that either a power or a limitation which tends towards perpetuity, is altogether void, but that it is good *pro tanto*. Another illustration of the same proposition is *Routledge v. Dorril*,^(e) where there was a power, in a settlement, to appoint to the *children, [*507] grandchildren or any other issue of the marriage, not limited to issue born within the lives of the parents or within any other given time: and the question was whether the power was not void, as it included objects too remote. The power, however, was held to be good; as the donee might exercise it in favor of such of the issue as were within the line of perpetuity.

(a) See Treat. on Pow. 4th edit. 147. (b) 2 Crompt. & Jer. 334. (c) Ante, vol. 4, p. 135.
(d) 1 Myl. & Keen, 249. See also *Wallis v. Freestone*, ante, 244. (e) 2 Ves. jun. 357.

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There we have an instance of a power being good or bad, according to the objects in whose favor it was exercised. In *Phipps v. Kelynge*,^(a) a testatrix gave her leasehold estates to trustees, in trust, from time to time during the term of years therein, to lay out the yearly profits in the purchase of lands of inheritance, and to settle the same to the use of the plaintiff for his life, with remainder to his first and other sons in tail male, with several remainders over. The plaintiff had a son who attained twenty-one, and the question was to what extent, in point of time, the trust was good. Now it will be observed that there was this peculiarity in that case; the trustees were to receive the rents and invest them, every year, in the purchase of land, and they were to settle the purchased land on the plaintiff for life, with remainder to his first and other sons in tail; so that the enjoyment of the rents was not, in effect, suspended, as it was in *Lord Southampton v. The Marquis of Hartford* and *Marshall v. Holloway*, until the termination of the trust: and Lord Camden, before whom the cause was heard, held that the trust was not wholly void, but was good for the life of the plaintiff and until his first son should attain twenty-one. We cite these cases in order to show that, where

[*508] it has been held that a trust was wholly void on the ground *of perpetuity, the trust was wholly for the benefit of an individual who was too remote for the law to contemplate. Here that is not so; for, even if the future tenant in tail in possession of the age of twenty-one, is a person too remote to be contemplated by law, the persons for the time being in possession of the mansion house, are not in that predicament. In *Lord Deerhurst v. The Duke of St. Albans*, Lord Vere bequeathed chattels to trustees in trust for his wife for life, and, after her death, in trust for his son for life, and, after the death of the survivor of them, in trust for such person as should from time to time, be Lord Vere; it being his will that the same should, after the death of his wife, go and be held and enjoyed with the title, so far as the rules of law and equity would permit. The testator left his son and two sons of that son living at his death. The son afterwards died, and then his eldest son died leaving a grandson. Sir John Leach held that, under the trust, the testator's son, who was the second Lord Vere, was entitled to the chattels for his life, and that, upon the death of the second lord, his eldest son, who became the third Lord Vere, was entitled to them for his life, and that, on his death, they vested absolutely, in his son, who was the testator's grandson and became the fourth Lord Vere. The House of Lords, however, differed, to some extent, from Sir John Leach, and held that the chattels vested, absolutely, in the third lord. Therefore, the House of Lords, as well as Sir John Leach, held that the trust was not wholly void on the ground of remoteness, as had been contended in argument; but that it was good so as to vest the chattels in the third lord: but the House of Lords decided that it was not

(a) 2 V. & B. 57, note; and Fearn v. Cont. Rem. 616. See Sir W. Grant's observations on this case, 2 V. & B. 62 and 63.

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good so as to divest the chattels from him, on his death, and vest them in the fourth lord. It will be observed that the objects of the trust, in that case, were to be the "members of a class ; and Sir John Leach says: [*509] "I think no person can take under a description by class, if, prior to him in that class, there might have been persons with respect to whom that limitation would have been too remote : he may take by class, if, prior to him, there could not, by any possibility, have been any person with respect to whom the limitations would have been too remote".(a) In that case, the title of Lord Vere descended, from father to son and so on, in a direct line : but, if the title had gone to collaterals, then the case put by Sir John Leach might have arisen. For suppose that the second lord had died without issue, then the third lord would have been a collateral relation of the second : and there might have been some person or persons, between the second and third lords, on whom the title might have devolved, but, with respect to whom, the objection on the ground of remoteness, would have applied. We apprehend that the opinion expressed by Sir John Leach, in the passage just adverted to, will be found to be consistent with all the authorities on the point, that is, that if there is a trust in favor of a class of persons who are to take successively, the individuals of that class will take, unless they are in a position too remote, or unless, in the language of Sir John Leach, there might have been, in these series of limitations, other persons who might have come in before them, and, with respect to whom, the limitation would have been too remote. The case of *Mackworth v. Hinzman* is a good deal like the last case. There Admiral Affleck bequeathed personalty in trust for Sir Gilbert Affleck, for life, and, after his death, in trust for his eldest son for the time being ; but, if Sir Gilbert should die without leaving a son, then in trust for the person on whom the "baronetcy should devolve, it being the testator's [*510] intention that the income of the property should never be alienated from the title, but that each succeeding baronet should enjoy it for his life. Sir Gilbert survived the testator and died without issue male, leaving two brothers, James and Robert, on whom the baronetcy successively devolved. Now all James' male descendants (if he had had any) would have succeeded to the baronetcy before Robert: therefore Robert stood after persons with respect to whom the limitation would have been too remote, and, consequently, according to the rule laid down by Sir John Leach, it was void as to him. We now call the attention of the court to the case of *Trafford v. Trafford*,(b) which appears to us to govern the present case. There the testator bequeathed his real estates in trust for S. Boehm and his issue male, in strict settlement with remainder in trust for Clement Boehm, the plaintiff's father, and his issue male, with remainder in trust for the defendant Charles Boehm and his issue male, in like manner : and he bequeathed his plate, books, &c., to such male person, when he should attain twenty-one, who should then be entitled to the trust, in possession, of the real estates thereinbefore devised. Now, if

(a) 5 Mad. 271.

(b) 3 Atk. 347.

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the will had stopped there, it would have been difficult, perhaps, to support that bequest. But the will went on to direct that, until such male person should attain twenty-one, the plate, books, &c., should be kept at Dunton Hall, and be used, in the meantime, by such male person residing there (by which the testator must have meant such male person, being entitled to the property, as should be, from time to time, residing there): it being the testator's intention that the plate, books, &c., in the nature of heir-looms, [*511] should go with his estates and be "used therewith, as long as the law would permit. That gift, therefore, resembles, as nearly as can be, the gift in the present case. Then the testator bequeathed the residue of his personal estate to such person, when of the age of twenty-one, as, by his will, should be entitled to the trust, in possession, of his lands. Now it is very important to remark that the gift of the residue, did not contain that direction for the intermediate enjoyment of the property, which was contained in the gift of the plate, books, &c., and which is found in the will in the present case. The testator then, by a codicil, gave, to Ann Beveridge, the use of his plate, for life; and declared that all his pictures at Dunton Hall, should, at all times, go and be enjoyed, with his mansion house and estate at Dunton, by the persons who, by his will, should successively hold his estates. Lord Hardwicke declared that the pictures, books, &c., ought to be considered as heir-looms, and to go along with the real estates as far as, by the rules of law and equity, they might, and that the plaintiff would be entitled to the property thereof in case he should attain twenty-one, and that, in the meantime, he was entitled to the use and enjoyment thereof. In the judgment there is this remarkable passage: "It has been said, he has made the gift of his residue equally an heir-loom, and that the plaintiff might as well contend this should go to him. By no means; for the devise of the residue *wants the very clause which constitutes and makes the other go as heir-looms*:" that is, it wanted the interim gift: the will did not declare that, in the meantime, the residue should be enjoyed by the persons for the time being entitled to the rents of the real estates. The observations on that case, made by Lord Eldon in *Lady Lincoln v. The Duke of Newcastle*, which have been referred to by [*512] the plaintiff's counsel, amount only to this; namely, that "the limitation in the will in *Trafford v. Trafford*, might have involved a question of perpetuity; but the facts of the case did not involve it; for Clement Boehm, the plaintiff's father, was alive when the will was made; so that the limitation was good as to the son of Clement Boehm, but would have been bad as to his grandson.

Some stress was laid, in the argument on the other side, on the omission, in this will, of the words: "so far as the rules of law and equity will permit." Those words may be important in determining the character of the bequest, that is, whether it is, executory or not: but they are of no importance in determining on the validity or effect of it: for, in *The*

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Duke of Bridgewater v. Egerton, (a) and *Foley v. Burnell*, (b) and in other cases on heir-looms, those words were omitted.

In this case Sir Charles Henry Ibbetson was born at the time when the will was made, and, consequently, long before the testator's death: he, therefore, is clearly within the line of perpetuity: and, as he answers the description of tenant in tail in possession of the mansion house of the age of twenty-one, the chattels in question, to the use of which the late Sir Charles was entitled during his life, are now absolutely vested in him. But suppose that it were possible to say that the time has not yet arrived when there is a tenant in tail in possession of the age of twenty-one, still the chattels are to be used and enjoyed by the person for the time being in possession of the mansion house. That person is the present Sir Charles Henry: and, he having once become entitled to the chattels, there is no valid gift over by which they can be taken away from him. Consequently, in any view of the case, they are now his property.

*In addition to the cases above mentioned *Gower v. Grosver-* [*513]
nor (c) and *Ellicombe v. Gompertz* (d) were cited for the defendant.

Mr. Turner appeared for the executors.

THE VICE-CHANCELLOR:—On the 11th of October, 1814, Sir Henry Carr Ibbetson made his will. At that time, by virtue of a settlement made on his marriage with Lady Alicia Mary Ibbetson, his mansion house at Denton Park stood settled to the use of himself for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of the marriage, severally and successively, in tail male, with remainder to the use of Sir Henry Carr Ibbetson in fee.

By his will, Sir Henry Carr Ibbetson devised the reversion in fee of his mansion house, to the use of his brother, the late Sir Charles Ibbetson, for his life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of Sir Charles Ibbetson, severally and successively, in tail male, with remainder to the use of his brother, John Thomas Ibbetson, in like manner in strict settlement, with remainder to the use of his own daughters, severally and successively, in tail male, with several remainders over for life and in tail, with remainder to his own right heirs. He then gave in the words following: "I give and bequeath unto William Charlton and Matthew Wilson, their executors, administrators and assigns, all my plate, pictures, books and household furniture in and about my mansion house at Denton Park, upon trust to permit the same to be used and enjoyed by the *person and persons who, for [*514] the time being, shall be entitled in possession to my said mansion house under or by virtue of the settlement made upon my marriage or of the limitations contained in this my will, until a tenant in tail of the age of twenty-one years shall be in the possession of my said mansion house, and

(a) 2 Vez. 121: and 1 Bro. C. C. 260, note.

(b) 1 Bro. C. C. 274.

(c) 5 Madd. 337.

(d) 3 Myl. & Craig, 127.

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then the said plate, pictures, books and household furniture are to go and belong to such tenant in tail. I give and bequeath all the rest and residue of my personal estate and effects, after payment of my just debts, funeral and testamentary expenses and legacies, and subject thereto, unto the person who at my decease, will be beneficially entitled, in possession, to my said mansion house at Denton Park : and I constitute and appoint my said brother, Charles Ibbetson, executor of this my will."

He afterwards made a codicil not affecting the mansion house, the specific gift or the residuary bequest, and died in 1825 without issue. In September, 1825, the will was proved by Sir Charles Ibbetson, who, on the testator's decease, became beneficially entitled, in possession, to the mansion house, and consequently was his residuary legatee. He has died lately. Before the testator's death, the present Sir Henry Charles Ibbetson, the eldest son of Sir Charles Ibbetson, was born, and has now attained the age of twenty-one years.

The question is, who became entitled to the subjects of the specific gift?

The words in this case are singular and unlike the words in any other case. The gift is in the form of a simple declaration of trust, not requiring any settlement to be executed. It has no such qualifying words as are found in the case of *Gower v. Grosvenor* and other cases, namely: "as far [*515] as they can by law," or, "as far as the rules of law and equity will permit." The gift referring to the limitations of the mansion house in the settlement and in the will, meant to pass the chattels in succession: but the trust is so expressed that, if it were literally carried into effect, it might have happened, to use the expression of Lord Eldon in *Ware v. Polhill*, that no tenant in tail of the age of twenty-one years might have been in possession of the mansion house for two centuries, and, consequently, the absolute interest in the plate and other articles, would not have vested during that time. In *Marshall v. Halloway*, the same great authority says: "The trust in this case for accumulation, I think bad; because it may last for ages:" and, under the will of Sir Henry Carr Ibbetson, the suspension of the vesting of the chattels, might have endured for ages.[1]

The fact that a tenant in tail of the age of twenty-one years, has become possessed of the mansion house within the space of twenty-one years from the death of the testator, is immaterial: for the validity of the gift must be determined by considering how it stood at the death of the testator; and, unless it was then such as that, if it ever took effect at all, it must, of necessity,

[1] So, Lord Cottenham says, in this case on appeal; "The claim, under the gift to the first tenant in tail of the age of twenty-one who should be in possession of the testator's mansion house, is clearly too remote. There might be successive tenancies in tail, lasting for any number of years, without any one tenant in tail in possession attaining twenty-one; and as the estate could not remain suspended, if such contingency should not happen within the period limited by the rule of law, so the possibility of such contingency not happening within the limited period renders the gift void, although the contingency has, in fact, happened within that period." 5 Myl. & Cr. 27.

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have vested the absolute interest in some one within the period allowed by law, it was bad then and must be so now. For, as Sir William Grant said in *Lord Southampton v. Marquis of Hertford*: "An executory devise exceeding the allowed limits, is void *in toto*." And, in *Tollemache v. Earl of Coventry*, Lord Brougham says: "To argue from the fact that the person was *in esse* at the date of the will who became Lord Vere, is to rely upon an accident. The event might have been otherwise. He would not, *ex necessitate*, answer the description within the allowed period. The estate must be certain, so as, within the time, to vest in the person described."^[1] And, after "the fullest consideration, I am opinion that, so [*516] far as the gift was framed to take effect after the death of Sir Charles Ibbetson, it was void. Whether it was good as a gift to him for life only and void as a gift in remainder after his death, or whether it might be construed as a gift absolutely to Sir Charles Ibbetson, according to what seems to have been the opinion of Lord Brougham upon the gift, in Lord Vere's will, to the third Lord Vere, it is not necessary to decide; because Sir Charles Ibbetson was residuary legatee.

Upon the whole, I think that, under the will of Sir Henry Carr Ibbetson, Sir Charles took absolutely the subjects of the specific gift.

The decree, which was dated the 8th of May, 1840, declared that the bequests of the plate, pictures, books and household furniture contained in the will, so far as it was intended to take effect from and after the death of Sir Charles Ibbetson, was void; and that the plate, pictures, books and household furniture fell into and formed part of the testator's residuary personal estate from and after the death of Sir Charles Ibbetson: and it was referred to the Master to inquire and state to the court what the plate, pictures, books and household furniture consisted of and which of them, or what part thereof, were taken possession of by the defendant Sir Charles Henry Ibbetson, as mentioned in his answer. And it was ordered that the defendant Sir Charles Henry Ibbetson should deliver up such of the plate, pictures, books and household furniture as were so taken possession of by him, to the defendants John Thomas Selwin and Dame Alicia Mary Ibbetson, the executor and executrix of the testator Sir Henry Carr Ibbetson.^(a)

*Sir Charles Henry Ibbetson appealed, to the Lord Chancellor, [*517] from the above decree; but, on the 19th of November, 1840, his Lordship dismissed the appeal with costs.^[2]

(a) So in brief

[1] "I admit, that where a future interest in an estate is so given, that by possibility it may not take effect in possession until a period more remote than the law allows, that devise may be void from the beginning, as tending to a perpetuity. But where the will declares that objects are to take in succession, there is no reason why I should hold the will void, as to those objects to whom an interest not extending beyond their own lives, is given immediately at the testator's death." *Wigram, V. C., Liley v. Key*, 1 Hare, 583.

[2] Decision of the Lord Chancellor is reported, 5 Myl. & Cr. 26; and see *Banks v. Le Despencer*, post, 576.

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GOOSEMAN v. DANN.

1840: 7th February.—Clerk in court; Injunction.

A defendant's clerk in court is not his agent for the purpose of receiving notice of an injunction granted in the cause.

ON the 27th of January, the plaintiff obtained an order for the common injunction, for want of answer, to restrain an action brought, by the defendant, against the plaintiff; and on the morning of the 29th, the order was passed and entered. About half past 12 o'clock on the same day, the plaintiff served the order on the defendant's clerk in court, by delivering to him a copy thereof and, at the same time, showing him the original. About four hours afterwards, the defendant's town agent left the declaration in the action, at the office of the plaintiff's solicitor.

A motion was now made, for the plaintiff, to commit the defendant and his clerk in court for the breach of the injunction, or that all proceedings in the action taken since the 37th of January, might be set aside with costs.

Mr. *Knight Bruce* and Mr. *Hislop Clarke*, in support of the motion:—The order for the injunction, was obtained on the 27th of January. At that time, the declaration in the action had not been delivered; therefore, the injunction stayed all proceedings at law. An order for an injunction stays all proceedings at law; but, without notice of it, there can be no contemptuous breach. The clerk in court is the agent for the party: he had no-
[*518] tice of the injunction several hours before the declaration was delivered; therefore, at all events, the action must be restored to the position in which it was at the time when the order for the injunction was obtained. *Tarleton v. Dyer*,^(a) *Lorimer v. Lorimer*,^(b) *Boswell v. Tucker*,^(c) *Stephens v. Neale*,^(d) *Taylor v. Sheppard*.^(e)

Mr. *Jacob* and Mr. *Lowndes*, for the defendant, said that the clerk in court was not agent for the party for all purposes, but only to receive 20s. costs on the amendment of the bill, and in other cases in which the practice of the court required service upon him.

Mr. *Knight Bruce*, in reply, said that, independent of notice, an injunction operated from the time when the order for it was made. *Rattray v. Bishop*.^(f)

THE VICE-CHANCELLOR:—I am asked, in this case, either to commit the defendant and the town agent of his attorney in the country, or to make void the step which has been taken at law: but I am of opinion that I can not do either the one or the other of those things.

The clerk in court is the agent for the party, to receive notice of the proceedings in the cause: but an injunction is extraneous to the cause, and not a proceeding in it: [1] and I have always understood that an injunction has

(a) 1 Russ. & Myl. 1.

(b) 1 Jac. & Walk. 284.

(c) 2 Keen, 188.

(d) 1 Madd. 550.

(e) 1 You. & Coll. 94.

(f) 3 Madd. 220.

[1] Vide 9 Sim. 410, n. 1.

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no operation unless it is served either on the defendant personally, or on some person who, by an order of the court, has been substituted for the defendant.[1]

Motion refused with costs

**CHARLES EDWARD MANGLES v. THE GRAND COLLIER DOCK* [*519]
COMPANY.

1040: 14th and 15th Feb.—Fraud in obtaining a local act of Parliament; Demurrer; Equity. A bill forming a dock company, passed the House of Commons, before three-fourths of the capital had been subscribed. As the orders of the House of Lords required that proportion of the capital to be subscribed before the bill could be brought into that House, certain of the subscribers to the undertaking subscribed for additional shares, in order to make up the deficiency. Those persons, afterwards, signed a memorandum declaring that the additional shares were to be held in trust for the company. The bill was then brought into the House of Lords and passed. One of the sections provided that, on the trial of an action to be brought, by the company against a shareholder, for money due on a call, it should only be necessary to prove that such call was made, and that twenty-one days' notice of it was given, *without proving the appointment of the directors who made the call*; and that the company should, thereupon be entitled to recover, unless it should appear that the call exceeded 5*l.* per share, or that the required notice had not been given. At the first meeting of the company, directors were chosen; at another meeting, it was resolved that the trust declared, by the memorandum, of the additional shares, should be annulled, and that those shares should be transferred to the secretary, for the use of the company; but the members present at those meetings did not hold the number of shares required, by the act, to constitute a valid meeting, exclusive of the additional shares. Afterwards the directors having made a call, the company brought an action, against one of the original subscribers, for the amount of it: whereupon he filed a bill, to restrain the action, alleging *that the additional subscriptions were fraudulently made*, and consequently the meetings were not duly constituted, and the appointment of the directors who had made the call, and the other proceedings of those meetings, were invalid; but that, *by the special provisions of the act, he was prevented from giving evidence*, at the trial of the action, to show that the appointment of the directors was not duly made. A demurrer to the bill, for want of equity, was allowed.

On the 16th of February, 1837, certain persons having agreed to form a company for the purpose of making wet docks at or near Rotherhithe and Deptford, to be called the Grand Collier Docks, and to apply for an act of Parliament to enable them to carry their project into effect, [*520] executed an indenture, called the parliamentary deed or contract, by which they mutually covenanted, with each other, that they had subscribed the sums set opposite to their respective names, for the purpose of making

[1] "An injunction must be personally served upon the defendant, and upon his solicitors, attorneys, or agents, by delivering to, and leaving with each of them, a correct copy of the writ, and at the same time showing him the original writ under the seal of the court, unless the court, under particular circumstances, dispenses with the personal service, and orders a substituted service to be made in some other manner." 1 Barb. Ch. Pract. 631. But, if a party has actual notice that an injunction has been granted, he is in contempt for disobeying it, although it may not have been served. *Hull v. Thomas*, 3 Edw. Ch. Rep. 237. 1 Barb. Ch. Pract. 633. *Lorton v. Seaman*, 9 Paige, 610. 1 Hoff. Ch. Pract. 166.

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and maintaining the projected docks, and authorizing the sale and purchase of the property belonging to the Grand Surrey Canal and East Country Dock Companies (which was to be included in the projected docks) in such manner as should be provided for by an act to be applied for in the then session of Parliament; and, further, that they would pay the amount of their respective subscriptions, within five years from the passing of the act, in such sums and at such times as the directors or others authorized by the act, should, in conformity to the provisions thereof, direct.

The plaintiff executed that deed as a subscriber to the undertaking for fifty shares.

By the deed of management, which bore even date with the parliamentary deed and was executed by twenty-nine persons, who subscribed the same for 255 shares, but which was not executed by the plaintiff, eleven of the the promoters of the undertaking were formed into a committee for managing the affairs of it, until the act of Parliament should be obtained; and it was agreed, amongst other things, that the capital of the undertaking should be 550,000*l.* to be divided into 11,000 shares of 50*l.* each.

One of the members of the provisional committee, neither signed the parliamentary deed nor subscribed for any shares.

[*521] "On the 17th of February, 1837, a bill for making the proposed docks, was brought into the House of Commons, and passed that house on the 29th of June following. At that time, the parliamentary deed was not executed by more than thirty-four persons, who had subscribed for 455 shares, forming a capital of 22,750*l.*: but as, by the standing orders of the House of Lords, the bill could not be brought into that House until three-fourths of the capital had been subscribed by the parties to the parliamentary deed, nine persons, six of whom were members of the provisional committee, executed the parliamentary deed as additional subscribers for 1000 shares each; and another person executed it as a subscriber for 500 shares: making an additional subscription of 475,000*l.* On the 12th of July, 1837, a committee of the House of Lords reported that they had agreed to the bill; and the bill in this cause alleged that such report was made on the faith and confidence that the parliamentary deed had been duly and honestly executed, and that the parties executing the same had, thereby, *bona fide* subscribed for and intended to become the owners of the number of shares set against their respective names in the schedule to that deed. On the 16th of July, 1837, the bill received the royal assent, and was intituled: "An act for making wet docks and other works, on the south side of the river Thames, at or near Rotherhithe and Deptford, in the counties of Surrey and Kent, to be called the Grand Collier Docks." By that act, the persons who had subscribed and who should thereafter subscribe to the undertaking, were incorporated by the name of "The Grand Collier Dock Company," and they were empowered to raise not exceeding 550,000*l.* to be divided into shares of 50*l.* each; and, after reciting that the probable expense of making the docks and

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other works, "thereby authorized, would amount to 550,000*l.*, three- [*522] *fourths* whereof had been already subscribed for by several persons under a contract binding them, their heirs, executors, &c. for the payment of the several sums by them respectively subscribed for; it was therefore enacted that the whole of the 550,000*l.* should be subscribed for, in like manner, before any of the powers given by the act in relation to the compulsory taking of lands for the purposes of the said docks and other works should be put in force: that the first general meeting of the company should be held within six months after the passing of the act, at which twelve proprietors of ten shares each, were to be chosen directors of the company; and that, afterwards, there should be half yearly general meetings in the third week in February and the third week in August in every year, and so many special general meetings as the directors should think proper to convene: that if, at any general or special general meeting, *there should not be ten or more proprietors present who should be entitled to vote in respect of at least 1000 shares, no choice of directors should be made nor any business transacted*: that no proprietor of any share on which any call should have been made, should, after the day appointed for payment of the same, be allowed to vote or act as a director at any meeting, if objected to, until the money called for on such share, should have been fully paid: that the orders and proceedings of all meetings and of the directors, should be entered in a book and signed by the chairman, and, when so entered and signed, should be allowed to be read in evidence, in all courts and before all judges, justices and others, without proof of such meeting having been duly convened, or of the persons making or entering such orders and proceedings being proprietors or directors, or of the signature of the chairman; all of which last mentioned acts should be "presumed; that if any subscriber should make [*523] default in payment of such proportion of his subscription as should be called for by the directors, the company might sue for and recover the same in any court of record, or the directors might declare his shares to be forfeited; that, in any action to be brought, by the company, against any shareholder, for money due in respect of any call, it should be sufficient for the company to declare and allege that the defendant, being the proprietor of a share in the undertaking, was indebted, to the company, in such sum of money as the calls in arrear should amount to, for a call or so many calls of such sums of money, upon a share belonging to the defendant, whereby an action had accrued to the company by virtue of the act, without setting forth the special matter: and, on the trial of such action, it should only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of a share in the undertaking, and that such call was in fact made, *without proving the appointment of the directors who made such calls, or any other matter whatsoever*; and the company should, thereupon, be entitled to recover what should appear due on such calls, *unless it should appear that any such call exceeded 5*l.* per share* (which was the amount

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limited by the act,) *or was made payable before the end of two calendar months from the day appointed for payment of the preceding call, & that twenty-one days' notice of the call had not been given as thereinbefore required*; and, in order to prove that the defendant was the proprietor of such share in the undertaking as was alleged, the production of the book in which the company was, by the act, directed to enter the names and descriptions of the proprietors and the number of shares held by them, should be *prima facie* evidence: that it should be lawful for the proprietors to sell [*524] their shares, subject *to the following rules and conditions; that is to say, that the deed or conveyance should be kept by the company: and that the clerk or secretary of the company should enter, in a book to be kept for that purpose, a memorial of the sale, and endorse the entry on the deed of sale, and make an endorsement of the transfer on the back of the certificate of each share sold, and deliver the same to the purchaser for his security; and that such endorsement, being signed by the secretary or clerk, should be considered, in every respect, the same as a new certificate; and, *until such memorial should have been made and entered, the seller should remain liable for all future calls, and the purchaser should have no share of the profits of the undertaking, nor any vote as a proprietor: that no person should sell any share upon which any call should have been made, after the day appointed for the payment of the same, unless he should have paid the sum called for*: and that the act should be deemed a public act, and should be judicially taken notice of as such by all judges, justices and others.

The bill, after stating as above, alleged that, on the 12th January, 1838, an illegal or pretended meeting was held for the purpose of choosing directors of the company, and twelve proprietors (eight of whom had subscribed for the additional shares,) were then chosen directors; but the persons present at that meeting, did not hold more than 321 shares in the whole: that previously to the holding of such meeting, those eight persons set their initials to a memorandum in the following words: "The shares subscribed for this day by the provisional committee of the Grand Collier Dock Company, are to be held in trust for the company, and to be allotted and sold only by a [*525] vote of the majority of *the said provisional committee similarly subscribing: all benefits and profits in any way arising from the allotting or sale of such shares, to be held for the company, and not for the said subscribers. London, 4th July, 1837.": that a similar memorandum had been previously signed by the two other subscribers for the additional shares: that no general meeting of the company, save only the said illegal or pretended meeting, was held during the year 1838; but some of the persons so nominated directors as aforesaid, met, from time to time, and assumed to act as a board of directors: that a special general meeting of the company was held on the 27th of June, 1839, at which were present persons holding *bona fide* 396 shares only; but seven of the holders of the additional shares being also pre-

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sent, their names, in order to give a color to the meeting, were entered in the books of the company, as then holding these additional shares: and, at such meeting, the following entry was made in the books of the company: "At a special general meeting of the proprietors of the Grand Collier Dock Company, the following proprietors were present, holding 7000 shares and upwards: (a) Resolved that the trust entered into for the benefit of the company by the memorandum dated the 4th of July, 1837, and, on that day, lodged in the hands of the solicitor of the company, be hereby annulled, and that the 8000 shares so subscribed for and numbered 1001 to 9000 in the register share book of the company, be now transferred to Mr. John Smith, the secretary of the company, to be issued, from time to time, for the use of the company, by a vote of the board": that, by some mistake or omission, the names of the two other subscribers for the additional shares, were omitted in that resolution: that, pursuant to such resolution, all the persons therein named made "a nominal and fraudulent transfer of their 100 addi- [526] tional shares each, so fraudulently subscribed for in the parliamentary deed, into the name of the secretary in trust for the company: that such transfers were colorable and fraudulent, and made to relieve the parties from any responsibility they had incurred by executing the parliamentary deed or contract: that, in the books of the company, some colorable entries or entry were or was made, declaring that the other additional 1500 shares fraudulently subscribed for, were held, by the subscribers, in trust for the company: that in the books of the company the shares *bona fide* subscribed for, were numbered 1 to 605 both inclusive: that 230 shares were entered, in the books, as if held or subscribed for by the solicitor to the company, and were therein numbered 606 to 835 both inclusive: that, on the 2d of July, 1839, another illegal or pretended meeting of the pretended directors, was held, when it was resolved that a call of 5*l.* per share should be made, and that the registered proprietors should be requested to pay the said call upon their respective shares, on or before the 21st of August, then next: that, on the 2d of August, 1839, the plaintiff, agreeably to the provisions of the act of Parliament, transferred his shares to Arthur Molony, and that a memorial of such transfer was duly made, in the books of the company, and the entry of such memorial was endorsed on the deed of transfer of the shares, and an endorsement of such transfer was made on the back of the certificate of each share so transferred, and signed by the secretary of the company, and, by him, delivered to Molony, *whereby the plaintiff ceased to be a member of the company, and, thenceforth, ceased to be liable to pay the call of 5*l.* a share*: that on the 26th of August, 1839, at an illegal or pretended meeting of four of the pretended directors, it was resolved: "that, subject to the con- [527] firmation of the proprietors at the half yearly general meeting to be held on the 13th September, 400 shares of this company, paid up in full, be placed in the hands of Mr. George Barnard, stock broker, in trust for the

(a) Here followed the names of the proprietors present.

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following purposes: that, provided the 10,000 shares of the company now remaining unsold, shall be disposed of, registered, and the sum of 4^l per share paid to the account of this company on or before the 4th of April, 1840, or if, by any means, a clause compulsory on colliers to unload in docks, shall be obtained previous to the 4th of April, 1840, then and in such case, or in the event of either of them happening, Mr. Burnand is, on the 5th of April, 1840, to deliver such shares to the order of Major Richardson; (a) but provided neither of the said events occur, Mr. Burnand is, on the 5th of April, 1840, to deliver, to Captain Guyon, the chairman of the said company, the said shares for the benefit of the said company": that the 10,000 shares mentioned in the said resolution, were numbered, in the books of the company, 1001 to 11,000 both inclusive: that another illegal or pretended meeting of the pretended directors was held on the 11th of September, 1839, at which it was resolved that, in pursuance of the agreement that day concluded with the solicitor of the company, 230 shares, upon each of which 5^l. had been paid, should be issued to him: that the 230 shares mentioned in last resolution, were numbered 606 to 835 both inclusive: that another illegal or pretended meeting of the company was held on the 27th of September, 1839, and an entry of such meeting was made, in one of the books of the company, which was partly as follows: "At the adjourned half yearly general [*528] meeting of proprietors of the Grand Collier Dock Company, held on the 27th of September, 1839, the following proprietors were present holding 1000 shares and upwards, &c. &c. (a) The secretary was requested to read the resolution passed, at a board of directors held on the 13th of September, with reference to the disposal of the remainder of the shares of the company, subject to the confirmation of the general meeting to be held this day, and such resolutions being as follows: 'Resolved, subject to the confirmation by the proprietors at the half yearly general meeting to be held this day, or by adjournment of such meeting, that 400 shares of the company, paid up in full, but not bearing interest, be placed in the hands of Mr. Sewell of Salters' Hall, in trust for the following purpose; that, provided the 10,000 or other remaining shares of the company on hand, shall be disposed of and registered, and the sum of 5^l. per share paid to the account of this company, on or before the 4th day of April, 1840, then and in such case Mr. Sewell is immediately to deliver up such shares to Mr. George Burnand or to his assigns, to be applied or disposed of in such manner as he may think proper, but, in the event of such shares not being disposed of, registered, and the sum of 5^l. per share paid to the account of the company, then the said 400 shares to be delivered up to the secretary of the company.' It was moved, seconded and carried that the foregoing resolution, passed by the board of directors, is hereby approved and confirmed, and the directors are requested

(a) This gentleman was a director of the company, and one of the subscribers for the additional shares.

(b) Here followed their names.

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to carry the purposes of the same into operation without loss of time. (a)

W. Hulme, (one of the subscribers for the additional shares,) "having signed the parliamentary subscription list in trust for the company for 1000 shares, and registered No. 9500 to 10,501; it was moved, seconded and resolved that the said trust should be annulled, and that the said shares should be transferred to the secretary of the company, for the benefit of the company, as the board of directors might order:" that the 230 shares mentioned, in the entry of the 27th of September, 1839, as held by the solicitor of the company, were the 230 shares thereinbefore mentioned: that, at no one of the said pretended special meetings of the company, ten or more proprietors ever attended; and that there never were, at any period since the passing of the act, any legally appointed directors; and that all the before mentioned meetings, resolutions and proceedings, and all other resolutions passed at any pretended special meetings of the company, and all entries thereof, and all resolutions passed at any pretended board or boards of any pretended directors of the company, and all entries thereof, and the call of 5*l.* per share, were unauthorized by the act; and that, *in case the facts aforesaid could appear, or evidence thereof be given on the trial of the action after mentioned, a verdict must, of necessity, pass for the defendant in such action:* that, in consequence of the utter failure of the undertaking, and no more than 605 shares therein having been *bona fide* subscribed for, which, if paid up in full, would only raise a capital of 30,250*l.*, it had become manifest, as the fact was, that, long before the call was made, it was impossible to carry on the undertaking, and that the attempt to make the projected docks had wholly failed; and that, under these circumstances, no call could be made upon the subscribers by virtue of the act or otherwise; and that, long before the said pretended call was made, it had become apparent, as the fact was, that the undertaking had become a bubble, and all the parties actively concerned therein, and who pretended to act as directors or officers thereof, well knew it had become impossible to dispose of shares in the undertaking to an extent sufficient to enable the parties engaged therein to carry the act into effect; and that such call was not only made by persons unauthorized by the act to make the same; but that, if such call had been made by legally constituted directors, it would have been, under the circumstances aforesaid, a gross fraud upon the plaintiff and the other *bona fide* shareholders: that, notwithstanding the circumstances aforesaid, an action was brought, on the 11th of October, 1839, by the company against the plaintiff, for the purpose of compelling him to pay the call of 5*l.* per share on his shares: and, on the 29th of November, 1839, the plaintiff pleaded to the action, first, that he never was indebted in manner and form as in the declaration alleged, and, secondly, that he was not proprietor of the shares in manner and form as in the declaration alleged: but, *in consequence of the special provisions contained in the*

(a) There appears to be some inconsistency between this resolution and the resolution of the 26th of August, 1839.

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act, he would be unable to give, on the trial of the action, such evidence as would support such pleas. The bill then contained the usual charge as to documents in the possession of the defendants; and it prayed that the defendants might be perpetually restrained from further proceeding in the action and from commencing or prosecuting any other action, against the plaintiff in respect of the matters aforesaid; and that all declarations which might be necessary to give effect to the relief which the plaintiff was entitled to in the suit, might be made; and that all orders, directions and accounts might be made and decreed which were necessary to give effect to such declarations;

and that, in the meantime, the defendants might be restrained from [*531] further proceeding in "the action, and from commencing any other action, against the plaintiff, in respect of the matters aforesaid.

The defendants demurred, to the bill, for want of equity and because Molony was not a party to it.

Mr. *Jacob* and Mr. *James Russell*, in support of the demurrer:—The plaintiff insists, by his bill, that he is not bound to pay the call, on the ground that the persons by whom it was made, were not legally appointed directors of the Company: but the act of Parliament provides that the appointment of the directors, shall not be called in question; and, therefore, we contend that the plaintiff is bound to pay the call if it is made by directors *de facto*, whether they are directors *de jure* or not. We shall, however, show that the persons by whom the call was made, were duly chosen directors. The bill states that, when the act of Parliament was passed by the House of Commons, the parliamentary deed was executed by not more than thirty-four persons, who subscribed for 455 shares, forming a capital of not more than 22,750*l.*: but, as the standing orders of the House of Lords required three-fourths of the capital to be subscribed by the persons executing that deed, nine gentlemen (eight of whom were, subsequently, chosen directors,) executed the deed as additional subscribers for 1000 shares each, and another gentleman executed it, as an additional subscriber for 500 shares, in order to make up the required amount of subscription. The bill, however, does not state that those additional subscriptions were colorable; and, consequently, the parties by whom those subscriptions were made, became subject to the same legal and equitable liabilities as the other subscribers were subject to. The bill

[*532] then *represents that eight of the additional subscribers, set their initials to a memorandum dated the 4th of July, 1837, which purported that they intended to be trustees of their additional shares, for the company; but the bill does not state that the company then accepted them as such trustees, or that they were not to be liable in respect of their additional shares. Therefore more than ten proprietors entitled to vote in respect of 1000 shares, were present at the meeting for the choice of directors held on the 12th of January, 1838; and the persons who were then chosen directors, were duly elected. No other meeting was held until the 27th of June, 1839; and then, and not before, the resolution was passed in pursuance of which the additional shares

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were transferred, to the secretary, in trust for the company. The bill avers that that transfer was colorable and fraudulent; but nothing is stated to show that it was so; and, if it was, the consequence is that the shares still belong to the parties who subscribed for them. There can be no doubt that there was present, at all the meetings, a sufficient number of shareholders to comply with the requisitions of the act.

Another ground on which the demurrer for want of equity may be supported, is that the facts stated in the bill, constitute, if true, a legal defence to the action: [1] and, therefore, the defendant ought to have filed a bill for discovery only: but, as the bill is for equitable relief, it must be founded on the hypothesis that the legal right is in the company; and, if the plaintiff is legally liable to pay the call, what equity is there to exempt him. The act which creates the legal liability, makes certain special provisions; but the party on whom it imposes that liability, is not entitled, on that account, to be relieved from it by a court of equity. This court can not relieve against the provisions of an act of Parliament; and, [*533] consequently, it can not annul that clause in the act as to not proving the validity of the appointment of the directors. If the plaintiff can not prove the invalidity of the appointment at law, this court can not allow him to prove it. Again, the plaintiff says that the transfer of his shares to Molony, has put an end to his liability to pay the call; but, supposing that to be so, is it a ground for coming into a court of equity?—[The Vice-Chancellor: I do not observe that the bill any where states that the subscriptions which were made in order to comply with the standing orders of the House of Lords, were subscriptions which, *ab origine*, were not intended to be binding.]—There is no such statement.

The second ground of demurrer, is that Molony ought to have been made a party to the bill. Supposing that the plaintiff has as he alleges, duly assigned his shares to Molony, and thereby got rid of his liability to pay the call, still the shares are liable to be forfeited: and moreover Molony, having purchased the shares subject to the payment of the call, is bound to indemnify the plaintiff from it: Molony, as between himself and the plaintiff, is bound to pay the call. Besides, he may file a bill, against the company, stating that they intend to bring an action against him for the amount of the call, and seeking to restrain the action on the same grounds as are stated in this bill: he, therefore, ought to have been made a party to the record.

Mr. Wakefield and Mr. Lovat in support of the bill:—The subscriptions required by the standing orders of the House of Lords, are *bona fide* subscriptions: but, in "this case, they were fictitious; and, therefore, [*534] the parties who were instrumental in procuring this act of Parliament, practised a fraud upon the Legislature. The total number of shares is 11,000; but only 605 have been subscribed for *bona fide*, consequently, none of the meetings which have been held, have been legally constituted;

[1] Vide *Simpson v. Lord Howden*, 3 Myl. & Cr. 97, 109, n. 1. S. C. 1 Keen, 583, 600, n. 1.

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and the appointment of directors, and all the other proceedings of those meetings, are invalid, and no call has been legally made. The compulsory powers of the act, do not come into operation until the whole of the capital is subscribed for; and, as the act allows the Company no more than eighteen months, from the passing of it, to purchase the Surrey Canal,^(a) it is manifest that the project can not be carried into effect. Besides the allegations in the bill (which, on the present occasion, must be taken to be true) show that the Company are unable to sell any more of their shares, and, therefore, the funds necessary to complete the undertaking, can not be raised; and, that being the case, this court, according to the doctrine laid down by Lord Eldon in *Agar v. The Regent's Canal Company*^(b) will restrain the Company from exercising any of the powers given them by the act.

As the plaintiffs in the action are not required to prove that the persons by whom the call was made, were duly appointed directors, a call made by any of the members of the company, whether directors or not, might [*535] be enforced at law.—[The Vice-Chancellor: The act assumes 'that the persons by whom the call is made, must be directors *de facto*. All that the Legislature meant was that, if the call was made by persons appearing to be directors, it should not be necessary to prove their appointment.]—It was said that the defendant ought to have filed a bill for discovery only: but, if he had done so, the evidence obtained would have been of no use, as it would have been shut out in a court of law. That circumstance constitutes a sufficient equity to support this bill.—[The Vice-Chancellor: If the act of Parliament has said that the Company shall recover a verdict in the action, provided there be a certain state of circumstances, is not that the law of the land?—According to the statements in the bill, no binding call has been made: consequently, nothing is justly due from the plaintiff. If that be so, and the plaintiff is, notwithstanding, to have a verdict pass against him in a court of law, is not this court to interfere to protect him: more especially in a case where the project has totally failed and become a bubble? *Colt v. Woollaston*,^(c) *Green v. Barrett*.^(d)

Whatever may be the result of this suit, Molony's interest will not be affected by it either in one way or another: therefore, he is not a necessary party.

Mr. Jacob in reply:—Mangles is still liable to pay the call; but, as between him and Molony, Molony is bound to pay it. If the Company recover one-half of the amount of the call from Mangles, they may declare the shares to be forfeited for the remainder.

[*536] *If the Company were going to take the plaintiff's land under the compulsory powers of their act of Parliament, the plaintiff might say

(a) None of the sections of the act relating to the purchase of the Surrey Canal or the East Country Docks, were set forth in the bill.

(b) See 1 Swanst. 250.

(c) 2 P. W. 154.

(d) Ante, vol. 1, p. 45.

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that they should not take it, because they had not the means of paying for it; and might fortify himself by citing *Agar v. The Regent's Canal Company*: but Lord Eldon did not say, in that case, that, because the company had got but little money, they should be prevented from making calls, on the shareholders, in order to raise more, and, thereby, place themselves in a condition to complete their works. For anything that appears on his bill, the docks may be half completed. A *mandamus* would, perhaps, be to compel the Company to complete them; and, if they were to answer that they had no funds, the court would direct them to make calls on their shareholders. In *Colt v. Woollaston* and *Green v. Barrett*, the projects were bubbles in their concoction. Does this plaintiff profess to call back his money, on the ground that the project in this case, was a bubble in its concoction?—[The Vice-Chancellor: In neither of those cases, had any attempt been made to obtain an act of Parliament.]—If the act of Parliament has said that calls made by directors *de facto*, shall be paid, that is conclusive: but, if the plaintiff is at liberty to prove, at law, that the directors were not duly appointed, then the bill ought to have been for discovery, to enable him to get evidence of the irregularity of the appointment. The defence, if any, is at law; but, supposing that there is no defence at law, there is not a particle of equity to support this bill.

THE VICE-CHANCELLOR:—The bill represents this case: that, when the bill for making the projected docks, was in progress through the House of Commons, only a small number of shares was subscribed for: but, as the standing orders of the House of Lords required that a much larger number of shares should be subscribed for, the deficiency was made up by the additional subscriptions of the ten gentlemen whose names appear in this bill, and who, altogether, subscribed for 9500 shares: that the House of Lords was satisfied, and the bill actually passed on the 15th of July, 1837. [*537]

Now it was for the House of Lords to determine what was the subscription for shares which would satisfy them; and I must suppose that the House of Lords were satisfied that the subscription which had taken place, was a subscription that ought to satisfy them. And then the only question is whether, on this bill, there is enough stated to show that there was a fraud practised on the Legislature, so gross that a court of equity ought to interfere.

It does not appear, on the face of the bill, that the memorandum dated the 4th of July, 1837, was signed at the particular time when the parties subscribed for the additional shares.

Mr. *Wakefield*.—It is expressly charged to be at the very time.

THE VICE-CHANCELLOR:—What is stated is that, previously to the holding of the meeting of the 12th of January, 1838, eight of the additional subscribers had set their initials to the memorandum of July, 1837, and then the bill states that a similar memorandum had also been previously signed by the two other additional subscribers; so that it is quite clear that [*538]

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limited by the act,) *or was made payable before the end of two calendar months from the day appointed for payment of the preceding call, or that twenty-one days' notice of the call had not been given as thereinbefore required*; and, in order to prove that the defendant was the proprietor of such share in the undertaking as was alleged, the production of the book in which the company was, by the act, directed to enter the names and descriptions of the proprietors and the number of shares held by them, should be *prima facie* evidence: that it should be lawful for the proprietors to sell [*524] their shares, subject *to the following rules and conditions; that is to say, that the deed or conveyance should be kept by the company: and that the clerk or secretary of the company should enter, in a book to be kept for that purpose, a memorial of the sale, and endorse the entry on the deed of sale, and make an endorsement of the transfer on the back of the certificate of each share sold, and deliver the same to the purchaser for his security; and that such endorsement, being signed by the secretary or clerk, should be considered, in every respect, the same as a new certificate; and, *until such memorial should have been made and entered, the seller should remain liable for all future calls, and the purchaser should have no share of the profits of the undertaking, nor any vote as a proprietor: that no person should sell any share upon which any call should have been made, after the day appointed for the payment of the same, unless he should have paid the sum called for*: and that the act should be deemed a public act, and should be judicially taken notice of as such by all judges, justices and others.

The bill, after stating as above, alleged that, on the 12th January, 1838, an illegal or pretended meeting was held for the purpose of choosing directors of the company, and twelve proprietors (eight of whom had subscribed for the additional shares,) were then chosen directors; but the persons present at that meeting, did not hold more than 321 shares in the whole: that previously to the holding of such meeting, those eight persons set their initials to a memorandum in the following words: "The shares subscribed for this day by the provisional committee of the Grand Collier Dock Company, are to be held in trust for the company, and to be allotted and sold only by a [*525] vote of the majority of *the said provisional committee similarly subscribing: all benefits and profits in any way arising from the allotting or sale of such shares, to be held for the company, and not for the said subscribers. London, 4th July, 1837.": that a similar memorandum had been previously signed by the two other subscribers for the additional shares: that no general meeting of the company, save only the said illegal or pretended meeting, was held during the year 1838; but some of the persons so nominated directors as aforesaid, met, from time to time, and assumed to act as a board of directors: that a special general meeting of the company was held on the 27th of June, 1839, at which were present persons holding *bona fide* 396 shares only; but seven of the holders of the additional shares being also pre-

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sent, their names, in order to give a color to the meeting, were entered, in the books of the company, as then holding those additional shares; and, at such meeting, the following entry was made in the books of the company: "At a special general meeting of the proprietors of the Grand Collier Dock Company, the following proprietors were present, holding 7000 shares and upwards: (a) Resolved that the trust entered into for the benefit of the company by the memorandum dated the 4th of July, 1837, and, on that day, lodged in the hands of the solicitor of the company, be hereby annulled, and that the 8000 shares so subscribed for and numbered 1001 to 9000 in the register share book of the company, be now transferred to Mr. John Smith, the secretary of the company, to be issued, from time to time, for the use of the company, by a vote of the board": that, by some mistake or omission, the names of the two other subscribers for the additional shares, were omitted in that resolution: that, pursuant to such resolution, all the persons therein named made "a nominal and fraudulent transfer of their 100 additional shares each, so fraudulently subscribed for in the parliamentary deed, into the name of the secretary in trust for the company: that such transfers were colorable and fraudulent, and made to relieve the parties from any responsibility they had incurred by executing the parliamentary deed or contract: that, in the books of the company, some colorable entries or entry were or was made, declaring that the other additional 1500 shares fraudulently subscribed for, were held, by the subscribers, in trust for the company: that in the books of the company the shares *bona fide* subscribed for, were numbered 1 to 605 both inclusive: that 230 shares were entered, in the books, as if held or subscribed for by the solicitor to the company, and were therein numbered 606 to 835 both inclusive: that, on the 2d of July, 1839, another illegal or pretended meeting of the pretended directors, was held, when it was resolved that a call of 5*l.* per share should be made, and that the registered proprietors should be requested to pay the said call upon their respective shares, on or before the 21st of August, then next: that, on the 2d of August, 1839, the plaintiff, agreeably to the provisions of the act of Parliament, transferred his shares to Arthur Molony, and that a memorial of such transfer was duly made, in the books of the company, and the entry of such memorial was endorsed on the deed of transfer of the shares, and an endorsement of such transfer was made on the back of the certificate of each share so transferred, and signed by the secretary of the company, and, by him, delivered to Molony, *whereby the plaintiff ceased to be a member of the company, and, thenceforth, ceased to be liable to pay the call of 5*l.* a share*: that on the 26th of August, 1839, at an illegal or pretended meeting of four of the pretended directors, it was resolved: "that, subject to the confirmation of the proprietors at the half yearly general meeting to be held on the 13th September, 400 shares of this company, paid up in full, be placed in the hands of Mr. George Barnard, stock broker, in trust for the

(a) Here followed the names of the proprietors present.

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following purposes: that, provided the 10,000 shares of the company now remaining unsold, shall be disposed of, registered, and the sum of 5*l.* per share paid to the account of this company on or before the 4th of April, 1840, or if, by any means, a clause compulsory on colliers to unload in docks, shall be obtained previous to the 4th of April, 1840, then and in such case, or in the event of either of them happening, Mr. Burnand is, on the 5th of April, 1840, to deliver such shares to the order of Major Richardson ;(a) but provided neither of the said events occur, Mr. Burnand is, on the 5th of April, 1840, to deliver, to Captain Guyon, the chairman of the said company, the said shares for the benefit of the said company": that the 10,000 shares mentioned in the said resolution, were numbered, in the books of the company, 1001 to 11,000 both inclusive: that another illegal or pretended meeting of the pretended directors was held on the 11th of September, 1839, at which it was resolved that, in pursuance of the agreement that day concluded with the solicitor of the company, 230 shares, upon each of which 5*l.* had been paid, should be issued to him: that the 230 shares mentioned in last resolution, were numbered 606 to 835 both inclusive: that another illegal or pretended meeting of the company was held on the 27th of September, 1839, and an entry of such meeting was made, in one of the books of the company, which

was partly as follows: "At the adjourned half yearly general [*528] *meeting of proprietors of the Grand Collier Dock Company, held on the 27th of September, 1839, the following proprietors were present holding 1000 shares and upwards, &c. &c.(a) The secretary was requested to read the resolution passed, at a board of directors held on the 13th of September, with reference to the disposal of the remainder of the shares of the company, subject to the confirmation of the general meeting to be held this day, and such resolutions being as follows: 'Resolved, subject to the confirmation by the proprietors at the half yearly general meeting to be held this day, or by adjournment of such meeting, that 400 shares of the company, paid up in full, but not bearing interest, be placed in the hands of Mr. Sewell of Salters' Hall, in trust for the following purpose; that, provided the 10,000 or other remaining shares of the company on hand, shall be disposed of and registered, and the sum of 5*l.* per share paid to the account of this company, on or before the 4th day of April, 1840, then and in such case Mr. Sewell is immediately to deliver up such shares to Mr. George Burnand or to his assigns, to be applied or disposed of in such manner as he may think proper, but, in the event of such shares not being disposed of, registered, and the sum of 5*l.* per share paid to the account of the company, then the said 400 shares to be delivered up to the secretary of the company.' It was moved, seconded and carried that the foregoing resolution, passed by the board of directors, is hereby approved and confirmed, and the directors are requested

(a) This gentleman was a director of the company, and one of the subscribers for the additional shares.

(b) Here followed their names.

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to carry the purposes of the same into operation without loss of time. (a)
 J. W. Hulme, (one of the subscribers for the additional shares,) "hav- [*529]
 ing signed the parliamentary subscription list in trust for the company
 for 1000 shares, and registered No. 9500 to 10,501; it was moved, seconded
 and resolved that the said trust should be annulled, and that the said shares
 should be transferred to the secretary of the company, for the benefit of the
 company, as the board of directors might order:" that the 230 shares men-
 tioned, in the entry of the 27th of September, 1839, as held by the solicitor
 to the company, were the 230 shares thereinbefore mentioned: that, at no one
 of the said pretended special meetings of the company, ten or more propri-
 etors ever attended; and that there never were, at any period since the passing
 of the act, any legally appointed directors; and that all the before mentioned
 meetings, resolutions and proceedings, and all other resolutions passed at any
 pretended special meetings of the company, and all entries thereof, and all
 resolutions passed at any pretended board or boards of any pretended direc-
 tors of the company, and all entries thereof, and the call of 5*l.* per share, were
 unauthorized by the act; and that, *in case the facts aforesaid could appear,*
or evidence thereof be given on the trial of the action after mentioned, a
verdict must, of necessity, pass for the defendant in such action: that, in
 consequence of the utter failure of the undertaking, and no more than 605
 shares therein having been *bona fide* subscribed for, which, if paid up in full,
 would only raise a capital of 30,250*l.*, it had become manifest, as the fact was,
 that, long before the call was made, it was impossible to carry on the under-
 taking, and that the attempt to make the projected docks had wholly failed;
 and that, under these circumstances, no call could be made upon the subscri-
 bers by virtue of the act or otherwise; and that, long before the said pretend-
 ed call was made, it had become apparent, as the fact was, that the
 'undertaking had become a bubble, and all the parties actively con- [*530]
 cerned therein, and who pretended to act as directors or officers there-
 of, well knew it had become impossible to dispose of shares in the undertak-
 ing to an extent sufficient to enable the parties engaged therein to carry the
 act into effect; and that such call was not only made by persons unauthorized
 by the act to make the same; but that, if such call had been made by legally
 constituted directors, it would have been, under the circumstances aforesaid,
 a gross fraud upon the plaintiff and the other *bona fide* shareholders: that,
 notwithstanding the circumstances aforesaid, an action was brought, on the
 11th of October, 1839, by the company against the plaintiff, for the purpose
 of compelling him to pay the call of 5*l.* per share on his shares: and, on the
 29th of November, 1839, the plaintiff pleaded to the action, first, that he never
 was indebted in manner and form as in the declaration alleged, and, secondly,
 that he was not proprietor of the shares in manner and form as in the declara-
 tion alleged: but, *in consequence of the special provisions contained in the*

(a) There appears to be some inconsistency between this resolution and the resolution of the
 26th of August, 1839.

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act, he would be unable to give, on the trial of the action, such evidence as would support such pleas. The bill then contained the usual charge as to documents in the possession of the defendants; and it prayed that the defendants might be perpetually restrained from further proceeding in the action, and from commencing or prosecuting any other action, against the plaintiff, in respect of the matters aforesaid; and that all declarations which might be necessary to give effect to the relief which the plaintiff was entitled to in the suit, might be made; and that all orders, directions and accounts might be made and decreed which were necessary to give effect to such declarations; and that, in the meantime, the defendants might be restrained from [*531] further proceeding in the action, and from commencing any other action, against the plaintiff, in respect of the matters aforesaid.

The defendants demurred, to the bill, for want of equity and because Molony was not a party to it.

Mr. Jacob and Mr. James Russell, in support of the demurrer:—The plaintiff insists, by his bill, that he is not bound to pay the call, on the ground that the persons by whom it was made, were not legally appointed directors of the Company: but the act of Parliament provides that the appointment of the directors, shall not be called in question; and, therefore, we contend that the plaintiff is bound to pay the call if it is made by directors *de facto*, whether they are directors *de jure* or not. We shall, however, show that the persons by whom the call was made, were duly chosen directors. The bill states that, when the act of Parliament was passed by the House of Commons, the parliamentary deed was executed by not more than thirty-four persons, who subscribed for 455 shares, forming a capital of not more than 22,750*l.*: but, as the standing orders of the House of Lords required three-fourths of the capital to be subscribed by the persons executing that deed, nine gentlemen (eight of whom were, subsequently, chosen directors,) executed the deed as additional subscribers for 1000 shares each, and another gentleman executed it, as an additional subscriber for 500 shares, in order to make up the required amount of subscription. The bill, however, does not state that those additional subscriptions were colorable; and, consequently, the parties by whom those subscriptions were made, became subject to the same legal and equitable liabilities as the other subscribers were subject to. The bill [*532] then represents that eight of the additional subscribers, set their initials to a memorandum dated the 4th of July, 1837, which purported that they intended to be trustees of their additional shares, for the company: but the bill does not state that the company then accepted them as such trustees, or that they were not to be liable in respect of their additional shares. Therefore more than ten proprietors entitled to vote in respect of 1000 shares, were present at the meeting for the choice of directors held on the 12th of January, 1838, and the persons who were then chosen directors, were duly elected. No other meeting was held until the 27th of June, 1839; and then, and not before, the resolution was passed in pursuance of which the additional shares

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were transferred, to the secretary, in trust for the company. The bill avers that that transfer was colorable and fraudulent; but nothing is stated to show that it was so; and, if it was, the consequence is that the shares still belong to the parties who subscribed for them. There can be no doubt that there was present, at all the meetings, a sufficient number of shareholders to comply with the requisitions of the act.

Another ground on which the demurrer for want of equity may be supported, is that the facts stated in the bill, constitute, if true, a legal defence to the action:[1] and, therefore, the defendant ought to have filed a bill for discovery only: but, as the bill is for equitable relief, it must be founded on the hypothesis that the legal right is in the company; and, if the plaintiff is legally liable to pay the call, what equity is there to exempt him. The act which creates the legal liability, makes certain special provisions; but the party on whom it imposes that liability, is not entitled, on that account, to be relieved from it by a court of equity. This court "can not relieve against the provisions of an act of Parliament; and, [*533] consequently, it can not annul that clause in the act as to not proving the validity of the appointment of the directors. If the plaintiff can not prove the invalidity of the appointment at law, this court can not allow him to prove it. Again, the plaintiff says that the transfer of his shares to Molony, has put an end to his liability to pay the call; but, supposing that to be so, is it a ground for coming into a court of equity?—[The Vice-Chancellor: I do not observe that the bill any where states that the subscriptions which were made in order to comply with the standing orders of the House of Lords, were subscriptions which, *ab origine*, were not intended to be binding.]—There is no such statement.

The second ground of demurrer, is that Molony ought to have been made a party to the bill. Supposing that the plaintiff has as he alleges, duly assigned his shares to Molony, and thereby got rid of his liability to pay the call, still the shares are liable to be forfeited: and moreover Molony, having purchased the shares subject to the payment of the call, is bound to indemnify the plaintiff from it: Molony, as between himself and the plaintiff, is bound to pay the call. Besides, he may file a bill, against the company, stating that they intend to bring an action against him for the amount of the call, and seeking to restrain the action on the same grounds as are stated in this bill: he, therefore, ought to have been made a party to the record.

Mr. Wakefield and Mr. Lovat in support of the bill:—The subscriptions required by the standing orders of the House of Lords, are *bona fide* subscriptions: but, in "this case, they were fictitious; and, therefore, [*534] the parties who were instrumental in procuring this act of Parliament, practised a fraud upon the Legislature. The total number of shares is 11,000; but only 605 have been subscribed for *bona fide*, consequently, none of the meetings which have been held, have been legally constituted;

[1] Vide *Simpson v. Lord Howden*, 3 Myl. & Cr. 97, 109, n. 1. S. C. 1 Keen, 583, 600, n. 1.

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and the appointment of directors, and all the other proceedings of those meetings, are invalid, and no call has been legally made. The compulsory powers of the act, do not come into operation until the whole of the capital is subscribed for; and, as the act allows the Company no more than eighteen months, from the passing of it, to purchase the Surrey Canal,^(a) it is manifest that the project can not be carried into effect. Besides the allegations in the bill (which, on the present occasion, must be taken to be true) show that the Company are unable to sell any more of their shares, and, therefore, the funds necessary to complete the undertaking, can not be raised; and, that being the case, this court, according to the doctrine laid down by Lord Eldon in *Agar v. The Regent's Canal Company*^(b) will restrain the Company from exercising any of the powers given them by the act.

As the plaintiffs in the action are not required to prove that the persons by whom the call was made, were duly appointed directors, a call made by any of the members of the company, whether directors or not, might
 [*535] be enforced at law.—[The Vice-Chancellor: The act assumes *that the persons by whom the call is made, must be directors *de facto*.

All that the Legislature meant was that, if the call was made by persons appearing to be directors, it should not be necessary to prove their appointment.]—It was said that the defendant ought to have filed a bill for discovery only: but, if he had done so, the evidence obtained would have been of no use, as it would have been shut out in a court of law. That circumstance constitutes a sufficient equity to support this bill.—[The Vice-Chancellor: If the act of Parliament has said that the Company shall recover a verdict in the action, provided there be a certain state of circumstances, is not that the law of the land?]—According to the statements in the bill, no binding call has been made: consequently, nothing is justly due from the plaintiff. If that be so, and the plaintiff is, notwithstanding, to have a verdict pass against him in a court of law, is not this court to interfere to protect him: more especially in a case where the project has totally failed and become a bubble? *Colt v. Woollaston*,^(c) *Green v. Barrett*.^(d)

Whatever may be the result of this suit, Molony's interest will not be affected by it either in one way or another: therefore, he is not a necessary party.

Mr. Jacob in reply:—Mangles is still liable to pay the call; but, as between him and Molony, Molony is bound to pay it. If the Company recover one-half of the amount of the call from Mangles, they may declare the shares to be forfeited for the remainder.

[*536] *If the Company were going to take the plaintiff's land under the compulsory powers of their act of Parliament, the plaintiff might say

(a) None of the sections of the act relating to the purchase of the Surrey Canal or the East Country Docks, were set forth in the bill.

(b) See 1 Swanst. 250.

(c) 2 P. W. 154.

(d) Ante, vol. 1, p. 45.

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that they should not take it, because they had not the means of paying for it; and might fortify himself by citing *Agar v. The Regent's Canal Company*: but Lord Eldon did not say, in that case, that, because the Company had got but little money, they should be prevented from making calls, on the shareholders, in order to raise more, and, thereby, place themselves in a condition to complete their works. For anything that appears on this bill, the docks may be half completed. A *mandamus* would, perhaps, lie to compel the Company to complete them; and, if they were to answer that they had no funds, the court would direct them to make calls on their shareholders. In *Colt v. Woollaston* and *Green v. Barrett*, the projects were bubbles in their concoction. Does this plaintiff profess to call back his money, on the ground that the project in this case, was a bubble in its concoction?—[The Vice-Chancellor: In neither of those cases, had any attempt been made to obtain an act of Parliament.]—If the act of Parliament has said that calls made by directors *de facto*, shall be paid, that is conclusive: but, if the plaintiff is at liberty to prove, at law, that the directors were not duly appointed, then the bill ought to have been for discovery, to enable him to get evidence of the irregularity of the appointment. The defence, if any, is at law; but, supposing that there is no defence at law, there is not a particle of equity to support this bill.

THE VICE-CHANCELLOR:—The bill represents this case: that, when the bill for making the projected docks, was in progress through *the House of Commons, only a small number of shares was sub- [*537] scribed for: but, as the standing orders of the House of Lords required that a much larger number of shares should be subscribed for, the deficiency was made up by the additional subscriptions of the ten gentlemen whose names appear in this bill, and who, altogether, subscribed for 9500 shares: that the House of Lords was satisfied, and the bill actually passed on the 15th of July, 1837.

Now it was for the House of Lords to determine what was the subscription for shares which would satisfy them; and I must suppose that the House of Lords were satisfied that the subscription which had taken place, was a subscription that ought to satisfy them. And then the only question is whether, on this bill, there is enough stated to show that there was a fraud practised on the Legislature, so gross that a court of equity ought to interfere.

It does not appear, on the face of the bill, that the memorandum dated the 4th of July, 1837, was signed at the particular time when the parties subscribed for the additional shares.

Mr. *Wakefield*.—It is expressly charged to be at the very time.

THE VICE-CHANCELLOR:—What is stated is that, previously to the holding of the meeting of the 12th of January, 1838, eight of the additional subscribers had set their initials to the memorandum of July, 1837, and then the bill states that a similar memorandum had also been previously signed by the two other additional subscribers; so that it is quite clear *that [*538]

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there was no simultaneous signing by the ten, and that the thing could not have been done at one time; and I am not aware that it is meant to be said that this memorandum was signed at the time. Then, if it was not signed at the time, of course it must have been signed afterwards; for there is no pretence to say that it was signed before. And then, if the House of Lords were satisfied that the subscription was a sufficient compliance with their orders, can it be said that that subscription could be of no avail, because, at some subsequent time, the gentlemen who had entered into that very large subscription, took some steps by means of which they might be saved from the necessity of advancing, out of their own pockets, the whole amount of their subscriptions. As soon as the House of Lords were satisfied that a sufficient subscription had been made, within the meaning of their orders, and passed the bill, did not the House of Lords leave the persons who had subscribed the 9500 shares, at liberty to deal with those shares in the same manner as any previous subscriber for a less quantity of shares, was left at liberty to deal with his shares? In my opinion, therefore, it would be most presumptuous for this court, under such circumstances as are represented here, to say that, *ab origine*, the subscriptions were altogether false and fraudulent, and that the House of Lords allowed themselves to be entrapped into the measure of passing the bill, by so simple a contrivance as such a compliance with their orders. I do not think that I am at liberty to say that.

Then some steps were taken for the purpose of disposing of the shares; but the shares were not disposed of. What then is the consequence? Why that those persons whose subscriptions the House of Lords thought [*539] *authorized them to pass the bill, remain just as liable now as ever they were.

Let me put this case: suppose that, shortly after the bill had passed, these ten persons had become bankrupts; could it be said that, because they were bankrupts, therefore the whole thing was to be treated as a nullity? The question is whether the House of Lords had not good reason, at the time, to be satisfied with what had been done; and I must say that nothing appears, on the face of the bill, which tends to show that that subscription, which these ten gentlemen made, is to be considered as a fraud and a nullity. The conclusion to which the court ought to come, upon this part of the case, would rather be this, namely, that the subscription was good, and that the means taken to escape from the effect of it, were void. If (which I do not admit) the true effect of the memorandum of the 4th of July, 1837, was to enable the parties, who had subscribed, to escape from their subscriptions, I think this court, as well as every other court, would say that the first act was good and the second void, and that therefore those parties remained bound to make good their subscriptions. Then, if that be so, the meetings which took place, were not illegal or pretended meetings, but were properly constituted according to the requisitions of the act; as, at each of those meetings,

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there were present ten persons or more, holding collectively 1000 shares at the least, notwithstanding any reservation, in their own minds, that they would, if they could, get rid of the obligations imposed on them by their subscriptions. Then, that being the case, the whole bill fails; because it is nothing to say that it became apparent that the undertaking had utterly failed and become a bubble. There is no one fact alleged to show that it has become "impossible to carry the act of Parliament into effect, [*540] any farther than as it may be said that there is a difficulty in raising the money required for that purpose. But I do not see any difficulty represented as to raising the money, except the difficulty which the plaintiff has himself created; because he is sued at law and does not choose to pay, and then files a bill to evade the payment: that is, to a certain extent, creating a difficulty.[1] It does not follow, because the time has elapsed within which the Company was bound to purchase the tenements which belonged to the Surrey Canal Company, that therefore the undertaking has failed; for, in the first place, it is not averred that the purchase of those tenements is absolutely necessary for the completion of the projected docks; and it is not averred that there has not been some purchase actually made, or, at least, a binding contract entered into for the purchase of those tenements. An inference only is drawn that the undertaking can not be proceeded with, on the supposition that the ten additional subscriptions were not binding. Whereas my opinion is that the gentlemen who made those subscriptions, are now compellable, by law, to pay up the whole of their subscriptions: and that it would be no defence for them to say that they intended to commit a fraud upon the House of Lords, but would rather make the matter worse. Therefore I think that, as far as the main ground of the bill is concerned, it is quite plain that it cannot be supported.

Supposing, however, that the meetings were not duly constituted, and that, consequently, the directors were not duly elected, and the call sought to be enforced, was not made by proper authority; those circumstances do not entitle the plaintiff to file a bill in equity to restrain the action, but from the grounds upon which he "ought to rest his defence to the action [*541] in a court of law. It never has been the course of this court to restrain an action, merely because the plaintiff at law cannot make out his case. That certainly is not the rule of the court.

I cannot but think that, according to the proper construction of those clauses of the act which regulate the action, there is, *prima facie*, enough to support the action. If, however, in point of fact, the call was not properly made, I am inclined to think that the defendant at law, will be at liberty to show that it was not properly made.

I am not, however, sitting here to determine whether the action at law can be supported or not; the only question which I have to decide, is whether

[1] Vide *Bent v. Young*, 9 Sim. 179.

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there is any equity to support this bill; and I am of opinion that there is not.

Then with respect to the question relating to Mr. Molony; I rather think that the true construction of the act of Parliament is that, if a person holding a share, has a call made on him, and, prior to the time appointed for payment of the call, he transfers his share, in that case, the directors would have the power to declare that transferred share to be forfeited. It rather seems to me to be so; but it is not necessary to determine that question. It is sufficient to say that there is a question the decision of which may affect Mr. Molony's interest.[1]

On both grounds, therefore, this demurrer ought to be allowed.

 [*542]

TUNSTALL v. SIR W. BOOTHBY and Others.

1840: 22d February.—Pension; Compensation allowance; Assignable interest.

The Commissioners of Customs, by the direction of the Lords of the Treasury, granted to A., as a compensation for the loss of an office which he had held in the custom house, 500*l.* a year, payable quarterly by the Receiver General of Customs. A. assigned the allowance to B. for a valuable consideration, and, subsequently, took the benefit of the insolvent debtor's act. The court, in a suit by B. against A. and the assignees of his estate, but to which neither the Lords of the Treasury nor the Commissioners of Customs were parties, restrained the Receiver General from paying over, to the defendants, moneys in his hands on account of the arrears of the allowance, unless the Lords of the Treasury or the Commissioners of the Customs, should order the contrary.

Semble, that such compensation allowance, though revocable at the pleasure of the government, is assignable.

In June, 1832, the Commissioners of Customs, in pursuance of an authority granted to them by the Lords of the Treasury, made an order whereby they granted, to the defendant W. R. Browne, the sum of 500*l.* per annum payable quarterly, as a compensation for the loss of the office of cocket-writer at the custom house in London, which he had held and which had been recently abolished. That sum was not granted to Browne for his life or any other definite period; but was paid by the defendant Sir Wm. Boothby, the Receiver General of Customs, in obedience to orders made from time to time by the Commissioners of Customs.

In September, 1836, and May, 1837, Browne granted two annuities, one of 96*l.* 3*s.* 6*d.*, and the other of 9*l.* 4*s.* 6*d.* to the plaintiff, and assigned his compensation allowance of 500*l.* a year to the plaintiff, as a security for the due payment of those annuities. On the 12th of June, 1837, the deeds by which the annuities were secured, were entered at the audit office in Somerset House; which, it was said, was the proper mode of giving notice of as-

[1] *Vido Wendell v. Van Rensselaer*, 1 Johns. Ch. Rep. 349. *Hosie v. Carr*, 1 Sumn. 173. *Mason v. Franklin*, 1 Yo. & Coll. C. C. 239. *Hawley v. Oramer*, 4 Cow. 723.

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signments of pensions and compensation allowances payable by the Receiver General of Customs. In November or December, 1837, [*543] Browne took the benefit of the act then in force for the relief of insolvent debtors,^(a) and in January, 1838, the usual assignment of his estate and effects was made to the defendants Asprey and Chart.

Down to the 5th of April, 1839, the plaintiff had been paid his annuities out of Browne's compensation allowance: but afterwards, in the same year, two orders were made, by the Insolvent Debtors' Court, with the consent of the board of customs, by which, first, 150*l.*, part of the compensation allowance, and, afterwards, 350*l.*, the remainder of it, were ordered to be paid, to Asprey and Chart, for the benefit of Browne's general creditors; and, under those orders, Sir William Boothby had paid 87*l.* 10*s.*, being one quarterly payment of the 350*l.* to Asprey and Chart.

(a) 7 Geo. 4, c. 57. The 29th section of the act enacts as follows: "That nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being or having been an officer of the army or navy, or an officer or clerk, or otherwise employed or engaged in the service of his Majesty, in the customs or excise, or any civil office or other department whatsoever, or being or having been in the naval or military service of the East India Company, or an officer or clerk or otherwise employed or engaged in the service of the Court of Directors of the said company, or being otherwise in the enjoyment of any pension whatever under any department of his Majesty's government, or from the said Court of Directors, to the pay, half-pay, salary, emoluments or pension of any such prisoner, for the purposes of this act: provided always, nevertheless, that it shall be lawful for the said court to order such portion of the pay, half-pay, salary, emoluments or pension of any such prisoner as on communication from the said court to the Secretary at War or the Lords Commissioners of the Admiralty, or the Commissioners of the Customs or Excise, or the chief officer of the department to which such prisoner may belong or have belonged, under which such pay, half-pay, salary, emoluments or pension may be enjoyed by such prisoner, or the said Court of Directors, he or they may respectively under his or their hands, or under the hand of his or their chief secretary, or other chief officer for the time being, consent to, in writing, to be paid to such assignee or assignees, in order that the same may be applied in payment of the debts of such prisoner; and such order and consent being lodged in the office of the Pay-master of his Majesty's forces, or of the Treasurer of the Navy, or of the secretary of the said Court of Directors, or of any other officer or person appointed to pay, or paying any such pay, half-pay, salary, emoluments or pension, such portion of the said pay, half-pay, salary, emoluments or pension as shall be specified in such order and consent, shall be paid to the said assignee or assignees until the said court shall make order to the contrary."

The 30th section, which also was referred to in the course of the argument, is as follows:—"And be it enacted that if any person who shall petition the said court for his or her discharge from imprisonment under this act, shall at the time of his or her arrest or other commencement of such imprisonment, by the consent and permission of the true owner thereof, have in his or her possession, order or disposition any goods or chattels whereof such prisoner was reputed owner, or whereof he or she had taken upon him or her the sale, alteration or disposition as owner, the same shall be deemed to be the property of such prisoner so petitioning, so as to become vested in the provisional assignee of the said court, by the conveyance and assignment executed in pursuance of this act; provided that no transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an act made in the fourth year of the reign of his present Majesty, intituled an act for the registering of vessels, or according to the provisions of an act made in the sixth year of his said Majesty's reign, intituled an act for the registering of British vessels, shall be invalidated or affected by reason of such possession, order or disposition of the same as aforesaid." See 1st and 2d Vict. c. 110, sects. 56 and 57.

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[*544] “The bill, which was filed on the 9th of January, 1840, alleged
[*545] that the defendants pretended that the *plaintiff’s annuities were not
 well charged upon the compensation allowance of 500*l.* a year, and
that such allowance was not assignable or chargeable, and that the assignments thereof to the plaintiff, were void : but the plaintiff charged that the allowance was assignable and chargeable in equity, and that the plaintiff, under the assignments to him, had a valid and subsisting lien thereon and on the arrears and future payments thereof, for securing his two annuities and the arrears and growing payments thereof : that the allowance was granted, to the defendant Browne, as a compensation for the loss of his office of a cocket writer, and not in consideration of any future services to be performed by him and that it had never been revoked or determined : that a considerable sum of money was due and payable on account of the arrears of the allowance down to the 5th of January, 1840, and that 250*l.* had been paid, to Sir William Boothby, for the purpose of answering such arrears, and that the same sum was then in his hands, and had been carried by him to the account of Browne’s compensation allowance, or otherwise set apart or appropriated by him for or towards the payment of the arrears thereof, and that Boothby was a trustee, of the last mentioned sum, for the plaintiff and the other persons entitled thereto.

The bill prayed that the plaintiff might be declared to have a good equitable charge or lien upon the compensation allowance and the arrears
[*546] and growing payments thereof, as a security for his annuities and *the
 arrears and growing payments thereof ; and that an account might be taken of the last mentioned arrears and growing payments,^(a) and also of the moneys which had been received by the defendants, Asprey and Chart, on account of the compensation allowance ; and that they might be charged therewith, for the plaintiff’s benefit, and be decreed to pay the same accordingly : that an account might be taken of the moneys then in Sir William Boothby’s hands for the purpose of paying the arrears of the allowance, and that the same might be paid to and divided amongst the plaintiff and the other parties entitled thereto, according to their respective rights ; and that, in the mean time, Sir William Boothby might be restrained from paying over to the other defendants or any of them, any moneys then being in his hands or power on account of or for the purpose of paying arrears of the allowance ; and also any moneys which should, thereafter, be in his hands or power for the purpose of answering the future payments of the allowance, and that Asprey and Chart might be restrained from receiving the allowance or the arrears or growing payments thereof, and from commencing or prosecuting any proceedings, at law, for recovering or compelling payment of the same or in any manner interfering with the payment thereof ; and that a receiver of the allowance might be appointed.

A motion was now made, on behalf of the plaintiff, for the receiver and in-

(a) So in brief.

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junctions as prayed by the bill, except that the injunctions were confined, by the notice of motion, to the moneys then in Sir William Boothby's hands or power.

It appeared, from an affidavit made by Browne, that the cocket writers at the custom house, were clerks in "the service of the Go- [*547] vernment in the office of the collector of the customs outwards, and were appointed by the Lords of the Treasury upon the nomination of the Commissioners of Customs, and might be dismissed at the pleasure of either of those boards: that the Lords of the Treasury fixed the sum of 500*l.* a year as the compensation to the deponent for the loss of his office: that the payment of the compensation was entirely under the control and direction of the Commissioners of Customs, who had, hitherto, made orders, quarterly, upon Sir William Boothby for payment thereof, and that, until such orders were made, neither the deponent, nor any person on his behalf, had any right to receive the allowance, nor had Sir W. Boothby any right to pay the same.

Mr. G. Richards and Mr. J. H. Palmer, in support of the motion, said, first, that Browne's compensation allowance, although it was revocable at the pleasure of the Government, was assignable in equity, and had been duly assigned, to the plaintiff, for valuable consideration: that it was not, like military pay or half pay, granted with reference to future services, and, therefore, there was not the same ground for holding it not to be assignable as there was with regard to those payments: *Alexander v. The Duke of Wellington*, (a) *Ellis v. Earl Grey*, (b) *Stone v. Lidderdale*. (c) Secondly: that, under the 29th section of the insolvent debtors' act, the allowance in question did not, like the goods and chattels of the insolvent, pass to his assignees by virtue of the assignment under the act: that the Board of Customs could not consent to any part of the allowance being paid to the assignees, as the insolvent had assigned it to "the plaintiff, and therefore was not [*548] in the enjoyment of it within the meaning of the 29th section of the act: that the Legislature could not have intended to deprive a particular assignee for value, of the benefit of his security, in favor of the general creditors of the insolvent: that, as the subjects to which the 29th section of the act related, were expressly excluded from the operation of the assignment under the act, no notice of the assignment to the plaintiff was necessary, in order to take the allowance out of the operation of the 30th section; but if, any notice was necessary, the entering of the plaintiff's deeds at the audit-office, was sufficient to take the allowance out of the order and disposition of the insolvent. *Burn v. Carvalho*. (d)

Mr. Wray, for Sir W. Boothby, submitted that the motion ought to be refused, as the compensation allowance was payable only during pleasure, and therefore was not assignable.

Mr. Knight Bruce and Mr. Coleridge, for Asprey and Chart, said that the allowance was not assignable: that it was a mere expectancy.—[The

(a) 2 Russ. & Myl. 35. (b) Ante, vol. 6, p. 214. (c) Anst. 533. (d) Ante, vol. 7, p. 1 09

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Vice-Chancellor: Expectancies are assignable in equity.[1]—Supposing that the allowance was assignable, the notice of the assignment to the plaintiff, which was given at the audit-office, was not sufficient to take it out of the order and disposition of the insolvent: for nothing that is entered at the audit-office, is communicated to the Commissioners of Customs, to whom the notice ought to have been given. But no such precaution was taken until after the insolvent had been discharged under the act; and no notice was ever given to Sir William Boothby: therefore, the allowance remained in Browne's [*549] order and "disposition at the time of his insolvency; and we are entitled to it under the orders which have been made, by the Commissioners of the Insolvent Debtors' Court, with the consent of the Board of Customs. *Clay v. St. John*,(a) *M'Carthy v. Gould*.(b)

THE VICE-CHANCELLOR:—With regard to the sums in the hands of Sir W. Boothby, I have to observe that this court has given effect to an assignment of even military full pay, with respect to money which was actually in the hands of the agent for the party who had made the assignment: for, in *Spencer v. Cox & Drummond*,(c) an officer in the army had assigned his pay, to the plaintiff, to secure an annuity and had given notice to the defendants, the agents of his regiment, to pay it over to the plaintiff. The officer being abroad on service, the plaintiff demanded payment of the arrears of the annuity from the defendants: and, on their refusing, he filed his bill. The defendants proved that officers in the army were at liberty to take up their pay from the regimental pay-master, and that the agent was answerable over to him. The Master of the Rolls, however, decreed that the defendants should pay the money in their hands, in discharge of the arrears of the annuity; and should discharge the growing payments of it, out of such moneys as they should receive on account of the assignor. But the Lord Chancellor varied the decree, by ordering the defendants to discharge the annuity out of what should remain in their hands after satisfying the demands of the pay-master: so that the court gave the assignee the benefit [*550] of his lien with respect to the balance of the moneys in the hands of the agents.

In my opinion, Sir W. Boothby stands in the same situation, with respect to the sums in his hands which he has been directed to pay to the insolvent, as the defendants did in the case which I have alluded to. And, the plaintiff's deeds, as I understand, were entered at the audit-office: which appears, from one of the affidavits, to be the proper mode of giving notice of assignments of pensions and compensation allowances: therefore, all the notice of the transaction between the plaintiff and the defendant, which was requisite, has been given.

I cannot think that the meaning of the 29th section of the insolvent debtors' act, is that a pension or compensation allowance which has been assigned, is to be dealt with just in the same manner as if there had been no as-

(a) 2 Sim. & Sta. 32.

(b) 1 Ball & Beat. 387.

(c) 2 Anst. 535, note.

[1] Vide 1 Russ. & M. 562 n. 1. *Phipson v. Turner*, 9 Sim. 245.

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signment, and that too in the absence of the assignee. I feel, however, some delicacy in interfering in this case, without having the Lords of the Treasury and the Commissioners of the Customs before the court: and, in their absence, I cannot make the order which is asked, on this motion to its full extent; but the order which I shall make is that Sir W. Boothby be restrained from paying over, either to Asprey or Chart or to Browne, any moneys in his hands or power on account of the arrears now due of the compensation allowance granted to Browne, unless the Lords of the Treasury or the Commissioners of Customs shall make order to the contrary: and that Asprey and Chart be restrained from commencing or prosecuting any proceedings, at law or in the Insolvent Debtors' Court or *elsewhere, against [*551] Sir W. Boothby, for recovering or compelling payment of such moneys now in his hands or any part thereof.(a)

 HAMMOND v. HALL.

1840: 26th and 28th February—Water-right; Well.

Whether the owner of an old well, can prevent his neighbor from sinking a well in his own land, on the ground that, thereby, the supply of water to the old well, will be drawn off or diminished. *Qu.*

THE plaintiffs were the trustees, appointed under a local act of Parliament (2d and 3d W. 4, c. 66,) for repairing and keeping in repair the iron railing round the centre or middle space of Queen's-square in the parish of St. George-the-Martyr, Middlesex, and for improving and regulating the use and enjoyment of the garden of the square, cleaning the foot-pavement and *repairing the pump and well in the square*. The defendants were the commissioners appointed, under the same act, for paving, cleansing, lighting, &c. the squares, streets, &c. within the united parishes of St. Andrew, Holborn, above the Bars, and St. George-the-Martyr, and were empowered to sink wells and erect pumps within the limits of the act, for the purpose of watering the squares, streets, &c. within those limits.

The defendants having, under the act, begun to sink a well at the distance of twenty-three yards from an old well and pump situate within and close to the iron railings round the garden of Queen's-square, the bill was filed alleging that the old well and pump had been always repaired at the expense of the inhabitants of the square, who, at all times, had had the control of the pump, and had been in the habit of having the handle of it *locked, during the night, in order to prevent the water, with which [*552] it was but scantily supplied, being exhausted; and that the new well

(a) Affirmed by the Lord Chancellor on the 13th of May, 1840. His Lordship relied, particularly, upon the injunction being confined in the sums of Sir W. Boothby's hands. [See further, *Cooper v. Reilly*, 2 Sim 560, 563 n. 1.]

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was intended to be sunk deeper than the old one, and would, when completed, draw off the water from it. The bill prayed for an injunction to restrain the defendants from further sinking their well, or doing any other act tending to diminish the supply of water to the old well.

The injunction having been granted *ex parte*, the defendants now moved to dissolve it. One of the affidavits in support of the motion, stated that the water in the new well, stood five inches higher than the water in the old one.^(a)

Mr. Jacob, Mr. Wigram and Mr. Sharpe, for the defendants, in support of the motion:—The plaintiffs are not entitled to sustain this suit. They have no ownership or estate either in the pump or in the soil in which the well is sunk. It appears, by the affidavits, not to be known in whom the ownership is. The plaintiffs are trustees only of certain naked powers vested in them by the act: but the act does not authorize them to institute suits for protecting the supply of water to the pump, but only to repair it. If the right claimed by the bill, is a public right, the suit ought to have been instituted by the Attorney General: if it is a private right, the bill ought to have been filed by some of the individuals having that right, on behalf of themselves and the others.

[*553] *The defendants have, under the act, the power of sinking wells and erecting pumps for the purpose of watering the squares and streets within the limits of the act: and, in exercise of that power, they have dug a well in the open space on the south side of Queen's-square. That well is already sunk to its greatest depth, that is, about twenty-two feet: the depth of the old well is about eighteen-feet. It is said, in one of the affidavits, that the new well will drain the water from the old one; but no one can tell what the effect will be, except by experience. If, when the new pump is erected, the commissioners draw off an excessive quantity of the water, it will then be time enough to apply to this court to prevent the commissioners from making that excessive use of the pump. This court will not interfere to prevent an act from being done, unless it is manifest that the act, when done will cause an irreparable injury. *Earl of Ripen v. Hobart.*^(b) The owner of a pump cannot prevent his neighbor from erecting a pump on his land, because, it may, *perhaps*, lessen the supply of water to the other pump. It is evident that there is no communication between the water which supplies the old well and that which supplies the new one; for, if there were any communication, the water would not stand higher in the new well than it does in the old one.

There is no instance of an action being brought to sustain such a right as is claimed by this bill, or of an injunction being granted, by this court, to

(a) A report is given of this case, because a question was raised in arguing it, which was said never to have been discussed before, namely, whether a right or easement could be claimed with respect to *subterranean* water.

(b) 3 Myl. & Keen, 169; see 173, et seq.

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prevent the infringement of such a right. But the courts both of law and equity will interfere to sustain and protect rights of way, rights to running water and also rights *to light and air, so far as may be ne- [*554] cessary for the preservation of health or for the purposes of trade, but not further. A right of way or to running water, is founded on acquiescence, which affords a ground for presuming a grant of the right. But there can be no acquiescence with regard to subterranean water: for no one, standing on the surface, can tell how the water gets to the well. If the party against whom the right is claimed, has stood by and *seen the right enjoyed* for a series of years, the courts will presume that he has granted the right; but, if he could have no knowledge of the enjoyment of the right, there is no ground for making the presumption.(a)

Mr. Knight Bruce, and Mr. G. Richards, for the plaintiffs:—Wherever the legal estate in the centre of the square, may have originally been, it is now in the trustees. *Trent v. Hanning*.(b) Every power that the owner of the inheritance could have, is now vested in them.

It has been suggested that the only origin of rights *in alieno solo* is by permissive user: but that is not so. *Could it be contended [*555] that, after the owner of a mine had enjoyed a right of drainage for a century, the owner of an adjoining mine could intercept the drainage, so as to drown his neighbor's mine?

The owner of land has a right to all water courses under it, until some person has acquired a right inconsistent with it. That principle was recognized in *Balston v. Bensted*.(c) where Lord Ellenborough, C. J. held that a person who, for twenty years, had had the uninterrupted enjoyment of a spring of water, had acquired an absolute right to it.

Mr. Jacob, in reply:—In the case referred to, Lord Ellenborough was speaking with reference to the facts before him. That was the case of a water course; and it was manifest that the water came from the plaintiff's land. This is not the case of a water course or stream of running water, but of an accumulation of water under the land; and, from whence it arises, no one can tell.

THE VICE-CHANCELLOR:—There can be no doubt that, under the act of Parliament, the commissioners have, *prima facie*, the right to do that which they propose to do; for the act expressly authorizes them to sink wells and erect pumps, wherever they may think proper, within the district over which their powers extend, for the purpose of watering the squares, streets and

(a) Mr. Sharpe referred to the following passages in the Digest of the Roman Civil Law. "Marcellus scribit, cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi nec de dolo actionem; et sane non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi, id fecit.—L. 1, § 12, ff. de aq. et aq. pl. arc. Si in meo aqua irrumpat quæ ex tuo fundo venas habeat; si eas venas incidatis, et ob id desiderit ad me aqua pervenire, tu non videris vi fecisse, si nulla servitus mihi eo nomine debita fuerit; nec interdicto quod vi aut clam teneris."—L. 21, ff. de aq. et aq. pl. arc.

(b) 10 Ves. 495, and 7 East, 97.

(c) 1 Camp. N. P. C. 463.

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other places within that district. The question then is whether the trustees have any right to prevent the exercise of that general power which is clearly given, to the commissioners, by the act : and, after the best consideration which I have *been able to bestow upon the case, I am inclined [*556] to think that they have not. Any opinion, however, that I can express upon the question, is of but little, if any, value ; as, if the cause is proceeded with, the point must be decided by a court of law.

The powers which the act gives to the trustees to be appointed under it, do not, as I understand, extend to the whole of the spaces included within the houses of the squares in the district to which the act relates ; but are confined, principally at least, to the gardens of those squares and the iron railings round them. The trustees, however, are empowered to cleanse the foot pavements of the squares and to repair the pumps and wells therein. But, in my opinion, it would be a very forced construction of the act, to say that the power to repair the pumps and wells, was an authority which was intended to contravene the general power, given to the commissioners, to make pumps and wells for the purpose of watering the squares and streets within their district. The powers given to the trustees seems to me to have reference to the comfort and enjoyment of the inhabitants of the squares ; but the powers vested in the commissioners seem to be intended for the benefit of the public at large : therefore, it is but reasonable to suppose that the former were not intended to control or interfere with the latter. Supposing then the opinion which I have formed upon this part of the case, to be correct, the consequence is that the trustees have no right to ask the court to restrain the commissioners from doing the act which forms the subject of the present suit.

It may, however, be said that, although my opinion is unfavorable [*557] to the right claimed by the plaintiffs, yet, *as the question whether they have that right or not, is a legal one, I ought to restrain the defendants from doing the act complained of, until that question has been decided in a court of law. It appears, however, that the two wells are at the distance of twenty-three yards from each other ; and that the level of the water in the new well, is higher than the level of the water in the old one ; which shows that the water, if it flows at all, would flow from the new well to the old one ; so that an injury would be done to the old well, if the supply of water to it from the new one, were to be intercepted. There is, however, no evidence at all that the wells are supplied by a stream of flowing water, or in what other manner they are supplied : but there is evidence to show that the one cannot be supplied from the other ; because, it has been sworn that the water in each of them does not stand at the same level. There is therefore, quite sufficient evidence to warrant me in believing that there will be no danger in dissolving this injunction. As however the plaintiffs may wish to carry the matter further, I shall leave them at liberty to bring such action or actions as they may be advised : and, when they have established their right at law, they may apply to this court to revive the injunction. (a)

(a) See 22 Vin. Ab. p. 528, Water course, C. 9. *Prickman v. Tripp*. Skin. 389 ; S. C. Comb'

1840.—*Worthington v. Remnant.***WORTHINGTON v. REMNANT.*

[*558]

1840 : 7th March.—*Certiorari* ; Practice ; Court of Common Pleas at Lancaster.A *certiorari* issued out of the Court of Chancery, on an order made by a Judge at common law, is irregular.The Court of Chancery has issued a *certiorari* to the Court of Common Pleas at Lancaster.

THE plaintiff having brought an action of *replevin*, against the defendant, founded on a distress for the rent of an inn, at Ulverston in Lancashire, held by the defendant as his tenant, the defendant caused the proceedings in the action to be removed, from the County Court, into the Court of Common Pleas at Lancaster, and then, under an order made, by Mr. Justice Colton, on an *ex parte* application, obtained a writ of *certiorari*, from the High Court of Chancery, for removing the cause into the Court of Common Pleas at Westminster.

A motion was now made, on the plaintiff's behalf, that the *certiorari* might be quashed ; and that the record in the cause might be sent back to the Court of Common Pleas at Lancaster, to be proceeded with according to law ; or that a writ of *procedendo* might issue to enable that court to proceed in the cause according to law ; and that the record, together with the last mentioned writ might be sent back, to that court, for that purpose ; and that the defendant might pay, to the plaintiff, the costs of the motion.

Mr. Romilly, in support of the motion :—The Courts of the county palatine of Lancaster, are not inferior courts, but have a co-ordinate jurisdiction with the courts at Westminster ; and there is no case in which a *certiorari* has issued to those courts. In *Zink v. Langton*,^(a) Lord Mansfield says that the Court of King's Bench may, in a case which calls strongly for "a trial at bar, grant a *certiorari* to remove proceedings from a county palatine : but that is merely a *dictum* ; and, moreover, this is not a case which calls for a trial at bar. [559]

Secondly : neither Mr. Justice Coltman nor any other Judge of the courts

231 ; 1 Com. Dig. 306, Action on the Case (C) : 2 Williams' Saunders, 175, note 2 ; *Cooper v. Barber*, 3 Taunt. 99. [2 Story's Eq. § 927. Where a bill in equity charged the defendant with digging and sinking a deep well and fountain, and thereby occasioning a diversion of the water from a certain spring and water course on the meadow land of the plaintiff, so as to render the same dry during a portion of the year, and prayed for an injunction and relief therefrom ; and the answer denied the facts stated in the bill, alleging, that the diminution of the water was occasioned by other and natural causes ; it was held, that if the facts were as alleged in the bill, the plaintiff was entitled to the relief sought. But, in consideration of the contradictory nature of a great mass of testimony, relating merely to the matter of fact, and dependent upon the credibility of the witnesses, the court proposed, that the following questions should be submitted to a jury, to aid in its decision. 1st. Whether there was any such diversion of the water as that alleged in the bill. 2d. If so, what damages have been sustained thereby. 3d. What is the permanent diminution or loss in value of the plaintiff's meadow land, occasioned thereby. *Dexter v. The Providence Aqueduct Company*, 1 Story's Rep. 387.]

(a) Doug. 749.

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of common law, could have any power to order a *certiorari* to issue out of this court. Indeed, in *Edwards v. Bowen*,^(a) Lord Eldon intimates that even the Vice-Chancellor has no authority to direct a *certiorari* to issue out of this court.

Thirdly: the *certiorari* in this case, was granted on an *ex parte* application, and without any sufficient ground being laid for it. *Jones v. Davies*,^(b) *Williams v. Thomas*,^(c) *Pierce v. Thomas*.^(d)

Mr. *Knight Bruce*, for the plaintiff:—There is no court, either in England or Wales, to which either this court or the Court of King's Bench has not the power of issuing a *certiorari*. It appears, from some of the cases that have been referred to, that this court has the power to issue the writ to the Courts of Great Sessions in Wales. Upon what principle can there be any distinction between those courts and the courts of the county palatine of Lancaster? It did not occur to any of the learned counsel who argued the case of *Zink v. Langton*, to question the power of the courts at Westminster to issue the writ to the courts of the county palatine.

In replevin, the defendant is, substantially, the plaintiff; and the [*560] title to the freehold, will of necessity, come in question: therefore, there were sufficient grounds for granting the writ.

THE VICE-CHANCELLOR:—I have been informed, by Mr. Hubert, the clerk of the petty bag, that there is no single instance in which a writ of *certiorari* has issued, from this court, to the Court of Common Pleas at Lancaster,^(e) and that he so told the party in this case when he applied for the writ; but notwithstanding, he chose to take it on his own responsibility.

Supposing, however, that this court has jurisdiction to direct the writ to issue to the Court of Common Pleas at Lancaster; I think that, according to the view taken, by Lord Eldon, in *Pierce v. Thomas*, an application for it ought to be made to this court: for, in that case, a *certiorari* had issued as of course, without any affidavit or application to the court; and on an application being made to quash it on those grounds, his Lordship held [*561] that the objections taken were fatal, and that the writ must be quashed: and when we see that, in *Edwards v. Bowen*, the same learned Judge doubts whether the Vice-Chancellor has jurisdiction to order the writ to issue, it is quite manifest that it cannot be issued without any order of the court at all.

(a) 2 Rnm. 153. (b) 1 Barn. & Cres. 143. (c) Doug. 751, note. (d) Jac. 54.

(e) This information appears not to be correct; for, on the 18th of July, 1822, the Lord Chancellor ordered the writ to issue, to the Court of Common Pleas at Lancaster, on an application made by the defendants in an action for false imprisonment. The application seems to have been made *ex parte*, supported by affidavit. The grounds of it were that a material witness, being out of the jurisdiction of the local court, could not be compelled to attend at the trial of the action, and that many material and legal questions were likely to arise at the trial, in discussing a bankruptcy of which the defendants were the commissioners, and, in that character, had committed the plaintiff for not answering questions propounded to him on his examination. *In re Ashworth*, Reg. Lib. A. 1821, fol. 1800.

A subpoena *ad testificandum* issued out of the Common Pleas at Lancaster, may now be effectually served in any part of England and Wales. See 4 and 5 W. 4, c. 62, s. 29.

1840.—Perkin v. Stafford.

"Whereas Mr. *Romilly*, of counsel for the said M. Worthington, this day moved, &c., &c., this court doth order that the said writ of *certiorari* be superseded, and the proceedings taken off the file of this court: and it is ordered that a writ of *procedendo* do issue to Her Majesty's Court of Common Pleas for the county palatine of Lancaster: and it is ordered that the defendant, F. W. Remnant, do pay, to the plaintiff, his costs incurred by issuing the said writ of *certiorari*, such costs to be taxed by the Master in rotation."

*R. T. PERKIN v. THOMAS STAFFORD. R. T. PERKIN v. WILLIAM STAFFORD, MARY ANN STAFFORD AND THOMAS STAFFORD. [562]

1841; 4th December.—Mortgagor and mortgagee; Decree; Foreclosure; Disclaimer.

If some of the defendants in a foreclosure suit disclaim, the court will decree them to be foreclosed, and not simply dismiss the bill as against them.

THE original bill was filed, by the personal representative of the mortgagee against the mortgagor, to foreclose a mortgage, for 500 years, of certain tenements in the borough of Southwark. The defendant appeared to the bill, but died, before he had answered it, having devised the mortgaged premises to William Stafford in fee, in trust for his widow, Mary Ann Stafford, and appointed them executor and executrix of his will. The plaintiff, thereupon, filed a bill of revivor and supplement against William Stafford, Mary Ann Stafford and Thomas Stafford, the younger; (the testator's heir;) and they put in a joint and several answer, admitting the plaintiff's title and the will, but disclaiming, on the part of the widow and heir, any interest in the mortgaged premises or the equity of redemption thereof.

Mr. *Girdlestone*, for the plaintiff, contended that a decree of foreclosure ought to be made against the two defendants who had disclaimed, as well as against the other defendant. He referred to 2 Daniell's Prac. 235, 236, and also to *Collins v. Shirley*,^(a) and *Ablett v. Edwards*.^(b)

*Mr. *Wakefield*, for the defendants, contended that a decree of [563] foreclosure ought not to be made against the defendants who had disclaimed, but that the bill ought to be dismissed, as against them, with costs.

(a) 1 Russ. & Myl. 638; Reg. Lib. A. 1839, fol. 2326.

(b) Not reported. Rolls, 3d June, 1840. The decree in *Collins v. Shirley*, after reciting that two of the defendants had disclaimed any interest in the mortgaged premises, decreed that they should be foreclosed. It then directed an account of the principal and interest due on the mortgage, &c., and decreed that, on non-payment, by the defendant who had not disclaimed, of the amount found due and of the plaintiff's costs, within the usual time, that defendant should be foreclosed.

The decree in *Ablett v. Edwards*, recited and decreed in like manner, except that it ordered the plaintiff to pay the disclaiming defendant's costs, and add them to the mortgage debt.

 1841.—*Emery v. Newson.*

The Vice-Chancellor held that the plaintiff was entitled to have a decree of foreclosure made against the defendants who had disclaimed, as it was of essential importance to his title.

The minutes of the decree, after reciting that the widow and heir had, by their answer, disclaimed all interest in the premises, proceeded to foreclose them: and then directed an account to be taken of the principal and interest due on the mortgage, &c., and decreed that, on non-payment thereof and of the plaintiff's costs within the usual time, William Stafford should be foreclosed.[1]

[*564]

*EMERY v. NEWSON.

1841; 10th and 11th December.—New orders of August, 1841; Practice; Construction; Infant defendant.

The 21st order of August, 1841, does not apply to the case of an infant defendant.

MR. JEREMY applied for leave to proceed, against an infant defendant, in the manner pointed out by the 21st order of the 26th August, 1831.[2]

The Vice-Chancellor was of opinion that the order did not apply to the case of an infant defendant: and, on the following day, his Honor said that he had ascertained that the Master of the Rolls, the Vice-Chancellor Wigram and a learned counsel, were of the same opinion.

[1] As to the right of a party who disclaims, to have the bill dismissed as to him, with costs, see *Collins v. Shirley*, 1 Russ. & M. 638, and n. 1 and 2, *ibid.* When a defendant must answer fully, notwithstanding a disclaimer, see *Glassington v. Thwaites*, 2 Russ. 458, 463, n. 1. *Graham v. Coape*, 9 Sim. 93. S. C. 3 Myl. & Cr. 638, and *ibid.* 644, n. 1. *Hutchinson v. Reed*, 1 Hoff. Ch. Rep. 317. Where a defendant in a foreclosure suit who had filed an answer and disclaimer in ignorance of her rights to the equity of redemption, applied after a decree to account for liberty to withdraw the disclaimer, and amend the answer, or to file a supplemental answer, stating her claims to the equity of redemption, the court refused the order without prejudice to any application which the defendant might make after satisfaction of the plaintiff's demand under the decree. *Glenny v. Murdock*, 1 Flan. & Kel. 277. Where a defendant disclaimed all interest, and then proceeded to answer the bill in detail, he can in no case have more costs than upon a disclaimer, or what is necessary to show that he had parted with the interest once held by him. *Hutchinson v. Reed*, *ubi sup.*

[2] For this order, see Cr. & Ph. 373.

1841.—Clough v. Dixon.

CLOUGH v. DIXON. COLLINS v. BOND. COLLINS v. COLLINS.

1841; 14th and 15th December.—Administrator; Parties.

A bill was filed, by a residuary legatee, against A. and B., the administrators of the deceased's effects, for an account of the assets received by them. A. died without having appeared to the bill; and C. obtained letters of administration of his goods, limited for the purpose only to attend, supply, substantiate and confirm the proceedings in the suit, until a final decree should be made and executed; and C. was brought before the court, by a supplemental bill. Held that, owing to the limited nature of those letters of administration, an account of A's receipts could not be taken; but that a general administrator to A. must be brought before the court.

THE hearing of the original cause, is reported ante, vol. 8, p. 594. The decree then made was affirmed, by the Lord Chancellor, 3 Myl. & Craig, p. 490. It was afterwards discovered that Mrs. Clough had died, in India, before the original cause was heard: and, consequently, the decree was nugatory.[1]

*On the 10th of May, 1839, letters of administration to Mrs. Clough, [*565] were granted to C. W. Collins, for the use and benefit of Mr. Clough who was resident in India. In March, 1841, W. C. Collins died; and, on the 18th of May following, letters of administration to Mrs. Clough, were granted to Caleb Collins and Anne Elizabeth Collins, for the use and benefit of Mr. Clough.

On the 21st of July, 1841, Caleb Collins and Anne Elizabeth Collins filed a bill of revivor against Mrs. Bond and the personal representatives of her late husband, John Bond; alleging that the plaintiffs, as the personal representatives of Mrs. Clough, were entitled to what might be recovered, in the original suit, in respect of Mrs. Clough's share of the undisposed of residue of Ann Dixon's estate, and also to revive that suit, which had become abated by Mrs. Clough's death; and praying that the suit might be revived against Mrs. Bond, and the personal representatives of John Bond. On the 10th of August, 1841, the suit was revived accordingly.

In August, 1841, Caleb Collins and Ann Elizabeth Collins filed a bill of supplement, alleging that Thomas Reup Dixon, as had been lately discovered, died in 1838, without having appeared to the original bill, and that, on the 10th of July, 1841, letters of administration of his goods, chattels and credits, limited for the purpose only of the proceedings had and to be had in the original suit and in any other suit for the same purpose, until a final decree therein and complete execution thereof, were granted, by the Prerogative Court of the Archbishop of Canterbury, to Mary Collins; and praying that Mary Collins might answer the supplemental matter, and that the plaintiffs might *have the benefit of the original suit and the pro- [*566]

[1] A decree or order may be entered *nunc pro tunc*, where the cause has abated by the death of a party after argument, and before a decision thereon. *Vroom v. Ditmas*, 5 Paige, 528. *Bradley v. Root*, id. 643. *Quackenbush v. Leonard*, 9 Paige, 351. *Rogers v. Paterson*, 4 Paige, 409. *Thomson v. Dudley*, 3 Edw. Ch. Rep. 137.

 1841.—Clough v. Dixon.

ceedings therein, against her, as the personal representative of Thomas Reup Dixon, in like manner as if he had appeared to and answered the original bill; and, if necessary, that the usual accounts might be taken of Dixon's personal estate, and that the same might be applied in a due course of administration, and in or towards payment of what was or might be found due to the plaintiffs as Mrs. Clough's personal representatives.

The original and supplemental causes now came on to be heard. Copies of the decree made on the original hearing, and of the letters of administration granted to Mary Collins, were produced. By the decree, it was referred, to the Master, to take an account of the personal estate of Ann Dixon, not specifically bequeathed come to the hands of Mrs. Bond, Thomas Reup Dixon, and the late John Bond; and it was ordered that what, on taking the account should appear to have come to Mrs. Bond's hands since John Bond's death, or to Dixon's hands, should be answered by them respectively; and that what should appear to have come to John Bond's hands, should be answered by the other defendants, his executors, they admitting assets; and, that the Master should take an account of Ann Dixon's debts, funeral and testamentary expenses, &c., and that her personal estate not specifically bequeathed should be applied in payment of her debts, &c., in a due course of administration: and that the Master should ascertain the amount of the clear residue of her personal estate and of Mrs. Clough's share therein; and should inquire and state whether any and what part of such share had been paid or satisfied, and by what means; and that Bond's executors, they admitting assets, [*567] "should be personally charged with the sum of 1348*l.*, admitted, in their answer, to have been drawn out of Child's bank by Dixon, with interest at four per cent.; and it was declared that the sum of 988*l.* and interest after the rate aforesaid, part of the 1348*l.* formed the share or part of the share of Mrs. Clough, &c. &c.

The letters of administration granted to Mary Collins, recited the bill in the original suit, and that it was alleged that Thomas Reup Dixon was late of Boulogne in France, and died on the first of March, 1838, having, at the time of his decease, *goods, chattels and credits, in divers dioceses* within the province of Canterbury, sufficient to found the jurisdiction of the Prerogative Court, and *having made his will, and thereof appointed his wife, Eliza Dixon, sole executrix and universal legatee*, who had not then proved the will in the Prerogative Court: and that it was further alleged that Mrs. Clough was dead, and that Caleb Collins and Anne Elizabeth Collins, as the administrators of her estate and effects, intended to file their bill of revivor in the suit of *Clough v. Dixon*; but were unable to do so, with effect, for want of a representative of Thomas Reup Dixon to be made a party thereto: and that it was further alleged that the surrogate therein named had, on the petition of Caleb Collins and Anne Elizabeth Collins, decreed letters of administration of the goods, chattels and credits of Thomas Reup Dixon, limited as after mentioned, to be granted to Mary Collins, as a person for that purpose

1841.—Clough v. Dixon.

named by and on behalf of Caleb Collins and Anne Elizabeth Collins, Eliza Dixon having consented thereto. The letters of administration then proceeded thus: "We do, therefore, by these presents grant full power and authority to you *the said Mary Collins, to administer and faithfully [*568] dispose of the goods, chattels and credits of the said Thomas Reup Dixon, limited for the purpose only to attend, supply, substantiate and confirm the proceedings which shall have been had or may, at any time hereafter, be had in the aforesaid cause or suit about to be revived in the High Court of Chancery, or in any other cause or suit which may, hereafter, be commenced in the same or any other court, between the aforesaid or any other parties, touching and concerning the said premises, and until a final decree shall be had and made therein, and the said decree carried into execution, and the execution thereof fully completed, but no further or otherwise." The letters of administration then constituted Mary Collins, administratrix of the goods, chattels and credits of T. R. Dixon, limited for the purpose before expressed.

Mr. *Whitmarsh*, sen., Mr. *Girdlestone*, and Mr. *Whitmarsh*, jun. for the defendants, Mrs. Bond and her late husband's executors, said that the letters of administration to T. R. Dixon, which had been granted to Mary Collins, did not enable her to receive and deal with his assets: that the parties for whom they appeared, were entitled to have Dixon's assets first applied to make good the sum which he had drawn out of Child's bank; but that could not be done unless a *general* representative of Dixon, who was the delinquent party, was a party to the suit.

Mr. *Richards* and Mr. *Walker*, for the plaintiffs, said that the limited letters of administration which had been granted to Mary Collins, were amply sufficient for the purpose of which Dixon's estate was required to *be represented in the suit: for that no relief was prayed, by the original bill, against Dixon: (a) that the object of the suit was to make Bond's estate answerable for the sum which had been drawn out of the bank: that, where a suit was instituted for the purpose of making one of two trustees responsible for a breach of trust, the only purpose for which the other trustee was made a party to the suit, was that he might attend the taking of the accounts in the Master's office; which he was entitled to do, as his co-trustee might institute a suit against him for contribution.

(a) The original bill prayed for an account of Ann Dixon's estate possessed by T. R. Dixon, Mr. and Mrs. Bond, and the executors of Mr. Bond, and of her funeral and testamentary expenses and debts; and that the clear residue of her estate, and Mrs. Clough's share therein, might be ascertained; and that Mrs. Bond and her late husband's estate, might be declared to be liable for the moneys which had been paid into Child's bank, and drawn out by Dixon, with interest thereon; and that Mrs. Bond and her late husband's executors, might be decreed to pay what should be found due from them on taking the before mentioned accounts: and, if Bond's executors should not admit assets, that the usual accounts might be taken of his estate; and that Mrs. Clough's share of Ann Dixon's residuary estate might be paid to her and her husband.

1841.—*Clough v. Dixon.*

Mr. *Rolt*, for Mary Collins, was about to argue against the objection raised by the defendant's counsel ; but,

The Vice-Chancellor said that he could not be heard for that purpose, as the objection which had been raised, affected the plaintiffs only. His Honor added that he could not dispose of the objection, until he had heard what decree the plaintiffs intended to ask for.

[*570] *Mr. *Richards* :—We ask for a decree in the same terms as the original decree.

Mr. *Whitmarsh* :—The original bill prays that T. R. Dixon, as well as the other defendants, may account for Ann Dixon's estate ; and the supplemental bill asks for an account of T. R. Dixon's estate. How can those accounts be taken without having his general personal representative before the court ?

Mr. *Richards* :—If we are not entitled to a decree to the extent which we ask, we are willing to waive the account against T. R. Dixon.

Mr. *Girdlestone* :—The suit is not confined to the sum abstracted from Child's bank. The original bill states that T. R. Dixon and Mr. and Mrs. Bond possessed assets of Ann Dixon to the amount of 20,000*l.*; and then it prays for a general account and for a general administration of her estate. Is it then possible to sustain this suit as against Mrs. Bond and her late husband's executors, without having a complete personal representative of T. R. Dixon before the court? Dixon died without having even appeared to the original bill ; therefore, so far as the purposes of the suit are concerned, he may be fairly considered to have been dead at the time when that bill was filed. The question then is, if he had been dead when the original bill was filed could this decree have been made, with this limited administratrix before the court. It is perfectly manifest that the decree could not

[*571] *have been made, without a full administrator to Dixon being a party to the suit. The letters of administration to him which have been granted, show that he left goods and chattels in divers dioceses, and that he made a will and appointed his wife executrix : but those letters of administration, give his administratrix no power either to receive or apply his assets, or to bind them by any admission in her answer : nor, as the suit is now constituted, can any decree or report be made, which will have the effect of binding his assets. The plaintiffs have no right to waive the accounts prayed against Dixon and his estate ; for my clients have a right to have those accounts taken, and a decree made which will have the effect of binding his assets. But the court can do neither of those things, except in the presence of a person who fully represents those assets. It can not declare the liability of Bond's estate, in the absence of a full administrator to Dixon : for it is one of the best established principles of a court of equity, to do complete justice and prevent multiplicity of suits. *Knight v. Knight.(a)* In that case Lord Talbot, C., held that the executor was a necessary party to a bill against the

(a) 3 P. W. 331.

1841.—Clough v. Dixon.

heir of a deceased covenantor ; for the court would not first decree the heir to perform the covenant, and then put him to file another bill, against the executor, in order to reimburse himself out of the personal assets. Your Honor's judgment in *Munch v. Cockerell*(a) also shows that a plaintiff who seeks relief, in this court, in respect of a breach of trust, can not select one or more of the parties to the act complained of, but must make them all defendants to the suit. If, as the plaintiffs in this case admit, an administrator to T. R. Dixon, is a necessary party to this suit, the court must have before it a complete administrator to him ; for, otherwise, it can not [*572] do complete justice between the parties.

Mr. Richards :—The plaintiffs are entitled to have the liability declared, in the first instance, against the wholly solvent executor : *Walker v. Symonds* : (b) but the court can not, in this suit, decree, Dixon's assets to make contribution, to Bond's estate, in respect of the sum which Bond's estate may be compelled to pay. Consequently the defendants have no right to have Dixon's assets either accounted for or administered in this suit. The letters of administration, though limited, are sufficient to enable Bond's executors to institute a suit, for contribution, against any person taking out a more extended administration to Dixon ; and, therefore, they are sufficient for the purposes of this suit.

THE VICE-CHANCELLOR :—The object of this suit is to have Mrs. Clough's shares of Ann Dixon's residuary estate, determined ; but, as that can not be done without ascertaining what the assets of Ann Dixon were, the original bill prays and the decree directs a general account to be taken of her assets. But the court can not determine what the assets of that lady were, without having an account of her assets received by Thomas Reup Dixon. As, therefore, the main object of the suit, can not be attained, without taking that account, the plaintiffs are not at liberty to waive it.

I do not, however, see how that account can be taken without having before the court some person who *represents, generally, the personal [*573] estate of T. R. Dixon. Mary Collins, under the limited letters of administration which have been granted to her, has no dominion over the general assets of T. R. Dixon, nor could she, under those letters of administration, recover any part of his assets. I do not, therefore, see how the account of the assets of Ann Dixon, received by Thomas Reup Dixon, can be taken as against her.

The defect in my opinion, is a substantial one ; and the cause must stand over in order that either the executrix or a general administrator to T. R. Dixon, may be brought before the court.[1]

(a) Ante, vol. 8, p. 231, *et seq.*

(b) 3 Swanst. 1.

[1] Vide *Lowry v. Fulton*, 9 Sim. 104, 113, n 1 ; *Cave v. Cork*, 2 Yo. & Coll. C. C. 130.

 1841.—In re Grant.

IN THE MATTER OF P. F. GRANT, AND IN THE MATTER OF 11 GEO.
IV. AND 1 WILL. IV. c. 60.

1841: 14th December.—New Orders; Construction of 48th Order of August, 1841; Master's Report.

Under the 48th order of August, 1841, it is not sufficient for the Master to give a short description of the documents laid before him, and then to state his finding; but he ought to mention on which of those documents he proceeded, and to show what were the contents thereof from which he drew his conclusion, and then to state his finding.

THIS was a petition to confirm the Master's report finding certain persons to be trustees within the intent and meaning of the act above mentioned.

The Master, intending to comply with the 48th order of the 26th of August, 1841,[1] framed his report in the following manner: "In pursuance of an order made, in these matters, on the petition of John Hill and Henrietta Gordon his wife, and Henrietta Mary Johnstone Hill, spinster, bearing date, &c., whereby it was referred to me to inquire and state whether Helena Dallas [*574] *and Barbara Gordon Grant, in the said petition named, are trustees of the hereditaments and premises comprised in the indenture of mortgage of the 1st of May, 1830, in the petition mentioned, within the intent and meaning of the said act; I have been attended by the solicitors of the said petitioners, and have proceeded to make the inquiry directed by the said order; and a state of facts hath been laid before me, by or on behalf of the said petitioners, together with the several documents and affidavits hereinafter mentioned, that is to say, an office copy of an indenture of settlement, dated the 2d day of November, 1827, also of a deed poll dated the 27th day of April, 1840, also of the will of Robert Browne, Esq. dated the 12th of October, 1830, also an affidavit of the said petitioners sworn the 27th of July, 1840, also an affidavit of the petitioner Henrietta Mary Johnstone Hill, sworn the 25th day of February, 1841. Upon consideration of which said state of facts and the several documents and affidavits aforesaid, I find that the said Helena Dallas and Barbara Gordon Grant, as the co-heirs at law of Peter Fraser Grant, deceased, the mortgagee of the hereditaments and premises comprised in the said indenture of mortgage of the 1st day of May, 1830, and who was a trustee of the mortgage money upon the trusts of the said indenture of settlement of the 2d day of November, 1827, set forth in the said state of facts, are trustees of the said mortgaged hereditaments and premises within the intent and meaning of the act of Parliament in the said order mentioned.

Mr. *Toller*, for the petitioners, having applied to confirm the report,

The Vice-Chancellor said that the Master had not stated the grounds [*575] on which he had formed the *conclusion which he had come to, and, therefore, the court, before it could confirm the report, must peruse and consider the contents of all the documents referred to in the report, in order to see whether the Master's finding was correct. His Honor added that

[1] Vide Cr. & Ph. 381.

 1840.—*Bankes v. Le Despencer*.

in future, he should direct the Masters to state the grounds upon which they had formed their opinion.

On a subsequent day his Honor said as follows:—I have had a conversation with a learned Judge, as it had been mentioned to me that a petition had been brought before him in which the same thing had been done, by another Master, that was done in this case; but that learned Judge was of opinion that the report which he was asked to confirm, was wrong in point of form, and that the Master, in that instance, had misconceived the 48th order; the real object of which was, not to direct the Master to omit, from his report, the statement of the grounds on which he proceeded; but to leave that as it formerly was, and to make this additional circumstance necessary, that, when the Master does state the grounds on which he came to the conclusion, he shall also state the evidence from whence he deduces those grounds; and that the order was made for preventing disputes which frequently arise on the Master's report, on this question, namely, on what evidence does the Master proceed. Whereas, if the terms of the 48th order are adhered to by the Master, then he will state, on the face of his report, what depositions, examinations, &c., he has gone upon, and also what are the facts which he has inferred from those matters of evidence, and what is the ultimate conclusion to which he comes.

I really think, in this case, it must be sent back to the Master to review his report.(a)

*BANKES v. THE BARONESS LE DESPENCER, AN INFANT, AND [*576]
OTHERS.

1840: 5th, 6th and 10th March.—Executory trust; Settlement of estates to go along with a barony in fee; Perpetuity; Remoteness.

Lord Le Despencer being seized of the ancient barony of Le Despencer in fee, conveyed real estates to trustees, in trust, after the death of himself and his eldest son, to settle the estates to the use of such persons, for such estates, and in such manner that the same should, so far as the law would permit, be strictly settled so as to go along with the dignity of Le Despencer, so long as the person possessed of the same dignity should be a lineal descendant of the settlor, and be held and enjoyed by the person for the time being possessed of the same dignity, and being such lineal descendant as aforesaid; and that, during every suspension or abeyance of the same dignity, within the limits prescribed by law for strict settlements, the rents of the estates might be equally divided amongst the co-heirs *per stirpes* of the person or persons respectively, by reason of whose death or deaths without issue male, such suspension or abeyance should be, for the time being, occasioned.

Held that the above trust was not void for remoteness; and the Master was directed to approve of a proper settlement accordingly.

By indentures of lease and appointment and release, of the 7th and 8th of August, 1826, made between Thomas Lord Le Despencer, and the Honor-

(a) The above note of the judgment is given *ex relations*; but it was perused by the Vice-Chancellor before it was sent to press.

1840.—*Banks v. Le Despencer*.

able Thomas Stapleton, his eldest son and heir apparent, of the first part, the Earl of Roden, the Honorable Hercules Robert Pakenham, the plaintiffs William John Banks and John Horace Thomas Stapleton, of the second part, and the Earl of Falmouth and Freeman Willis Elliot, of the third part, after reciting that, by virtue of divers conveyances and assurances, executed and made by or by the direction of Thomas Lord Le Despencer and Thomas Stapleton or one of them, the manor or lordship and castle of Mereworth in the county of Kent, and divers other manors or lordships, messuages, farms, lands and hereditaments in the same county, or the right or equity of redemption thereof, stood limited and assured to the use of such person and persons, for such estate or estates, intents, and purposes, &c., as Thomas Lord

[*577] Le Despencer and Thomas Stapleton should by, any deed or deeds, instrument or instruments in writing, to be by both of them sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time or at any time, jointly direct or appoint, subject nevertheless to the several mortgages and other incumbrances then affecting the same premises or parts thereof and thereafter mentioned, (that is to say,) &c., (several mortgages and other charges were here enumerated, and, amongst them, one for 27,300*l.* to John Eldred Walters, and another for 9000*l.* to Henry Banks and George Banks.) And after further reciting that the execution of the mortgages for 27,300*l.* and 9000*l.* respectively, and the limitations of certain parts of the before mentioned premises to the joint appointment of Thomas Lord Le Despencer and Thomas Stapleton, which were not previously subject to such joint appointment, were parts of an arrangement then lately agreed upon, between Thomas Lord Le Despencer and his son, respecting their estates in the county of Kent; and that the greater part of the mortgage debt of 27,300*l.* was incurred for the purpose of enabling Thomas Lord Le Despencer to repurchase certain life annuities granted by him, and other part thereof was incurred for his exclusive benefit; and that it was part of the arrangement that Thomas Lord Le Despencer should effect and keep up insurances on his own life, to such an amount as would, at his death be sufficient to pay off the mortgage for 27,300*l.*, except 12,700*l.* thereof, which it was agreed should remain an incumbrance upon the premises: and after further reciting that Thomas Lord Le Despencer and Thomas Stapleton were desirous, and that it was a further part of the arrangement that some provision should be made for securing, during the life of Thomas Lord

[*578] Le Despencer, the due payment of the interest of the said several principal sums, and also the due payment of the premiums on the policies of insurance effected or intended to be effected or appropriated for the purpose aforesaid, until the money due on the said principal sum of 27,300*l.* should be reduced to 12,700*l.*: and that Thomas Lord Le Despencer and Thomas Stapleton were further desirous, and that it was the ultimate object of the arrangement, that, subject to the aforesaid charges and incumbrances, all the estates should be settled upon Thomas Lord Le Despencer and Tho-

1840.—*Bankes v. Le Despencer.*

mas Stapleton, successively, for their lives, and, that from and after the deceased of the survivor of them, *all the estates should, so far as the law would permit, be strictly settled so as to go along with the baronial dignity of Le Despencer, and be held and enjoyed by the person for the time being possessed of the same dignity, for the support thereof, so long as the person possessed of the same dignity should be a lineal descendant of Thomas Lord Le Despencer, but with a provision that, in case, the dignity should at any time or times, within the limits prescribed, by law, for strict settlements, be suspended or in abeyance, the rents and profits of the same estates should, during the continuance of every such suspension or abeyance, be equally divided amongst the co-heirs per stirpes of the person or persons respectively by reason of whose death or deaths without issue male, such suspension or abeyance should be, for the time being, occasioned*: and that it had been agreed, between Thomas Lord Le Despencer and Thomas Stapleton, that their several objects then remaining to be accomplished as aforesaid, should be effected in the manner thereafter mentioned: it was witnessed that, in order to effect the said objects of Thomas Lord Le Despencer and Thomas Stapleton, and in consideration of their having mutually concurred in the execution of the *mortgages to [*579] John Eldred Walters and Henry Bankes and George Bankes respectively, they, the said Thomas Lord Le Despencer and Thomas Stapleton, by force and virtue of every power and authority in them vested or enabling them in that behalf, appointed, and also conveyed unto the Earl of Roden, Hercules Robert Pakenham, and the plaintiffs William John Bankes and John Horace Thomas Stapleton and their heirs, the manors or lordships of Mereworth, West Peckham, &c., and the capital messuage called Mereworth Castle, and also the park called Mereworth Park, &c., &c., and all other the manors, messuages, and other hereditaments in the county of Kent, which Thomas Lord Le Despencer and Thomas Stapleton, or either of them, were or was entitled to appoint, or were or was seised of or entitled to, at law or in equity, for an estate of freehold or inheritance in possession, reversion or remainder: to hold the same unto the Earl of Roden, Hercules Robert Pakenham, and the plaintiffs William John Bankes and John Horace Thomas Stapleton, their heirs and assigns, subject to the several charges and incumbrances aforesaid, and also to a term of years thereby limited to Lord Falmouth and F. W. Elliot, to the use of Thomas Lord Le Despencer and his assigns, for his life, without impeachment of waste (except voluntary waste) and, immediately after the decease of Thomas Lord Le Despencer, to the use of Thomas Stapleton and his assigns, for his life, without impeachment of waste, (except voluntary waste,) and immediately after the decease of the survivor of them, to the use of the Earl of Roden, H. R. Pakenham, and the plaintiffs W. J. Bankes and J. H. T. Stapleton, their heirs and assigns, in trust that they should, with all convenient speed after the decease of the survivor of Thomas Lord Le Despencer and Thomas Stapleton,

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[*580] convey, settle and assure all and singular the *manors and other hereditaments thereinbefore appointed, granted and released, to the use of such persons, for such estates, and with, under and subject to such powers, provisoes, declarations and agreements, and in such manner, in all respects, consistently with and in order to effect the said intent of Thomas Lord Le Despencer and Thomas Stapleton, that the same estates should, *so far as the law would permit, be strictly settled so as to go along with the dignity of Le Despencer*, so long as the person possessed of the same dignity should be a lineal descendant of the said Thomas Lord Le Despencer, and be held and enjoyed by the person for the time being possessed of the same dignity, and being such lineal descendant as aforesaid; and that, *during every suspension or abeyance of the same dignity, within the limits prescribed by law for strict settlements, the rents and profits of the same premises should or might be equally divided amongst the co-heirs, per stirpes, of the person or persons respectively by reason of whose death or deaths without issue male, such suspension or abeyance should be, for the time being, occasioned*, as, by three counsel in the law, whereof the Attorney or Solicitor General for the time being, whichever would undertake the reference, should be one, and whereof the others should be named by him, or as, by the majority of such three counsel, should be advised and directed; and in case both the Attorney and Solicitor General for the time being, should decline the reference, or if, upon such reference as aforesaid, no two of the referees should agree as to the mode of settlement, then in such manner as should be directed, by the High Court of Chancery, upon a bill to be filed, by the trustees or the survivors or survivor of them, or the heirs and assigns of such survivor, and which they and he were and was thereby directed to file against such person or persons as they or he might think proper,

[*581] for the purpose of obtaining *such direction of the court; and to and for no other use, intent or purpose whatsoever.

Thomas Stapleton died on the 1st of June, 1829, leaving issue one child only, the defendant Baroness Le Despencer. Thomas Lord Le Despencer died on the 3d of October, 1831. After Lord Le Despencer's death, the plaintiffs who, by the disclaimer of Lord Roden and H. R. Pakenham, had become the sole trustees of the indenture of the 8th August, 1826, caused it to be referred to the Solicitor General and two other counsel named by him, to approve of the settlement to be made in pursuance of the trusts of that indenture: but no two of the referees agreed as to the form of the settlement. In consequence of which the bill was filed against all the surviving lineal descendants of the late Lord Le Despencer, praying that the trusts of the indenture of the 8th of August, 1826, might, so far as was necessary, be carried into execution under the decree of the court; and that the rights and interests of all parties in the manors and hereditaments, might be declared, and that a proper settlement, conveyance and assurance thereof in pursuance of

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the trusts of the indenture, might be settled, prepared and executed under the direction of the court.

By the decree at the hearing, the following, amongst other inquiries, were directed: in what manner the barony of Le Despencer was created, and who was then entitled to the same, and to whom, and in what manner the same stood limited and was descendible; what lineal descendants of Thomas Lord Le Despencer were living at each of the three periods after mentioned, namely, the date of the indenture of the 8th of August, 1826, at Lord Le Despencer's death, and at the date of the report, and which of [*582] them might succeed to the dignity of Le Despencer.

The Master found that the barony of Le Despencer was created, by writ of summons, in the person of Hugh Le Despencer, Chief Justice of England, in the 49 Hen. 3, and was, afterwards, restored and confirmed, by letters patent of 2 Jas. 1, in the person of Maria Fane, only daughter and heiress of of Henry Baron of Abergavenny, who was a lineal descendant from Hugh first Baron Le Despencer; and that it was descendible to her heirs general. The Master further found that, at the date of the indenture of the 8th of August, 1826, Lord Le Despencer had four sons and five daughters living; that all of them were living at his death, except his three eldest sons, of whom the second alone had died without issue; and that all his other children (except one of his daughters, who had died without issue) were living at the date of the report; and that Lord Le Despencer had several grandchildren living at each of the before mentioned periods; and that all his issue then living, might succeed to the dignity. It appeared too, from the report, that the co-heirs presumptive of the Baroness Le Despencer, were the four daughters of the late lord's third son, and that his fourth and only surviving son had issue two sons and two daughters.

The cause now came on to be heard for further directions.

Mr. *G. Richards* and Mr. *Follett*, for the plaintiffs, the trustees of the deed of the 8th August, 1826.

Mr. *Knight Bruce* and Mr. *Loftus Wigram*, for Sir Francis Jarvis Stapleton, the youngest and only surviving son of the late Lord Le Despencer:—The object of the parties to the deed of August, 1826, "which [*583] this court is now asked to carry into effect, was not to create an entail to be governed by the ordinary rules of law, but to create a course of limitation unknown to the rules of law. It is a new device, and, therefore, to be checked. Of the three eminent counsel to whom it was referred to point out the mode in which the intention of the late Lord Le Despencer, and his eldest son, was to be carried into effect, no two could agree upon the subject; indeed it is impossible to give effect to that intention, without creating a perpetuity, which the law will not permit. If the dignity of Le Despencer were to become in abeyance in consequence of a former lord having died leaving only daughters or the issue of daughters, it might continue in abeyance for more than 200 years; and, according to the language of this deed, the trust

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for the co-heirs of the former lord is to continue for the same length of time; and, on the abeyance being determined, the estates are to go back to the title. It is manifest that such a provision can not be carried into effect, without transgressing the rules of law against perpetuity. Besides, this deed makes no provision for the case of attainder. An attainder would not be a suspension of the dignity: the term "suspension," as used in this deed, applies only to an abeyance. The intention expressed, with regard to the settlement to be made, is one and entire; and, consequently, if it fails in part, it must, according to the doctrine laid down, by Sir William Grant, in *Leake v. Robinson*,^(a) fail together.

The case of *Tollemache v. The Earl of Coventry*,^(b) is very [*584] strikingly analogous to the present. There the "principle of the decision invalidated the gift altogether, that is, so far as it extended beyond the widow of the testator and his son. It may be said, perhaps, that the Baroness Le Despencer stands in a position similar to that of the third Lord Vere in the case referred to; but it must be observed that the effect of the decision in that case, was just as adverse to the title of the third lord, as it was to the title of the fourth lord; and the principle of it was that the gift was wholly void (except to the extent before mentioned,) notwithstanding the words: "so far as the rules of law or equity will permit." *Lord Southampton v. The Marquis of Hertford*,^(c) *Stonor v. Curwen*,^(d) *Ware v. Polhill*.^(e)

Mr. *Loftus Wigram*:—The intention expressed, in the deed of August, 1826, with regard to the manner in which the estates are to be settled, is one entire intention. The sentence in which that intention is expressed, consists of two branches: and though that part of it which is comprised in the first branch of the sentence, ending with the words: "being such lineal descendant as aforesaid," might be given effect to; yet, as the other part, which is comprised in the second branch of the sentence, exceeds the limits allowed by law, and therefore can not be carried into execution, no effect can be given to any part of that intention.

The Vice-Chancellor:—The question is, whether the words, in [*585] the second branch of the sentence: "within the limits prescribed by law for strict settlements," do not apply to the words that follow, that is, to the words which direct to whom the rents and profits of the estates are to be paid, during the suspension or abeyance of the dignity.

Mr. *Wigram* and Mr. *Sharpe* appeared for the daughters of the late Lord Le Despencer, and their husbands.

Mr. *Jacob* and Mr. *Tyrrell*, for the Baroness Le Despencer, who was born at the date of the deed of August, 1826:—The argument for Sir Francis

(a) 2 Mer. 363.

(b) 8 Bligh, N. S. 547. S. C. 2 Clark & Fin. 611. This case is reported on the original hearing, in 5 Madd. 232, under the name of *Lord Deerhurst v. The Duke of St. Albans*.

(c) 2 Ves. & Beam. 54.

(d) Ante, vol. 5, p. 264.

(e) 11 Ves. 257.

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Jervis Stapleton is founded on two fallacies: the first consists in taking an erroneous view of the decision in *Tollemache v. Lord Coventry*, and the second, in treating the trust in this case as a trust executed; whereas it is a trust executory.

According to the report of *Tollemache v. Lord Coventry*, in 2d Clark & Fin., the House of Lords did not hold the gift of the chattels to be wholly void, but decided that it was good so far as to vest them in the third Lord Vere,^(a) and that too in a case where the trust was executed and not executory. The decision, therefore, in that case is in favor of our client; for it shows that the intention expressed in the deed of August, 1826, might be carried into effect, so far as to vest the estates in the Baroness for her life at the least. Secondly, where a trust is executory, the court, if it can not give effect to it *in toto*, must give effect to it so far as it can consistently with the rules of law and equity. *And, in this case, [*586] the parties to the deed of August, 1826, have provided, most expressly, that the limitations of the settlement directed to be made, shall not exceed the limits prescribed by law.

With respect to the objection that the settlement does not provide for the case of attainder, it may be observed that attainder is an event which provides for itself: for, when a peer is attainted, he loses his estates and his title together, and nothing that the settlors could have done, would have provided against those consequences.

Mr. *Girdlestone* and Mr. *Lee*, for the four daughters and only issue of the late Lord Le Despencer's third son, three of whom were born at the date of the deed of August, 1826:—The parties for whom we appear are the presumptive heirs of the present Baroness.

The court has been asked, in this case, to come to the conclusion that no settlement at all can be made, because some part of the direction respecting it, which is contained in the deed of August, 1826, is void.—[The Vice-Chancellor: That is applying the same rule where the parties are to take in succession, as is applicable to a case where all the parties are to take at once, as a class.]—The case of *Tollemache v. Lord Coventry*, which has been so much relied on by the counsel for Sir F. J. Stapleton, does not apply to the present: for, first, it related to personal chattels, and not to real estates, and, secondly, the trust was executed and not executory. An executory trust may be carried into execution within the limits allowed by law, although there may be something in the direction, which would go beyond those limits.[1] All that the late Lord Le Despencer and his *eldest [*587] son have required to be done, is that their estates should be settled according to a certain course of limitation, so far as the rules of law and

(a) See 8 Bligh, 563.

[1] Vide *The Attorney General v. Bright*, 2 Keen, 57. *Eyre v. Marsden*, id. 564. *Liley v. Hey*, 1 Hare, 583. *Irving v. De Kay*, 9 Paige, 253.

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equity would permit: and, therefore, the court, if it makes the settlement as far as those rules will permit, does effectuate the intention of the settlors. At the time when the deed of August, 1826, was executed, the late lord's second son was dead without issue; and his third son was dead, leaving only female issue; and, therefore, it was then highly probable that the dignity might become in abeyance within no great distance of time. It was said that the principle of the decision in *Tollemache v. Lord Coventry*, was that the gift was void altogether: but Lord Brougham admits that the gift was good so far as the objects of it who were *in esse* at the death of the testator were concerned: therefore, that case is an authority that the direction in this case, ought to be carried into effect as to the parties who were *in esse* at the time when the deed of August, 1826, was executed. What Lord Eldon says, at the conclusion of his judgment in *Ware v. Polhill*, namely, that the power of sale was void, must be taken in connection with what he had said before; and then it will be seen that what his lordship meant was that, as soon as the party had acquired the absolute interest in the property, the power ceased. The case of *Stonor v. Curwen*, also was cited in the argument against the settlement; but, in our opinion, it has very little application to the present case. The authorities in favor of the settlement which

have not been yet observed upon, are *Lord Dorchester v. The Earl* [*588] *of Effingham*, (a) *Humberston v. *Humberston*, (b) *Gower v. Lord Grosvenor*, (c) *Lord Deerpurst v. The Duke of St. Albans*, (d) *Pelham v. Gregory*, (e) *Phipps v. Lord Mulgrave*, (f) *The Duke of*

(a) *Lord Dorchester v. Earl of Effingham*.—Rolls, 19th March, 1813.—Mr. Lee produced an office copy of the decree in this cause, from which it appeared that Guy Lord Dorchester had made a settlement, by which life estates in his landed property, were given to his sons who were living, with remainders to their first and other sons in tail; reserving, however, to himself, a power to revoke the uses of the settlement, and to appoint new uses either by deed or will; and that his lordship made his will, which was partly as follows: "All my landed estates, to be attached to my title as closely as possible; all the timber, woods and trees on my estates I leave to my executors, in trust to increase my landed property; all debts due to me from government, and all my personal property not otherwise disposed of, I leave to my executors, in trust to increase my landed property."

Sir William Grant declared that, by the effect of the testator's will, the estate tail of the plaintiff, Arthur Henry Lord Dorchester (who was the testator's grandson,) in the settled estates, and the estates tail of all the other male issue or descendants of the testator *in esse* at the time of the testator's death, were abridged to estates for life only, with remainder to their first and other sons, in tail male, in strict settlement: and his Honor ordered the timber on the settled estates to be cut and sold, and the proceeds to be invested in the purchase of lands, to be settled to the same uses as the other estates were settled or subject to under the settlement and according to the effect and operation before declared of the testator's will; and the residue of the testator's personal estate to be laid out in the purchase of land to be settled in like manner. [See a note of this case in 3 Beavan, 180.]

The Vice-Chancellor, on this case being cited to him, observed that Sir William Grant's meaning was to give effect to the direction, in the testator's will, that his landed estates should be attached to his title as closely as possible.

(b) 1 P. W. 332.

(c) 5 Madd. 337

(d) Ibid. 232. See 271.

(e) 1 Eden, 518.

(f) 3 Ves. 613.

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Newcastle v. The Countess of Lincoln, (a) in which Lord "Loughborough seems to have anticipated this very case, *Bacon v. Proctor*, (b) [*589]

Woolmore v. Borrowes, (c) *Mackworth v. Hinzman*, (d) Litt. sect. 352.

Mr. *Knight Bruce*, in reply, said that either the direction for making the settlement, could not be carried into effect at all, or that the utmost that the court could do, was to give a life estate to the Baroness: that it could not give her an estate tail, as it was impossible so to mould that estate as to make it go along with the title.

10th March.—THE VICE-CHANCELLOR:—Since this case was opened, I have had time to look into the question, and my opinion remains the same as it was from the first, namely, that it is a case in which it is the duty of the court to try to give effect to the intention of the parties by making a settlement.

The words of the trust on which the question arises, are that the trustees should, after the decease of the survivor of Lord Le Despencer and Thomas Stapleton, convey, settle and assure all the manors and other hereditaments thereinbefore appointed, granted and released, to the use of such persons, for such estates, and with, under and subject to such powers, provisoes, declarations and agreements, and in such manner, in all respects, consistently with and in order to effect the intention of the settlors, that the same estates should, so far as the law would permit, [1] be strictly settled so as to go along with the dignity of Le Despencer, so long as the person possessed of the same dignity, should be a "lineal descendant of the said Thomas" [*590] Lord Le Despencer and be held and enjoyed by the person for the time being possessed of the same dignity and being such lineal descendant as aforesaid. [2]

If it had stopped here, there would have been no doubt that the court would have directed a settlement to be framed for the purpose of effectuating the general intention of the parties, the meaning of which no human being can doubt. Many instances may be found in which the court has given effect to the intentions of parties expressed in the like general manner. [3]

In *The Countess of Lincoln v. The Duke of Newcastle*, (e) for example, it was not even suggested that the court could not execute a covenant, in a marriage settlement, to settle leasehold estates, so as to go along with real

(a) Ibid. 387. (b) *Turn. & Russ* 31. (c) *Ante*, vol. 1, p. 512. (d) 2 *Keen*, 658.

(e) 12 *Ves.* 216; see 227.

[1] As to the expression, "so far as the law will permit;" See this case, in a subsequent stage, 11 *Sim.* 525.

[2] Vide *Mackworth v. Hinzman*, 2 *Keen*, 658. Although this was a case arising under a will, yet it appears to be peculiarly apt to the present topic. "There is no difference," says Sugden, Lord Chancellor, "in the nature of the thing, between a voluntary settlement and a will." *Rockford v. Fitzmaurice*, 1 *Conn. & Law*. 172.

[3] Vide *Parks v. Parks*, 9 *Paige*, 109, 117. *Hawley v. James*, 5 *Paige*, 459. *Am. Ch. Dig.* Devise X. *Hoxie v. Hoxie*, 7 *Paige*, 187. *Mackworth v. Hinzman*, 2 *Keen*, 663. 1 *Sim.* 271, n. 1.

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estates, so far as the law would allow ; but the question was in what manner the covenant ought to be executed. Lord Eldon, in that case, did not object to the decree because it had directed a settlement ; nor did he object to the House of Lords reforming the decree ; but he objected to the alteration proposed to be made, by Lords Erskine and Ellenborough, in the decree as it originally stood.

There is another instance of the court carrying such a general intention into effect in the case of *Woolmore v. Burrows*. There the direction was that the residue of the testator's fortune should be laid out in land as contiguous as practicable to Stradone in Ireland, to be added and closely entailed to the family estate then in the possession of the testator's [591] relative Thomas Burrows : "and, by a codicil, the testator added that his object in wishing to improve the Stradone estate, was to have a head to the family, who, he hoped, would be kind and attentive to the different branches. And then he directed that, if Thomas Burrows should die without leaving male issue or dispose of Stradone out of the family line, the residue of his fortune should go over to Arnold Burrows, or his nearest relative in the male line. On the hearing of the cause for further directions, it was referred to the Master to approve of a proper settlement of the estates then purchased and thereafter to be purchased with the testator's residuary estate, upon the uses and trusts and according to the directions expressed in the will and codicil. The Master approved of a settlement accordingly. The defendants, however, objected to the settlement on several grounds ; and they excepted to the Master's report. The exceptions were argued before Sir A. Hart, V. C. : and it has always struck me that the observations made, by that able Judge, in deciding on those exceptions, were extremely good ; and, in my opinion, they are applicable to the present, and, indeed, to every other case of the same nature. He says : "It often happens that the court is called on to expound a meaning and execute a purpose, which the testator himself could not have explained in their detail ; and the court is then driven to the necessity of giving such directions as it conceives to be nearest to a probable and rational purpose in the testator's mind." Then Sir A. Hart states the words of the will, and proceeds as follows : "The important words "closely entailed," would require the limitations to be as strict as the rules of law would permit ; and every person *in esse* at the testator's death, must have taken a life estate and no more." Then he says : "In giving effect to the [592] executory directions of a will, the "court will guard all rights by restrictions and covenants in the way of limitations.[1]

[1] "A settlement and a will stand precisely on the same footing, save that the very act of making a settlement *inter vivos* more strongly enforces the probability of an intention that it should be strict, than in the case of a will. A man must make some disposition of his property to take effect when he is gone, but if you in your lifetime settle your property, it must be taken that you mean to do effectually that which you proposed to do at all. The general object, however, of a voluntary settlement, or a will, cannot be collected from the mere nature of the instrument. You

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The case of *Lord Dorchester v. Lord Effingham*, was as follows: Lord Dorchester having settled certain estates which he had purchased, on his sons and their issue, so as to make the sons tenants for life and their sons tenants in tail, and having a general power of revocation and new appointment by deed or will, did, by his will, use this expression: "all my landed estates to be attached to my title as closely as possible." The next Lord Dorchester filed a bill immediately after the death of the former lord, who was his grandfather, and, after setting forth the deeds which contained the limitations, he prayed that he might be declared to be tenant in tail of of the settled estates under the limitations of the deeds. So far as that point was concerned, he was opposed by those who took other interests; and the result was that the court declared that, by the effect of the will, the estate tail of the plaintiff Lord Dorchester in the settled estates, and the estates tail of all the other male issue, were reduced to estates for life, with remainders to their first and other sons in tail male: and it was ordered that the timber money and the testator's residuary personal estate, should be laid out in lands to be settled to the same uses as the other estates were subject to, under the settlements and according to the operation and effect before declared of the testator's will. So that the court, in that case, decided what was the effect of the very general words used by the testator; and directed the estates which were to be purchased with the timber money and the residuary personal estate, to be settled accordingly.

The books are full of instances in which the court has interfered to carry into effect the general intention of the parties, of having a [593] settlement made where only general words are used. So that it is beyond all doubt that the court, in the simple case which arises on the first part of the direction in this case, can order a settlement to be made.

The only question then is, whether there is any thing in the second part of the direction, which is so illegal, as to tie up the hands of the court and prevent it from making any settlement.[1] That part of the direction is in the following words: "And that, during every suspension or abeyance of the same dignity within the limits prescribed by law for strict settlements, the rents and profits of the same premises shall be equally divided among the co-heirs *per stirpes* of the person or persons respectively, by reason of whose death or deaths without issue male, such suspension or abeyance shall be for the time being occasioned, as, by three counsel learned in the law, whereof the Attorney or Solicitor General for the time being shall be one, and whereof the others shall be named by him, or as, by the majority of such three counsel, shall be advised and directed: and in case both, the Attorney and Solicitor General shall decline the reference, or no two of the refer-

must gather the intention of the settlor from the four corners of the settlement itself." Sugden, Lord Chancellor. *Rockford v. Fitzmaurice*, 1 Conn. & Law. 172.

[1] Vide *Parks v. Parks*, 9 Paige, 123.

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ees shall agree as to the mode of settlement, then in such manner as shall be directed by the Court of Chancery upon a bill to be filed by the trustees."

For the purpose of construing this passage, I think that it is not material to consider whether the words: "within the limits prescribed by law for strict settlements," ought to be taken in connection with the words that precede them, namely, "during every suspension or abeyance of the same dignity," or in connection with the words that follow them, namely, [⁵⁹⁴] "the rents and profits of the same premises shall be equally divided between the co-heirs *per stirpes*, &c., the truth is that, in which ever of those two ways you take those words, you find an intention that that division of the rents and profits shall continue no longer than the rules of law allow.

Suppose that the settlement were to be made in this form: namely, that the estates were to be limited to trustees for a term of 1000 years, determinable at the end of twenty-one years from the death of the survivor of all the persons *in esse* at the time of the late Lord Le Despencer's death and then capable of succeeding to the dignity, and that subject thereto, the estates were then limited to the different persons so *in esse* and capable of succeeding to the dignity, for their lives, successively, with remainder to their sons in tail, with remainder to their daughters in tail: and that then the trusts of the term of 1000 years were declared to be that, in the event of there being any abeyance such as is here contemplated, the rents should, during the time (which could not exceed the limits fixed by law,) be disposed of in the manner prescribed: there can be no doubt that that would be a legal mode of settlement. I do not say that that is the only or the best method of executing the trust; but it is one mode which appears to me to be unobjectionable in point of law. And, when you find that the intention of the parties is to do that only which the rules of law will permit, or as it is expressed which may be done within the limits prescribed by law, for strict settlements, my firm opinion is, that it is the duty of the court to refer it to the Master to approve of a proper settlement according to the language of the trust.(a)[1]

(a) *Ibbetson v. Ibbetson*, ante, p. 495, [p. n.]

[1] As to the settlement approved by the Master, and the disposition thereof by the court, see 11 Sim. 508. As to remoteness, see farther, *Newman v. Newman*, 9 Sim. 51. *Vawdry v. Geddes*, Tam. 361. S. C. 1 Russ. & M. 203. *Bland v. Williams*, 3 Myl. & K. 411. *Ibbetson v. Ibbetson*, 5 Myl. & Cr. 26. *Gott v. Cook*, 7 Paige, 521. *Griffith v. Blunt*, 4 Beav. 248.

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1840: 21st March—Annuity; Will; Construction.

Testator, after reciting that the income of his wife, in case she survived him, would consist, in part, of the rent of a leasehold estate, which he had settled on her, directed his trustees, in case the lease should expire in her lifetime, to pay to her, out of the dividends and interest arising from a sufficient part of his personal estate, at their discretion, so much *per annum* as would be an equivalent for the rent lost thereby; and he gave his residuary personal estate to the trustees, in trust to invest it in the usual securities, and to accumulate the income until the lease should expire in his wife's lifetime, and then during the remainder of her life, to pay her the income of the accumulated fund, and, after her death, to stand possessed of the capital for his grandchildren. The lease expired in his wife's lifetime; but the income of the residuary fund was not equivalent to the rent lost. Held that the wife was entitled to have the deficiency of her income made good out of the capital of the residuary fund.

WILLIAM BOYD, by his will, dated the 15th of May, 1830, after reciting that, by the settlement on his marriage with the plaintiff, he had settled on her, during her life, in case she should survive him, the yearly rent of a leasehold estate, called the Battle-bridge estate, and also the dividends of 4000*l.* stock in the London Dock Company, ratified and confirmed the settlement as far as regarded the property settled upon the plaintiff: and, after further reciting that the leasehold estate would, in case the plaintiff should survive him, form a material part of her income, and as the lease under which he held the same, might expire in her lifetime, he directed the trustees thereafter named in case of such an event happening, out of and from *the dividends and interest arising from a sufficient part of his personal estate, at their discretion*, to pay, to the plaintiff, so much *per annum* as would be equivalent to the rent so lost by such lease having expired: and he gave, to the plaintiff, the sum of 500*l.* sterling, to be paid to her within three calendar months next after his decease; and he gave, to the trustees, all his shares, amounting to 600*l.*, in the capital stock of the Commercial Sale-rooms Company in Mincing-lane, London, *upon trust, during the life of the [*596] plaintiff, to pay the interest thereof to her; and he also gave to the trustees, so much of the consolidated bank three per cent. annuities standing in his name at the time of his decease, as would produce the sum of 100*l.* *per annum*; or, if there should not be so much of that stock standing in his name at the time of his decease, then he directed the trustees to purchase, out of his residuary estate, so much three per cent. consolidated bank annuities as would produce the sum of 100*l.* *per annum* in their names, upon trust to receive the said sum of 100*l.* *per annum* produced from the dividends and interest of such stock, and pay the same to the plaintiff during her life. The testator then gave several legacies to different persons, and bequeathed to the trustees all his ready money, moneys in any of the public stocks or funds, and all such sums of money as should be due to him at his decease upon mortgage or other specialty and by simple contract, and all other his personal estate and effects whatsoever, not thereinbefore by him otherwise disposed

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of, upon trust with all convenient speed after his decease, to call in and to compel payment of such part of his said personal estate as should consist of moneys due and owing by judgment, bond, or simple contract, and also all other such part or parts, as they should deem proper and necessary of his personal estate which should consist of moneys invested in any of the public stocks or funds, or be due and owing upon real securities, and to sell and convert into money such part or parts thereof as should consist of specific chattels, and to stand possessed of and interested in the moneys, stocks, funds, and securities which should arise from the sale and conversion of his general personal estate, or which should continue part thereof unconverted, and the dividends, interest and annual produce thereof, upon trust, in the

[*597] *first place, to pay and satisfy, out of such of the same moneys as should first come to hand and be received, all his just debts and funeral and testamentary expenses and the pecuniary legacies thereinbefore bequeathed : and, as to the residue or surplus of the trust moneys which should remain after answering the several purposes aforesaid, he directed that his trustees should lay out and invest the same, in their or his names or name, in some of the parliamentary stocks or public funds of Great Britain or at interest upon real securities in England, and should from time to time, alter and vary and trans- pose, at discretion, as well the same stocks, funds or securities, or any of them, as also such of the stocks, funds or securities, being part of his personal estate, at his decease, which they should not think fit to convert into money or call in as aforesaid, and should stand possessed of and interested in all and singular the moneys, stocks, funds and securities which should be so invested, produced and acquired respectively as last mentioned, or which should continue part of his personal estate unconverted, and the dividends, interest and annual produce thereof, respectively upon trust, in the first place, in the meantime and until his term and interest in the Battle-bridge estate, whereof two years or thereabouts were then unexpired, should expire and determine or the plaintiff should die, which should first happen, to accumulate and improve the interest, dividends, and annual produce of all the residuary moneys, stocks, funds or securities by investing the same and the produce thereof, from time to time, in the names or name of the trustees or trustee for the time being, in some or one of the parliamentary stocks or public funds of Great Britain, or at interest on real security in England to

[*598] be from time to time altered and varied as occasion should *require and such accumulations to be added to and form part of the capital of the residuary moneys, stocks, funds or securities, and to be applied and disposed of accordingly : and upon further trust, in case his term and interest in the Battle-bridge estate should expire and determine in the lifetime of the plaintiff, then and from thenceforth, during the residue of the life of the plaintiff, to pay the interest, dividends and annual produce of all the residuary moneys, stocks, funds or securities and accumulations, unto, or permit the same to be received by the plaintiff or her assigns for her life ; and, from and

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after her decease, his will was that all the residuary moneys, stocks, funds and securities and accumulations, if any, should be held in trust for such of his grandchildren as should be living at his decease, in equal shares.

The testator died on the 10th of December, 1830. His term in the Battle-bridge estate expired on the 24th of June, 1834; and, thereby, the plaintiff sustained a loss of yearly income to the amount of 290*l*.

The interest and dividends of the testator's residuary estate being insufficient to make good the whole of that loss, the plaintiff claimed, by her bill, to have the deficiency supplied out of the capital.

Mr. *Knight Bruce* and Mr. *Teed*, for the plaintiff:—The interest and dividends of the testator's residuary estate are not sufficient, with the dividends of the 4000*l*. London Dock stock, to make up, to the plaintiff, the same amount of income which she had before the lease of the Battle-bridge estate expired. The executors and residuary legatees contend that the deficiency is to be supplied out of the interest and dividends *only [*599] of the residuary estate, and that the capital cannot be touched for that purpose. But this is nothing more than the common case of an annuity directed to be paid out of the interest of a fund; in which case, if the interest is not sufficient to pay the annuity, the capital is applicable to supply the deficiency. If a testator, at the commencement of his will, gives an annuity, and afterwards, directs a fund to be set apart and the interest of it applied in payment of the annuity, he does not thereby, cut down the annuity.[1] Here the testator directs his trustees, in case the lease should expire in the lifetime of his wife, out of the dividends and interest arising from a sufficient part of his personal estate, at their discretion, to pay, to his wife, so much per annum as would be an equivalent to the rent lost by the lease having expired. That direction charges the income of the residuary estate, for all time; and, therefore, it charges the capital. The will clearly shows that the testator was most anxious that his wife's income should be maintained, at its full amount, during the whole of her life; and the directions which he afterwards gives respecting his residuary estate, are only subordinate to that object, *Arundell v. Arundell*,(a) *May v. Bennett*,(b) *Davies v. Wattier*.(c)

Mr. *Jacob* and Mr. *Paley*, for the executors and trustees, declined to argue the question, as the persons beneficially interested in the residue, were parties to the suit.

Mr. *Elderton*, for some of the *cestuis que trust* of the residue:—The testator directs his trustees, out of and from the dividends and interest

(a) 1 Myl. & Keen, 316. [S. C. Coop. Sel. Cas. 139.]

(b) 1 Russ. 370.

(c) 1 Sim. & Stu. 463. [465, n. 1.]

[1] The point here alleged by the counsel, is affirmed in a much earlier decision. *Tyson v. Tyson*, (July, 1828, before Leach, M. R.) 5 Russ. 24. The synopsis of the case is:—"A testator gives to his wife an annuity of 100*l*. which he considers will, with the property which she is entitled to after his death, make up to her an income of 2500*l*. a year: in fact, those gifts make up her income only to 1800*l*; she entitled to have the deficiency supplied out of his residuary estate."

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[*600] arising from a sufficient part of "his personal estate, at their discretion, to pay to his wife, so much per annum as would be an equivalent to the rent lost by the lease having expired. It is quite clear that, under those words, the interest and dividends are alone applicable, *de anno in annum*, to make good the loss. I do not mean to contend that it was to be in the discretion of the trustees whether they should make good the loss or not; but it was to be discretionary in them what part of the estate should be applied for that purpose. If the income of the estate is not sufficient to make good the loss, the consequence is that the legatee, as frequently is the case, can not have all that the testator intended to give to her.

The cases that have been cited, are clearly distinguishable from the present. In *Arundell v. Arundell*, the rent-charge was not directed to be paid out of the rents of the Ashgrove and Tollard Royal estates; but was charged upon the *corpus* of the estates. In *May v. Bennett*, the testator gave an annuity to his widow; and directed his executors to lay out in government security, as much money arising from his estate as would produce the annuity. The executors, instead of purchasing a sufficient sum in the three per cents., as this court would have directed them to do, purchased 1092½. in the five per cents.; which were afterwards converted by act of Parliament, into four per cents.; and, thereby, the dividends became inadequate to satisfy the annuity. It is quite plain that, under those circumstances, the annuitant was entitled to have the deficiency of the dividends made up from the *corpus* of the fund. The facts of those cases are totally different from a case of this kind, where a certain portion of the income of the estate is directed to be paid to the widow. I submit, therefore, that the utmost that this lady is entitled to, is the income of the residuary estate.

[*601] *Mr. Perry for the assignee of the share of one of the *cestuis que trust* of the residue:—I submit that the widow is entitled to have her income made good, not out of the capital, but out of the dividends of the residuary estate. The difficulty of the case arises from the inconsistent dispositions made, by the testator, in the first and last clauses of his will. In the first clause he directs that his wife shall receive compensation out of his estate(a) for what she may lose by the expiration of the lease; but, in the last clause, he directs that she shall receive compensation out of the interest of his residuary estate: and, where there are two inconsistent clauses in a will, the rule is to reject the first and give effect to the last.[1]

(a) The will was stated in the answer of the executors and trustees, as well as in the bill; but it no where appeared that the testator had, in *terms*, charged his estate as above mentioned.

[1] Acc. *Parks v. Parks*, 9 Paige, 110. "I admit this rule is not founded upon a very satisfactory reason, and is only to be adopted from the necessity of the case." Walworth, Ch., *ibid.* 124. "The rule in favor of preferring the latter to the former in two dispositions in a will dealing differently with the same subject is, as we know, applied only after the failure of every endeavor to give such a reasonable construction to the entire dispositions as will render every part of them operative." Knight Bruce, V. C., *Shipperdeen v. Tower*, 1 Ye. & Coll. C. C. 409.

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Mr. Romilly, for the other *cestuis que trust* of the residue, merely submitted the point to the decision of the court.

THE VICE-CHANCELLOR :—It really appears to me that there is nothing in the point.

I do not think that the limited way in which the trust subsequently is declared with respect to the estate, takes away, from the widow, the benefit of the first charge; because the first charge is made with quite a different view.

I think that the plaintiff is entitled to have the deficiency of her income made good, from time to time, out of the *corpus* of the residuary estate.[1]

**ABURROW v. ABURROW.*(a)

[*602]

1840: 27th March.—New Orders; Vice-Chancellor; Jurisdiction.

Petition by tenant in tail, on the death of the tenant for life, for payment of a fund in court arisen from the sale of timber improperly cut by the tenant for life.

The decree, on further directions, was made by the Master of the Rolls, but it did not reserve liberty to apply. Held that the case was not affected by the 11th order of May, 1837, and therefore the application was not improperly made to the Vice-Chancellor.

THIS was a petition for payment of money out of court.

The suit was instituted by an infant tenant in tail under a will, against the first tenant for life and the other parties interested, to restrain the tenant for life from committing waste, and for an account of the proceeds of certain timber cut by him.

By the decree on further directions, made on the 27th July, 1804, the tenant for life was ordered to pay, into court, the amount of the proceeds of the timber cut by him, and, in default of payment, a receiver was appointed of the estates of which he was tenant for life.

By subsequent orders, made on interlocutory applications, the receiver was discharged on payment, by the tenant for life, of the sum ordered, by the decree on further directions, to be paid by him; and certain other sums, the proceeds of further cuttings of timber, were paid into court; and all such sums were invested, and the dividends were ordered to be paid to the tenant for life.

No liberty to apply was given either by the decree or by the subsequent orders.

The decree on further directions was made by the Master of the Rolls, and the subsequent orders by the Lord Chancellor.

(a) *Ex relations.*

[1] Vide *Stamper v. Pickering*, 9 Sim. 176, and n. 1, *ibid.* *Clason v. Lawrence*, 3 Edw. Ch. Rep. 48, 54. *Ante*, 599, n. 1.

 1840.—*Logan v. Baines.*

[*603] *The first tenant in tail having barred the entail and having subsequently died in the lifetime of the tenant for life, his representatives petitioned on the death of the tenant for life, for the transfer to them of the fund in court.

Mr. *Jacob* and Mr. *Freling*, for the petitioners, suggested a doubt whether the application was made to the right court; and submitted that, as this was neither an interlocutory application, nor a petition presented under or pursuant to the liberty to apply contained in any decree or decretal order,^(a) the case was not within the provisions of the general orders of the 5th of May, 1837.

The Vice-Chancellor was of opinion that the case was not affected by those orders; and referred it to the Master to inquire and state whether the tenant for life was dead, and whether the petitioners were entitled to the fund in question; with liberty to state special circumstances.[1]

 [*604]

**LOGAN v. BAINES.*

1840; 31st March.—New Orders; Accounts and inquiries.

If on an application by the plaintiff, under the 5th order of the 9th of May, 1839, for preliminary accounts to be taken, the defendant objects that certain persons ought to have been made co-plaintiffs, the court will not make the order.

Mr. *JACOB* and Mr. *Koe*, for the plaintiff moved, under the 5th order of the 9th of May, 1839,[2] that certain preliminary accounts might be taken in the cause.

Mr. *Knight Bruce* opposed the application, on the ground that two persons whom he named, ought to have been made co-plaintiffs in the suit.

The Vice-Chancellor said that, as it had been objected that the suit could not be sustained in its present form, and as the decision upon that objection must be reserved until the hearing of the cause, he could not direct the accounts to be taken, on an interlocutory application.[3]

(a) See 11th order of May, 1837.

[1] Vide 1 Keen, 14, 15; *Wright v. Irving*, post 625.

[2] For this order, see 4 Myl. & Cr., Appendix, iii.

[3] These preliminary inquiries, it seems, are only allowed in cases free from difficulty and complexity. *Topham v. Lightbody*, 1 Hare, 289. *Curd v. Curd*, 2 Hare, 116. *Breeze v. English*, id. 118.

1840.—In re King.

*IN RE KING.

[*605]

1840; 22d April.—Construction of 11 Geo. 4 & 1 Will. 4, c. 60; Trustee; Costs.

A person beneficially entitled to part of the dividends of a sum of stock, has a sufficient interest to support a petition under 11 Geo. 4, and 1 Will. 4, c. 60, for the appointment of a new trustee of the stock.

The words in the 10th section of the act, which empower the court to order "any person appointed as aforesaid to receive and pay over or join in receiving and paying over the dividends of such stock in such manner as the said court shall direct," authorize the court to direct one of the officers of the bank to receive the dividends of the trust stock and pay them over, not to the party beneficially entitled, but to the new trustee.

If a motion is made to enforce an order under the act, and the order appears to be an improper one, the court has jurisdiction to give the party resisting it, the costs of the motion.

A TENANT for life of a sum of stock standing in the name of one Hodsoll, the surviving trustee thereof, granted an annuity to Margaret Charlotte King, and assigned to her his life interest in the stock, in trust to apply the dividends in payment of the annuity and to pay over the surplus to him. For several years Hodsoll received the dividends of the stock, and paid the annuity out of them. Afterwards he went to reside abroad; and, the annuity becoming in arrear, M. C. King presented a petition, under 11 Geo. 4 and 1 Will. 4, c. 60, s. 10, praying for a reference, to the Master, to inquire and state whether Hodsoll was a trustee within the meaning of the act; and, if the Master should find in the affirmative, then that the court would direct such person as it should think proper to appoint in Hodsoll's place, to receive the dividends, and to pay them to the petitioner, during the continuance of the annuity. The usual order having been made on the hearing of the petition, and the Master having reported that Hodsoll was a trustee within the meaning of the act, and that he was such trustee for the petitioner during the continuance of the annuity; the petitioner presented another petition, upon which an order was made confirming the report and directing *one of the officers of the Bank*, in *Hodsoll's place, to receive the dividends of [*606] the stock then remaining unreceived and thereafter to become due, and to pay them to the petitioner, upon the trusts of the assignment, so long as the annuity should remain payable.(a)

The Bank, considering the above order to be irregular, declined to comply with it.

(a) The section of the act above referred to enacts that, if a trustee of stock shall be out of the jurisdiction of the court, or it shall be uncertain whether he is living or dead, or he shall refuse to transfer the stock or to receive and pay over the dividends thereof to the party entitled thereto; it shall be lawful for the court to direct such person as it shall think proper to appoint for that purpose in the place of such trustee, to transfer such stock to or into the name of such person, and in such manner as the court shall direct, and also to order any person appointed as aforesaid to receive and pay over or join in receiving and paying over the dividends of such stock, in such manner as the court shall direct; and that every such transfer, receipt and payment shall be as effectual as if the said trustee had transferred or joined in transferring the stock, or had received and paid or joined in receiving or paying the said dividends.

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Mr. *Jacob* and Mr. *Burmester*, for M. C. King, now moved that the Bank might be ordered to act in obedience to the order.

Mr. *Knight Bruce*, for the Bank, said that the order was not authorized by the act: that it had directed the Bank to pay the dividends of the stock to an equitable claimant, and, therefore, it had, in effect, converted the Bank into an accountant general or a trustee of the stock: that all that the act authorized the court to do, was to order the Bank to give effect to a [*607] new appointment of trustees by the court: that it was questionable whether the petitioner in this case, had such an interest in the trust fund, as entitled her to present a petition under the act.

THE VICE-CHANCELLOR :—There can be no doubt that the petitioner's interest in the stock was sufficient to support her petition; for she was beneficially entitled to part at least of the dividends of the stock; and therefore, in my opinion, she was one of the persons beneficially entitled to the stock.(a)

In this case, the tenant for life of the stock, having assigned his life interest to M. C. King in trust to secure an annuity which he had granted to her and Hodsoll, the trustee in whose name the stock was standing, being out of the jurisdiction of the court, M. C. King presented a petition praying [*608] that it might be referred to the Master, to inquire and state whether Hodsoll was a trustee of the stock within the meaning of the act, and whether he was out of the jurisdiction of the court: and, if the Master should find in the affirmative, then that some person might be appointed, in Hodsoll's place, to receive the dividends of the stock, and pay them over to the petitioner, so long as her annuity should continue payable; that is, in effect, that some person might be appointed a trustee of the stock, in Hodsoll's place. The Master found that Hodsoll was a trustee within the meaning of the act, and that he was out of the jurisdiction of the court. The order, which ought to have been made on the petition to confirm the Master's report, was not that the Bank should be converted into trustees of the stock; but that some person should be appointed, as a trustee, and that the secretary, or some other officer of the Bank, should transfer the capital of the stock into his name, and pay to him the dividends accrued due and remaining unreceived: for the words towards the end of the 10th section of the act: "and also to

(a) The 11th section of the act enacts that every order to be made in pursuance of the act, shall be made either in a cause, or upon a petition in a lunacy or matter; and that such person as thereinafter mentioned should be the petitioner, (that is to say,) if the same should relate to a conveyance, transfer, receipt or payment to or in such manner as might be directed by any person beneficially entitled, then upon the petition of the person or some or one of the persons beneficially entitled to the land, stock or dividends to be conveyed, transferred, received or paid; and, if the same should relate to a conveyance in order to vest any land or stock in a new trustee duly appointed by virtue of some power or authority in some instrument creating or declaring the trust of such land or stock, or by the Court of Chancery, either alone or together with any continuing trustee, then upon the petition either of the trustee, or some or one of the trustees in whom the same shall be proposed to be vested, or of any person having an interest therein.

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order any person appointed as aforesaid to receive and pay over or join in receiving and paying over the dividends of such stock in such manner as the said court shall direct," authorize the court to order the dividends to be paid not to the party beneficially entitled, but to the new trustees.

The consequence is that the order made on confirming the report, is wrong, and the motion, which seeks to enforce that order, must be refused.

Mr. *Knight Bruce*, for the Bank, asked for their costs of the motion.

Mr. *Jacob* said that this was a case in which the court had no jurisdiction to make an order as to costs.

*THE VICE-CHANCELLOR :—I can not but think that this court has [*609] jurisdiction, in a case like this, to make an order as to costs.

Motion refused with costs.

COOPER v. EMERY.

1840: 26th February and 23d April.—Vendor and purchaser; Covenant to produce title deeds; Title.

The vendor of a piece of copyhold land, enfranchised in 1799, delivered, to the purchaser, two abstracts commencing in 1736, one of the title to the land, and the other of the title to the manor.

The deed of 1799, which was forty years old, recited that the then lord and the then owner of the land were respectively seised in fee; and several of the deeds relating to the lord's title, were bargains and sales enrolled, and, therefore, copies of them, as well as of the surrenders and admittances, which would be good evidence, might be procured by the purchaser at any time. The vendor was unable to deliver, to the purchaser, the deed of 1799, or any of the prior instruments, but was willing to covenant to produce that deed.

Held that he was bound to give the purchaser covenants for the production, not only of that deed but of all the prior instruments mentioned in the abstracts.

THIS was a suit, by the vendor against the purchaser, for the specific performance of a contract for the sale of an estate consisting, in part, of two roods and nine perches of land, formerly copyhold of the manor of Barton-under-Needwood, in Staffordshire. The question was whether the defendant was entitled to covenants for the production of certain copies of court roll relating to the vendor's title, and also of certain deeds relating to the title of the lord of the manor who had enfranchised the small piece of land. The abstracts of the vendor's and lord's titles were numbered two and three respectively. Their contents were, shortly, as follows.

Abstract No. 2—8th May, 1736: Surrender of the piece of land and other hereditaments, by John Belcher, *W. Dearbank and Sarah his [*610] wife, to Isaac Hawkins, by way of mortgage in fee, with a proviso for re-surrender to Dearbank and wife, for their lives and the life of the survivor, with remainder to William Dearbank, their son, in fee. Admittance of Hawkins.—30th April, 1737: Surrender, by William Dearbank, the son, of his reversion, to Richards Newton for life, with remainder to such uses as

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Richard Newton should appoint by deed or will, with remainder to his right heirs. Admittance of Richard Newton.—14th October, 1750: Devise by Richard Newton to Thomas and Matthew Newton in fee, in trust for his children Alice, Ann, Kenworth, William, Sarah and Elizabeth, as tenants in common in fee.—22d October, 1763: Surrender by Isaac Hawkins to William Newton, the brother and heir of Kenworth Newton deceased, the son and heir of Richard Newton deceased, in fee. Admittance of William Newton.—22d October, 1777: Surrender by William Newton to the use of his will.—9th May, 1794: Admittance of Sarah Newton, sister of William Newton and devisee in fee under his will dated 5th January, 1794.—24th November, 1798: At a court then holden a power of attorney, dated 22d November, 1798, from Elizabeth Newton, the only child and heir of Matthew Newton, the surviving trustee of Richard Newton's will, was read, whereby, after reciting that will, Kenworth Newton's death intestate, William Newton's death and devise to his sister Sarah, an indenture of the 30th October, 1794, by which Ann Newton released her share in the premises to her sister Sarah in fee, an indenture bearing even date with the power of attorney, whereby, after reciting that Alice and Ann Newton and their sister Sarah, then the wife of William Greaves, had given the premises to Greaves in fee, they requested Elizabeth Newton, as the heir of the surviving trustee of [611] Richard *Newton's will, to surrender the premises to the use of Greaves in fee; Elizabeth Newton appointed four tenants of the manor, as her attorneys, to surrender the premises; and she, by her said attorneys, surrendered them to the use of Greaves in fee; and, at the same court, he was admitted.—30th April, 1799: Feoffment, whereby, after reciting that Eusebius Horton was seised of the manor in fee, and that Greaves was seised of the copyhold premises, to him and his heirs, according to the custom of the manor, which premises Eusebius Horton had agreed to enfranchise, Horton conveyed those premises, discharged of the copyhold tenure, to Greaves in fee.—23d and 24th of June, 1817: Lease and release of the small piece of land alone, from Greaves to Coulston in fee.—16th and 17th April, 1818, Lease and release of the same, from Coulston to the plaintiff in fee.

Abstract No. 3.—19th and 20th of March, 1736: Lease and release by Edward Busby, settling the manor, on his marriage, on himself for life, with remainders to his intended wife and their issue (which never took effect,) with remainder to himself, in fee.—13th July 1749; Will of Busby, devising the manor to his three sisters and their issue, in strict settlement, with remainder to John Shadwell Horton in tail.—6th November, 1782: Bargain and sale enrolled, whereby, after reciting that Busby and his sisters had all died without issue, John Shadwell Horton conveyed the manor to John Harewood, in fee, as tenant to the *precipe* for the purpose of suffering a recovery to the use of J. S. Horton in fee.—Michaelmas Term, 23d Geo. 3: Exemplification of the recovery.—3d of April and 1st May, 1783: John Shadwell Horton mortgaged the manor to Timothy Williamson in fee.—15th Sep-

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tember, 1785 : John Shadwell Horton conveyed the manor to Thomas Skinner in *fee, in trust to sell.—26th and 27th February, 1787 : [*612] Williamson, being paid his mortgage money, together with J. S. Horton and Skinner, conveyed the manor to Eusebius Horton in fee.—27th February, 1787 : bargain and sale enrolled to the same effect.

It having been referred to the Master to inquire and state whether the defendant was entitled to any and what covenant for the production of the copies of court rolls and deeds above mentioned, relating to the small piece of land together with other hereditaments, the Master reported that the defendant was not entitled to a covenant for the production of any of them, except the indenture of feoffment of the 30th of April, 1799. The defendant excepted to the report, insisting that he was entitled to a covenant for the production of all the copies of court roll and title deeds above mentioned, relating to the small piece of land together with other hereditaments.

Mr. *Knight Bruce* and Mr. *Hodgkin*, in support of the exception :—The copies of court roll are part of the purchaser's title, and therefore, ought to be placed within his reach. It will be said that he may obtain copies of the different surrenders and admittances, from the steward of the manor ; but, for any thing that we know to the contrary, some former owner may have created an equitable mortgage, by deposit of the muniments relating to the copyhold title ; and, therefore, the non-production of them is an objection to the title. *Berry v. Young*,(a) *Whitbread v. Jordon*.(b) It will be said also, that the *purchaser is not entitled to the production of [*613] some of the deeds relating to the title to the manor, because they are enrolled. There is, however, no decision to that effect. The case of *Campbell v. Campbell*,(c) decides that the purchaser is not entitled to have attested copies of such deeds : but that is a very different question. Moreover it appears, in that case, that the purchaser had had inspection of the originals and procured a covenant to produce them, and, having the means of referring to the enrolment, he was not allowed to put the vendor to the expense of giving him attested copies. Besides, several of the deeds mentioned in Abstract Number 3, are not enrolled ; and the bargain and sale of the 27th of February, 1787, is not an instrument properly of record, and, therefore, an office copy of the enrolment, is not evidence.(d)

Mr. *Wigram* and Mr. *Stratton* for the plaintiff : It is not necessary that the vendor should give any covenant for the production of the copies of court-roll ; for the purchaser may, at any time, inspect the originals and obtain copies of them from the steward of the manor. Besides, in October, 1763, which is 77 years ago, the copyholds were surrendered to William

(a) 2 Espinasse's N. P. C. 640, n.

(b) 1 Yo. & Coll. 303. See Sir E. Sugden's observations on this case, 3 Vend. & Pur. 471, 472, 10th edit.

(c) 2 Sugd. Vend. & Pur. p. 119.

(d) Gilb. Evid. 86. Phill. Evid. 410, 3d edit. 2 Sugd. Vend. and Pur. 119, 120.

1840.—Cooper v. Emery.

Newton in fee; and possession has, ever since, gone along with that surrender. Then the enfranchisement deed of 1799, which the Master has decided that we are to give a covenant to produce, is forty years old: so that the purchaser will have a good forty years' title. That deed too recites that Eusebius Horton was seised of the manor in fee; and that William Greaves was seised of the copyholds in fee: and recitals in deeds thirty years [*614] old, are "good evidence of the facts recited. In *Whitbread v. Jordan*, Boulnois, before he took his security, had, at the least, constructive notice of the deposit made by Jordan. He knew that Jordan, who was a publican, was indebted to the plaintiffs, who were his brewers; and he was aware that it was the ordinary practice of publicans, when indebted to their brewers, to secure the debt by a deposit of their title deeds: and, therefore, he had sufficient notice to induce him to make further inquiry respecting the copies of court-roll, and was guilty of gross negligence in not doing so. *Coussmaker v. Sewell*,(a) *Nouaille v. Greenwood*.(b)

There can be no necessity for the vendor's giving a covenant to produce the title deeds of the manor; because the deed of 1799, recites that the then lord was seised of it in fee, and also because copies of the enrolments of bargains and sales are made evidence by 10th Anne, c. 18, sect. 3.

The Vice-Chancellor in the course of the argument said:—In *Goodtitle v. Morgan*,(c) Mr. Justice Buller decided that, if a first mortgagee left the title deeds in the hands of the mortgagor, and the second mortgagee got possession of them without notice of the prior mortgage, he would be entitled to priority over the first mortgagee: but that was a proposition to which Lord Eldon never would accede.[1]

I will look over the abstracts before I decide on the exception.

(a) 3 Sugd. Vend. and Pur. App. 31. (b) 1 Turn. & Russ. 26, see judgment. (c) 1 T. R. 755.

[1] The first mortgagee, by leaving the title deeds in the hands of the mortgagor, enabled him to commit a fraud. Mr. Chancellor Kent, however, considers the English doctrine to be settled, "that the mere circumstance of leaving the title deeds with the mortgagor, is not of itself, in a case free from fraud, sufficient to postpone the first mortgagee to a second, who takes the title deeds with his mortgage, and without notice of the first mortgage." 4 Kent's Comm. 151. Mr. Justice Story states the doctrine in nearly the same words. 2 Equity Jurisprudence, § 1020. Neither of the learned commentators hint a doubt as to the equity of the rule which they admit to be established. But, in one of his judicial opinions, the Chancellor of New York expresses himself in no equivocal language. After referring to several English decisions he says; "It is admitted by these same high authorities, [Lord Thurlow, Ch. B. Eyre and Sir W. Grant,] to be just, that the mortgagee, who leaves the title deeds with the mortgagor, so as to enable him to commit a fraud, by holding himself out as absolute owner should be postponed; but the established doctrine is, that nothing but fraud, express or implied, will postpone him." *Berry v. The Mutual Ins. Co.* 2 Johns. Ch. Rep. 610. It is proper to observe that in the case just cited the direct point did not arise for decision. In *Farrow v. Rees*, 4 Beav. 18, 21, Lord Langdale, M. R. says; "The first objection made to the mortgage to Holt in 1798 is this, that no title deeds were handed over to the mortgagee, and that therefore, in this court, the transaction must be regarded as so suspicious as to defeat the plaintiff's claim. No authority has however been cited for the proposition, that the mere omission to hand over the title deeds is, in all cases, to be considered as a proof of fraud, as against subsequent purchasers for valuable consideration; but here the estate was vested in true-

 1840.—*Fort v. The Bank of England.*

*THE VICE-CHANCELLOR:—The general rule is that, where the [*615] purchaser cannot have the title deeds, and there is no stipulation in the contract for the purchase regarding them, the purchaser is entitled to have, from the vendor or other holder of the deeds, a covenant to produce them.[1]

I have read over both the abstracts No. 2 and No. 3, and I see nothing whatever, upon the face of them, which shows that the purchaser ought not to have a covenant for the production of all the instruments mentioned in the exception. The vendor plainly has shown that he considered that, in order to make out his title, it was necessary that all those instruments should be abstracted which are found in the abstract; and, according to what I understand to be the practice of conveyancers, the purchaser is entitled to have a covenant for the production of them. I well remember, what Lord Eldon said in *Howard v. Ducane* : (a) " whatever other people may say upon the subject, I think that the practice of conveyancers has settled a great deal of law. I put this case on the practice of conveyancers; and I am not sorry to have this opportunity of stating my opinion that great weight should be given to that practice."

In my opinion, therefore, the purchaser is entitled to have a covenant for the production of all the title deeds and documents mentioned in the exception.[2]

*FORT v. THE GOVERNOR AND COMPANY OF THE BANK OF [*616]
ENGLAND and others.

1840; 1st April.—Plaintiff; Costs.

A plaintiff resident abroad, having made default in giving security for costs, the court ordered that he should give the security within four days, or that an injunction which he had obtained *ex parte*, should be dissolved; but it refused to order the bill to be dismissed.

THE plaintiff being resident abroad, the defendants obtained the usual order that he should give security for the costs of the suit.

tees, and was subject to a term for securing the jointure of the wife, and the portions of the younger children. I am of opinion, that the omission is not of itself sufficient to invalidate the mortgage, and for this I believe there is ample authority; though I admit a mortgagee may omit to take the title deeds, under such circumstances as to displace his priority in favor of a subsequent mortgagee." See further, *Johnson v. Stagg*, 2 Johns. Rep. 521, 522. *West v. Reid*, 2 Hare, 259, 260. 3 Myl. & Cr. 161, n. 1.

(a) 1 Turn. & Russ. 86.

[1] Acc. *Barclay v. Raine*, 1 Sim. & Stu. 449. If after a contract for sale of an estate, but before the title is accepted, the title deeds be destroyed by fire, the vendor can not compel a specific performance of the contract, unless he can furnish the purchaser with the means of showing what were the contents of the destroyed deeds, and of proving that such deeds were duly executed and delivered. *Bryant v. Busk*, 4 Russ. 1.

[2] A purchaser is entitled to "usual and proper covenants." "Covenants become usual and proper covenants, only because, by common consent, they are found essential to perfect the contract between the parties." *Wigram, V. C., Blakey v. Whieldon*, 1 Hare, 181.

1840.—Fort v. The Bank of England.

The plaintiff not having complied with the order,

Mr. *Knight Bruce* and Mr. *Goldsmid*, for the defendants, now moved that the plaintiff might be ordered to give the required security within four days from the date of the order to be made on the motion, or that an injunction which he had obtained, *ex parte*, to restrain the Governor and Company of the Bank from delivering to the other defendants, certain bullion, in their hands to which he laid claim, might be dissolved and the bill be dismissed. They cited *Camac v. Grant*.(a)

Mr. *Sharpe*, for the plaintiff, said that the court had no jurisdiction to order the bill to be dismissed, on the plaintiff making default in giving the security: and that Sir A. Hart, V. C., had desired that the order in *Camac v. Grant*, should not be drawn up, as he did not consider himself to be warranted by the practice of the court in making it.(b)

The Vice-Chancellor said that the defendants were not entitled to have the bill dismissed, but that they were entitled to have the injunction dissolved, on the plaintiff making default in giving the security: and his Honor made an order accordingly.[1]

(a) Ante, vol. 1, 348.

(b) See ante, vol. 2, p. 570.

[1] It is said, however, to be the practice in New York, that a defendant may have a bill dismissed upon the plaintiff's not filing security for costs within a time limited by the court, in those cases in which the defendant is entitled to such security. 1 Barb. Ch. Prac. 102. Mr. Barbour is certainly not borne out in his position by the title of the Revised Statutes to which he refers; (vol. 2, 1st ed. p. 620, 2d ed. 215.) And in citing the case of *Camac v. Grant*, he overlooks the circumstance that Vice-Chancellor Hart afterwards retracted his order in that case. Mr. Vice-Chancellor McCoun also adopts the first statement of the case of *Camac v. Grant*, but what he says in that respect, is merely an *obiter dictum*, not touching the ground on which he decided the motion before him. *Hay v. Power*, 2 Edw. Ch. Rep. 494. We have, however, the assurance of Sir M. O'Loughlen, M. R., that in Michaelmas term, 1830, Sir A. Hart, then Chancellor of Ireland, "said he thought the decision in *Camac v. Grant*, right, and he followed it. I think (the Master of the Rolls proceeds,) the practice laid down in *Camac v. Grant*, should prevail in all similar cases, for it is not reasonable that a plaintiff, by not complying with the oath to give security for costs, should keep a suit for ever depending over a defendant who is unwilling to forego such security." *Hardwicke v. Warren*, Saunde & Sc. 646. McMahon, M. R., also expresses a decided opinion as to the equity of the rule, without, however, seeming to be aware that the case of *Camac v. Grant* had been impeached. He says; "A person out of the jurisdiction, impleading another person within the jurisdiction, has no right to perpetuate pendency of litigation, and its consequences upon the rights of the defendant, by refusing to give security for costs, pursuant to the order of the court, as the condition for the prosecution of his suit; and if he will not comply with the order of the court within a time to be fixed, his bill ought to be dismissed." *Martin v. Farrel*, 2 Hog. 152. In *Massey v. Gilleland*, 1 Paige, 644, where the plaintiffs became insolvent pending the suit, and assigned all their interest therein to third persons, Walworth, Ch. ordered the plaintiffs or their assignees to give security for costs within a specified time; "and in default thereof, the bill in this cause must be dismissed with costs." As to waiver of order for security, see 1 Sim. 348, n. 2.

1840.—Wilkins v. Stephens.

*WILKINS v. STEPHENS.

[*617]

1840: 22d and 23d April.—New Orders; Practice; Setting down cause.

A party is not at liberty to disregard an order of the court, although it is irregular; but ought to move to discharge it. Consequently, if a party has obtained an order for setting down a cause before the Master of the Rolls, which, under the orders of May, 1837, ought to have been set down before the Lord Chancellor, the opposite party has no right to treat that order as a nullity and to proceed, before the Lord Chancellor or the Vice-Chancellor, just as if no such order had been obtained.

Before the orders of May, 1837, came into operation, a cause was heard, at the Rolls, both originally and for further directions; and exceptions to a report on a reference ordered at the latter hearing, were heard before the Vice-Chancellor, who merely referred it back to the Master to review his report. Held (the new orders being then in operation) that the cause was a Rolls' cause.

THE decree in this cause was made by the Master of the Rolls on the 14th of June, 1803; and the order on further directions was made, by the same Judge, on the 30th of May, 1834. On the 3d of March, 1837, the cause was heard, by the Vice-Chancellor for further directions and on exceptions to a report made by Master Martin, in pursuance of the order of May, 1834. On that occasion, the Vice-Chancellor referred it to Master Dowdeswell to review Master Martin's report, and to proceed on the general reference to Master Martin; and the consideration of the costs of the exceptions, was reserved until after Master Dowdeswell should have made his report; and it was ordered that the matter of the further directions should stand over. On the 12th of March, 1838, the Vice-Chancellor, on the motion of the plaintiffs and with the consent of the defendants, ordered that the order of the 3d of March, 1837, should be referred to the Master in rotation, who was Master Wingfield. On the 30th of May, 1839, Master Wingfield made his report, to which the plaintiffs took exceptions; and, on the 10th of June, 1839, they obtained an order, at the Rolls,^(a) for setting down 'the [*618] exceptions before the Master of the Rolls; and, on the 14th of that month, they served that order on the defendants' clerk in court. The defendants, however, disregarded the order, considering that the exceptions ought to have been set down to be heard before the Lord Chancellor; and, on the 19th of June and on the 6th of July, 1839, they obtained two orders from the Vice-Chancellor, one for confirming the report *nisi*, and the other for confirming it absolutely. On the 13th of July, 1839, they obtained, by petition, an order from the Lord Chancellor, for setting down the cause to be heard, for further directions, before his Lordship.

A motion was now made, for the plaintiffs, to discharge the orders of the 6th and 13th July, 1839, for irregularity.[1]

(a) Mr. Fry, the Registrar, stated that, since the issuing of the general orders of 1833, orders for setting down exceptions before the Master of the Rolls, were not drawn up by the Registrar, but by the Secretary at the Rolls.

[1] For the general orders of the court, on which the present case mainly turns, see 2 Myl. & Cr. 743.

1840.—*Wilkins v. Stephens.*

Mr. *Knight Bruce* and Mr. *Mylne*, in support of the motion, said that there was a dispute between the parties as to whether the cause was a *Rolls'* cause or a Chancellor's cause; that the plaintiffs insisted that it was the former, and the defendants that it was the latter; that, supposing the defendants were right, they were not justified in treating the exceptions and the order for setting them down as a nullity, as they had done by confirming the report; but ought, before they took that step, to have discharged the order for setting down the exceptions, for irregularity. *Boddy v. Kent.*(a)

The Vice-Chancellor:—When a petition is presented to have a [*619] cause set down before the Lord Chancellor, *his Lordship makes the order; and, therefore, I can not discharge it.

Mr. *Knight Bruce*, said that he had applied to the Lord Chancellor, and that his Lordship wished the Vice-Chancellor to dispose of the motion as he might think fit.

Mr. *Jacob* and Mr. *Bethell*, for the defendants, said that, by the order of the 3d of March, 1837, the cause had been reserved, by the Vice-Chancellor, to be heard for further directions; and, therefore, his Honor's court was the only tribunal in which the exceptions and further directions could be heard; and consequently, the order for setting down the exceptions at the *Rolls*, was a mere nullity; that exceptions, unless they were regularly set down, went for nothing; that, at all events, the plaintiffs ought to have notified, to the Registrar, that they had set down the exceptions; and then the Registrar would not have certified, as he had done, that no cause had been shown, and the defendants would not have been able to confirm the report absolutely; that the confirmation of the report might have been delayed for ever; as the Master of the *Rolls* would never hear the exceptions: and, therefore, the plaintiffs, if they meant to get any result from their exceptions, ought to have transferred them from the *Rolls* to the Chancellor's court; that a party, who has done an act that is inefficacious, could not have the same benefit of it, as he might have had if he had taken the right course; and, lastly, that the plaintiffs had not moved to discharge the order for confirming the report *nisi*.

Mr. *Knight Bruce*, in reply:—The plaintiffs did every thing that [*620] was incumbent *upon them, when they served the order, for setting down the exceptions, upon the defendant's clerk in court.—[The Vice-Chancellor: Was cause ever shown against the confirmation of the report?—Yes, by filing the exceptions, setting them down and serving the order. It is not necessary for counsel to appear, in court, and show cause against the confirmation of the report, on the day mentioned, in the order *nisi*, for making that order absolute. All that is necessary, is that exceptions should be filed, and that the order for setting them down should be served. *Mole v. Smith.*(b)]

(a) 1 *Mer.* 361; see 363.(b) 1 *Jac. & Walk.* 665; see 670.

1840.—Wilkins v. Stephens.

Every order of the court, whilst it stands, must be considered as to be obeyed.[1]

The question is whether these exceptions ought to have been set down to be heard before the Lord Chancellor or before the Master of the Rolls. The fourth section of the sixth general order of the 5th of May, 1837, directs that exceptions taken to any report made, by a Master, in pursuance of a decree or order of reference made by the Lord Chancellor or the Vice-Chancellor, shall be set down to be heard before the Lord Chancellor; and the fourth section of the tenth of those orders, directs that exceptions taken to a report made pursuant to a decree or an order of reference made by the Master of the Rolls, shall be set down to be heard before that Judge. Now, in this case, the original decree and the order of May, 1834, on further directions, were both made at the Rolls. By the latter, a further inquiry was directed; and further directions were again reserved. The Master having made his report, exceptions were taken to it; and, in March, 1837, the Vice-Chancellor heard the exceptions, and referred it back, to the Master, [*621] to review his report. But that was a mere order on exceptions; it was not an order of reference in the sense in which those words are used in the fourth section of the sixth general order of May, 1837; for it sent no new subject to be inquired into by the Master. The reference on which the Master made his report, was a Rolls' reference, and a Rolls' reference only; and, consequently, the plaintiffs are not within the influence of the fourth section of the sixth order.—[The Vice-Chancellor: If there be two orders of reference, one by the Master of the Rolls and the other by either the Lord Chancellor or the Vice-Chancellor, what is the unfortunate client to do? He can not be shut out from both branches of the court.]—He ought to go to the jurisdiction in which the question originated. I submit that, the report which is excepted to having been made pursuant to an order of reference made by the Master of the Rolls, the cause must be heard, on the exceptions to that report and also for further directions, before the same Judge.

THE VICE-CHANCELLOR, after stating the facts of the case, said:—Mr. *Knight Bruce* has contended that the report which is now excepted to, was made in pursuance of the order of reference made at the Rolls, or, in other words, that the exceptions which have been taken to that report are merely a continuance of that reference; and that, for the purposes of the general orders of May, 1837, the case is the same as if the exceptions which were heard before me, had been heard before the Master of the Rolls. But I am not of that opinion: for the general orders of May, 1837, were made on the assumption that the Judge who heard the matter last, would, most probably, recollect it best: and, as the exceptions which are now *pending, were taken to a report made on a reference directed by the [*622]

[1] Vide *infra*, p. 623. But it seems, the position is to be taken with this qualification, that as in the case in the text, it is an order made by a judge of the court: if a mere order of course the rule probably does not apply. 1 Hoff. Ch. Pract. 416.

1840.—Wilkins v. Stephens.

Vice-Chancellor to a new Master, I have not the slightest doubt that those exceptions ought to have been set down to be heard before the Lord Chancellor; and that they have been set down at the Rolls, in direct contravention of the general orders of May, 1837.

It was said that an order made by any one of the Judges of this court, remains an order of the court until it is discharged. That is true as a general proposition: but, if an order has been improperly obtained, it is not to be treated as right for all collateral purposes. I admit that the defendants were aware that the exceptions had been set down before the Master of the Rolls; but they were aware also that those exceptions had been set down under such circumstances, that the Master of the Rolls, on being informed of those circumstances, would, as a matter of course, have refused to hear them, that is, they knew that the order which the plaintiffs had obtained for setting down the exceptions, was a nullity in substance though not in form; and it does not lie in the mouths of those who had themselves done wrong in obtaining that order, to complain that the other parties did wrong in disregarding it.

Moreover, the last mentioned order was served, on the defendant's clerk in court, on the 14th of June; but the order *nisi* for confirming Master Wingfield's report, was not made until the 19th of that month: how, then, could the service of the order for setting down the exceptions, be, as it was said to be, a compliance with the subsequent order for confirming the report *nisi*, that is, a showing cause against the confirmation of the report? The order *nisi* refers to something prospective and not antecedent: it directs [*623] that the report shall be *confirmed, unless the other parties, "*shall show good cause to the contrary.*" It is manifest, therefore, that the serving of the order for setting down the exceptions, could not be a compliance with the order *nisi*.

The plaintiffs, having taken upon themselves to depart from the general orders of May, 1837, ought to have informed the Registrar that they had filed exceptions to the report; or they ought, when the motion was made to confirm the report absolutely, to have appeared, by their counsel, and stated that the report had been excepted to. But they did not think proper to take either of those steps: so that the parties who had disobeyed the orders of May, 1837, and, thereby, created the difficulty, did not think proper to remove it.

My opinion, therefore, is that the defendants were right in obtaining the order for confirming the report absolutely; and that there is no ground for my setting aside either that order, or the order of the 13th of July, 1839, for setting down the cause for further directions.

[Motion refused, with costs.]

The plaintiffs appealed from the above decision, to the Lord Chancellor; and, on the 9th of May, 1840, his Lordship reversed the decision and dis-

1840.—*Archer v. Slater.*

charged the orders of the 6th and 13th of July, 1839, with costs, on the ground that a party was not at liberty to disregard an order made by one of the Judges of the court, and to proceed, before another Judge, just as if no such order had been made.[1] His Lordship intimated that, as the decree and the order on further directions by which the reference was directed, had been made at the Rolls, "and as the Vice-Chancellor's [*624] order of the 3d of March, 1837, (which was before the general orders of May, 1837, came into operation) had done nothing more than refer it back to the Master to review the report, the cause ought to be set down, to be heard for further directions, before the Master of the Rolls,

ARCHER v. SLATER.

1840 : 2d, 3d, 4th, 5th and 9th March and 16th April.—Vice-Chancellor ; Jurisdiction ; Fraud ; Copyholds ; Will.

A suit to set aside a decree at the Rolls, on the ground of fraud, may be heard by the Vice-Chancellor.

There is no case in which the court has established a will of copyholds : *semble*, the probate copy of a copyholder's will, is sufficient to lead the uses of a surrender to the use of his will.

THE object of the suit was to set aside a decree made by the Master of the Rolls in 1823, on the ground that it had been obtained by fraud.

A doubt having been suggested as to whether the Vice-Chancellor had jurisdiction to hear the cause, as the object of it was to interfere with a decree at the Rolls ; his Honor said that he would consult the Lord Chancellor on the subject.

On a subsequent day, the Vice-Chancellor said that he had conferred with the Lord Chancellor, and that his Lordship was of opinion that his Honor might hear the cause.

In the course of the argument, the Vice-Chancellor said that he knew of no case in which the court had established a will relating to copyholds ; and that he had always understood that, if a copyholder surrendered his tenements to the use of his will, and then made an instrument which the Ecclesiastical Court, on his death, admitted to probate, the probate copy was sufficient to guide the uses of the surrender.

*Mr. Knight Bruce, Mr. Wakefield, Mr. Norton, Mr. G. Rich- [*625] ards, Mr. Bethell, Mr. K. Parker, Mr. James Parker, and Mr. Goodeve, were the counsel in the cause.

[1] An irregular order made by the court upon an *ex parte* application remains in force until it is set aside : and an order made by a Vice-Chancellor at chambers, is considered as made in court, provided it is regularly drawn up, and entered with the clerk as an order made by him in court. *Hunt v. Wallis*, 6 Paige, 371, 374. *Studwell v. Palmer*, 5 Paige, 166. In *Osgood v. Joslin*, 3 Paige, 198, the Chancellor held, that a special order made by the court, contrary to a standing rule, was binding upon the parties and officers, and must be regularly discharged.

 1840.—*Lenden v. Blackmore.*

WRIGHT v. IRVING. HAYNES v. HAWKINS.

1840 ; 28th April.—*New Orders* ; Vice-Chancellor : Jurisdiction.

The Vice-Chancellor has no jurisdiction under the 12th Order of May, 1837, to order a fund standing in trust in a Lord Chancellor's cause, to be transferred to a Rolls' cause.

A PETITION was presented, in these two causes, praying that a fund which was standing in the name of the Accountant General in trust in the first cause, might be carried over, from the credit of that cause, to the credit of the second cause.

The first was a Lord Chancellor's cause ; and the second was a Rolls' cause.

The Vice-Chancellor held that, under the 12th order of the 5th of May, 1837, he had no jurisdiction to make the order prayed ; and dismissed the petition with costs.

Mr. Knight Bruce and *Mr. Hubback* supported the petition ; and *Mr. Jacob* and *Mr. Campbell* opposed it.[1]

[*626]

***LENDEŶ v. BLACKMORE.**

1840 ; 3d April.—*Will* ; Construction.

Testatrix bequeathed her residue to A. T. : after A. T.'s death, to be equally divided between S. L. and M. S., the daughters of her sister E. S., and E. B., the daughter of her sister S. M., and her children. E. B. had eight children living at the testatrix's death, and one born afterwards and during A. T.'s life. Held that the residue, on A. T.'s death, was divisible equally amongst S. L., M. S., and E. B. and her nine children.

FRANCES TURNER, by her will dated the 31st of October, 1825, disposed of her residuary personal estate in the following words :

"After my funeral expenses and debts paid, I give the residue to Martha Turner, of Bideford, Devon, and Anne Turner, to be equally divided ; the survivor to enjoy the whole : after both their deaths, to be equally divided between Sybilla Lenden and Mary Seyer, daughters of my sister, Elizabeth Seyer, and Elizabeth Blackmore, daughter of my sister, Susannah May, and her children."

The testatrix died on the 15th of November, 1828, leaving Martha Turner, Anne Turner, Sybilla Lenden, Mary Seyer and Elizabeth Blackmore her surviving.

Mary Seyer afterwards died intestate : and letters of administration to her effects, were granted to Sybilla Lenden, her sister and sole next of kin. Anne Turner survived Martha Turner, and died in August, 1828. Elizabeth Blackmore had eight children living at the testatrix's death ; and she had another child born afterwards and during the lifetimes of Martha and Anne Turner.

[1] Vide 2 Myl. & Cr. 479.

 1840.—*Strickland v. Strickland*.

The bill was filed by Abel Lenden, the executor of the testatrix's will, and Sybilla Lenden his wife, against Mr. Blackmore and her nine children; and the question was whether, on Anne Turner's death, the testatrix's residuary estate became divisible into three equal parts, [*627] Sybilla Lenden being entitled to one-third, in her own right, and to another third as the personal representative of Mary Seyer; and Elizabeth Blackmore being entitled to the remaining third for her life, with remainder to her children; or whether it became divisible into eleven equal parts, Sybilla Lenden being entitled to one part in her own right, and to another part as the personal representative of Mary Seyer; and Elizabeth Blackmore and her eight children born at the testatrix's death, being each entitled to one of the remaining nine parts: or whether it was divisible into twelve parts, so as to let in the child of Elizabeth Blackmore, who was born after the death of the testatrix and in the lifetimes of Martha and Anne Turner.

Mr. Jacob and Mr. F. Bayley, for the plaintiffs, contended that Mrs. Blackmore took one-third part of the residue for her life, with remainder to her children, and that Sybilla Lenden took the two other third parts, as above mentioned. *Newman v. Nightingale*; (a) *Jeffery v. Honeywood*. (b)

Mr. Knight Bruce and Mr. Wilcock, appeared for the defendants, Elizabeth Blackmore and her children who were living at the testatrix's death; and Mr. Bethell and Mr. Abraham, for the child born in the lifetimes of Anne and Martha Turner: but

The Vice-Chancellor, without hearing them, held that the residue was divisible into twelve shares; that Sybilla Lenden was entitled to one share, in her own right, and to another share as the personal representative of Mary Seyer; and that Mrs. Blackmore and her children, including [*628] the one that was born after the testatrix's death and in the lifetimes of Martha and Anne Turner, were entitled to the remaining shares as tenants in common. (c)

STRICKLAND v. STRICKLAND.

1840: 15th April.—Practice; Dismissal.

A plaintiff amended his bill, not requiring an answer; the defendant, however, answered the amendments. Held that he could not move to dismiss until the expiration of two months from the time when the answer was to be deemed sufficient.

On the 10th January, 1840, which was more than two months after the defendants had answered the bill, the plaintiffs obtained leave to amend, not

(a) 1 Cox, 341.

(b) 4 Madd. 398.

(c) See *Butler v. Stratton*, 3 Bro. C. C. 367; *Blackler v. Webb*, 2 P. W. 383; *Longmore v. Broom*, 7 Ves. 124. [*Dowding v. Smith*, 3 Beav. 541, 543. *Brett v. Horton*, 4 Beav. 239, 241. *Barber v. Barber*, 3 Myl. & Cr. 696. *Collins v. Hozie*, 9 Paige, 81. *Heron v. Stokes*, 1 Conn. & Law. 270.]

(d) *Ex relations*.

 1840.—*De Viesca v. Lubbock.*

requiring an answer from any of the defendants; and on the 25th January, 1840, they amended the bill accordingly. On 30th January, one of the defendants put in an answer to the amended bill; and on this day,

Mr. *Shadwell* moved, on behalf of that defendant, to dismiss the bill for want of prosecution.

The Vice-Chancellor, however, was clear that the answer, though not required, might have been excepted to and could not be deemed sufficient until two months after it was filed: and refused the motion with costs.

A similar motion, on behalf of the defendants who had not answered the amendments, was granted.

Mr. *Jacob* appeared for the defendants.

[*629] **DE LA VIESCA v. SIR JOHN WILLIAM LUBBOCK.*

1840: 24th April.—Administrator.

Pending a litigation in a Spanish court, as to which of two testamentary papers of a deceased Spaniard, ought to be established, the plaintiff, who was resident in Spain, was appointed, by the Spanish court, the judicial administrator of the deceased's goods; and the plaintiff, under the authority of that court, afterwards appointed the defendant to be his attorney to recover and receive 10,000*l.* due to the deceased's estate from C. & Co., of London. The defendant, after litigation, in the Prerogative Court of Canterbury, with one of the parties to the Spanish suit, obtained letters of administration to the deceased, to be granted to him as the plaintiff's attorney, limited to receive the 10,000*l.*, until the plaintiff should obtain administration to the deceased. The defendant afterwards received the 10,000*l.* Held that he might safely pay it over to the plaintiff, although he had not obtained administration to the deceased.

PENDING a litigation, in the Civil Court of First Instance at Cadiz, between the sisters and the nephew of Don Domingo Aramburn, late of Cadiz, deceased, as to which of two testamentary papers of the deceased, the one dated in 1829, and the other in 1814, ought to be established, the plaintiff, who resided at Cadiz, was appointed, by that court, the judicial administrator of the goods, chattels and credits belonging to the deceased's testamentary estate. Afterwards, the plaintiff, in pursuance of an authority given to him by the court at Cadiz, executed an instrument, under his hand and seal, by which he appointed the plaintiff to be his attorney for the purpose of recovering and receiving from Messrs. James Campbell & Co. of London, merchants, a sum of 10,000*l.* or thereabouts, belonging to the deceased's estate. Accordingly the defendant, after some opposition on the part of Don Angel de Aramburn, the deceased's nephew, obtained a decree of the Prerogative Court of the Archbishop of Canterbury, under which limited letters of administration to the deceased, were granted to him, in the following words.

"William, by Divine Providence, Archbishop of Canterbury, &c.,
 [*630] to our well beloved in Christ, Sir John *William Lubbock, bart.,
 greeting: Whereas it hath been alleged before the worshipful Jesse Adams, doctor of laws, surrogate of the Right Honorable Sir Herbert Jenner,

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knight, doctor of laws, master, keeper or commissary of our Prerogative Court of Canterbury lawfully constituted, on the part and behalf of the said Sir J. W. Lubbock, bart., that Don Domingo de Aramburn, late of Cadiz, in Spain, merchant, deceased, having, whilst living and at the time of his death, goods, chattels or credits in divers dioceses or jurisdictions within the province of Canterbury, sufficient to found the jurisdiction of our said Prerogative Court of Canterbury, departed this life some time since, being, at the time of his death, domiciled in Spain; and that, in a suit, now depending in the Civil Court of First Instance in the said city of Cadiz, touching and concerning the validity of certain testamentary paper writings of said deceased, bearing date respectively the 29th December, 1814, and the 12th of June, 1829, Don Jose de la Viesca, of said city, merchant, was, by a decree or order of said court, bearing date the 16th October, 1838, appointed the judicial administrator of said deceased's property: and whereas it was further alleged that, by an official act of the said court, bearing date the 14th May, 1839, the said Jose de la Viesca was, amongst other things, authorized and empowered to receive, in London, of and from the house of Messrs. James Campbell & Co., all such amount of pounds sterling, not exceeding the sum of 11,000*l.* belonging to the testamentary estate of said deceased, as might be in their hands, as in and by an official copy of the said act of court, and also by an affidavit duly made and sworn to by James Dennington, brought into and now remaining in the registry of our said court, reference being thereunto had, will more fully and at large appear: and whereas it was further alleged that *said Don Jose de la Viesca now resides at the said city of Cadiz, [*631] and hath, in and by a certain power of attorney under his hand and seal, *duly appointed the said Sir J. W. Lubbock his lawful attorney as to the estate and effects of said deceased*, as in and by an official copy of said power of attorney, also brought into and now remaining in the registry of our said court, &c.: and whereas it was further alleged that, in a certain cause or suit lately depending in our said court, intituled "*Viesca, by his attorney, against De Aramburn,*" touching the grant of administration, under certain limitations, of the goods, chattels and credits of said deceased, the right honorable our master, keeper or commissary aforesaid was pleased, on the second session of Michaelmas term, (to wit,) Saturday the 16th day of November, instant, having heard proctors and advocates thereon, at the petition of the proctor of the said Sir John William Lubbock, by his interlocutory decree, to decree letters of administration of the goods and chattels and credits of the said deceased, to be granted and committed to said Sir John William Lubbock, *as the lawful attorney of the said Don Jose de la Viesca*, limited to receive, from the said Messrs. James Campbell & Co., all such amount of pounds sterling, as they may have in their hands belonging to said testamentary estate of the said deceased, provided the same does not exceed the sum of 11,000*l.*, and, in case the property of the said deceased now remaining in their hands, should exceed the said sum of 11,000*l.*, then to

 1840.—*De Viesca v. Lubbock.*

receive so much only thereof as shall amount to the sum of 11,000*l.* and no more, for the use and benefit of the said Don Jose de la Viesca *and until he shall duly apply for and obtain letters of administration of the goods, chattels and credits of said deceased to be granted to him*, on his [*632] exhibiting an inventory and his sureties *justifying, (justice so requiring :) and we being desirous that the goods, chattels and credits of the said deceased may be well and faithfully administered, applied and disposed of according to law, do therefore, by these presents, grant full power and authority to you, in whose fidelity we confide, to administer and faithfully dispose of the goods, chattels and credits of the said deceased, limited to receive, from the said Messrs. James Campbell & Co., all such amount of pounds sterling as they may have in their hands belonging to the testamentary estate of the said deceased, provided the same does not exceed the sum of 11,000*l.* ; and, in case the property of the said deceased now remaining in their hands, should exceed the said sum of 11,000*l.*, then to receive so much only thereof as shall amount to the sum of 11,000*l.* and no more, you having been already sworn well and faithfully to administer the same, and to make a true and faithful inventory of the said limited goods, chattels and credits, and to exhibit the same into the registry of our said court on or before the last day of May, next ensuing, and also to render a just and true account thereof on or before the last day of November, 1840 : and we also, by these presents, ordain, depute and constitute you administrator of the goods, chattels and credits of the said Don Domingo Aramburn deceased, as the lawful attorney of the said Don Jose de la Viesca, limited, &c. (as before) for the use and benefit of the said Don Jose de la Viesca, *and until he shall duly apply for and obtain letters of administration of the goods of the said deceased to be granted to him.*"

The defendant having, under the letters of administration, received 10,568*l.* from Campbell & Co., the bill was filed to compel him to [*633] pay over that sum to the *plaintiff. The question, at the hearing of the cause, was whether, having regard to the litigation in the Spanish court, (which was still pending,) and also to the litigation which had taken place in the Prerogative Court, and, more especially to the fact that the letters of administration were granted to the defendant, until the plaintiff should obtain letters of administration to the deceased, the defendant could safely pay the sum in question, to the plaintiff, until he had obtained such letters of administration.

Mr. *Knight Bruce* and Mr. *Colridge*, for the plaintiff.

Mr. *G. Richards* and Mr. *Huli*, for the defendant.

The Vice-Chancellor said that Sir John Lubbock was bound by the recitals of the letters of administration ; and that they were granted to him, expressly, as the attorney of De la Viesca ;[1] and, there-

[1] It is a general rule that an agent cannot dispute the title of his principal. Paley, Pr. & Ag.

1840.—*Phipps v. Henderson.*

fore, he might safely pay over the sum which he had received, to De la Viesca.[1]

Declare the plaintiff entitled to the fund in the pleadings mentioned; and order that the defendant do pay to the plaintiff, so much of the sum of 10,568*l.* received by him, under and by virtue of the letters of administration in the bill mentioned, as shall remain after deducting therefrom, the sum of 454*l.* the amount of his costs incurred in the proceedings to obtain such administration and otherwise relating thereto, and the costs of this suit, to be taxed as between solicitor and client.

*PHIPPS v. HENDERSON.

[*634]

1840; 28th April.—New Orders; Scandal and Impertinence: Master; Report.

The Master's decision, on a question of scandal or impertinence brought before him under the 73d order of 1828, is not final; and, therefore, he ought to issue a certificate of his decision.

UNDER the 73d general order of 1828,[2] a party who wishes to complain of any matter introduced into any state of facts, affidavit or other proceeding before the Master, on the ground that it is scandalous or impertinent, may, without any order of reference by the court, take out a warrant for the Master to examine such matter, and the Master may expunge any such matter which he shall find to be scandalous or impertinent.

Under a reference directed in this cause, the defendant carried into the Master's office an affidavit with four schedules thereto. The plaintiff, considering part of the affidavit and two of the schedules to be impertinent, proceeded in the manner pointed out by the 73d order, to obtain the Master's decision on the subject. The Master, having been attended by the solicitors on both sides, was of opinion that the matter complained of was not impertinent; but refused to certify to that effect. Whereupon the plaintiff, being dissatisfied with the Master's decision and wishing to bring the question before the court by way of exception, presented a petition praying that the Master might be ordered either to issue a certificate of his decision, or to expunge the matter alleged to be impertinent.

Mr. *Knight Bruce* and Mr. *G. L. Russell*, in support of the petition:—The 73d order enables a party who objects, on the ground of either scandal

10, 49, 53. 2 Story's Eq. § 817. *Tripler v. Olcott*, 3 Johns. Ch. Rep. 473. *Murray v. Toland*, id. 574. *Sims v. Brittain*, 4 Barn. & Ald. 375.

[1] Where an agent has duly and fairly accounted with his immediate and authorized principal, he is not bound to account over again to a person beneficially interested, or standing in the relation of *cestui que trust* to the principal. *Tripler v. Olcott*, 3 Johns. Ch. Rep. 473. There must be a privity between the agent and the ulterior claimant, to render the former accountable to the latter, *Sims v. Brittain*, 4 Barn. & Ald. 375. See further Paley Pr. & Ag., (ed. by Dunlap,) 48 n. e.

[2] For this order, see 2 Russ. 653.

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or impertinence, to any affidavit or other document brought, by his [*635] opponent, into the Master's office, to obtain the Master's judgment on the matter objected to, without incurring the expense of obtaining an order of reference from the court. That order does not make the Master's decision final; but merely enables the party to put the Master in motion just as he might have done before, by obtaining an order of reference. If, then, the Master's decision is not final, he ought to issue his certificate; for, otherwise, there would be no means of reviewing his judgment.

Mr. Wakefield and Mr. Faber, for the defendant:—The 73d order was intended to enable the Master to determine the question of scandal or impertinence in any proceeding before him, summarily and cheaply. It authorizes him to expunge, *instantly*, the matter that he deems to be either scandalous or impertinent. But the 22d order of 1833,[1] which relates to scandal or impertinence in an answer or other proceeding before the court, provides that the scandalous or impertinent matter shall not be expunged until the expiration of four days from the filing of the report, in order that the adverse party may have an opportunity to file exceptions to such report. Therefore, it may be fairly inferred that, as the 73d order of 1828 contains no such provision, the Master's judgment, as to matter alleged to be scandalous or impertinent in the proceedings to which that order relates, was not intended to be excepted to. The Master certifies his dissatisfaction, but not his satisfaction with an examination or other proceeding before him.

The Vice-Chancellor referred to the 97th proposition of the Chancery Commissioners, which is: That if any party wishes to complain of any matter, introduced into any state of facts, affidavit or other proceeding [*636] before the Master, on the ground that it is scandalous or impertinent, he shall be at liberty, without any order of the court, to take out a warrant for the Master to examine into the matter; and the Master shall have authority to expunge any such matter which he may find to be scandalous or impertinent; and his decision thereon shall be final: and that, in cases of impertinence, the costs of the reference shall be in the discretion of the Master. His Honor added that the 73d order did not direct that the Master's decision should be final, nor did it say any thing about the costs of the reference: and that, as the language of the order was so different from the proposition, he was of opinion that the Master's decision on a matter brought before him under the order, was not intended to be final; and, therefore, he should order the Master to issue his certificate.[2]

[1] Vide 1 Myl. & K., Appendix, xi.

[2] As to impertinence in affidavits, and how, and when it should be objected to, see, *In the matter of Burton*, 1 Russ. 380. *Keeling v. Hoskins*, 2 Russ. 319, 320, n. 1. *Ex parte Palmer*, 4 Russ. 188, 189, n. 1. *Powell v. Kane*, 5 Paige, 265, 268. It is competent for the court, upon the mere examination of an affidavit, or other paper, read before it on a motion, to order scandalous or impertinent matter contained therein, to be expunged without reference to the Master, and to charge the proper party with the costs. *Powell v. Kane*, *ubi sup.* *Ex parte Palmer*, *ubi sup.*

1840.—Benn v. Dixon.

BENN v. DIXON.(a)

1840: 1st May.—Will; Construction; Executor; Leaseholds; Perishable Property; Conversion. Testator gave to his wife, the whole of the interest arising from his property, both real and personal, during her life; and, in case he should die without issue, he gave, after the death of his wife, the whole of his property, both real and personal, to his brothers and sister. The testator died possessed of leasehold, and also of real property. Held that the widow was not entitled to the leasehold property, in *specie*, during her life, but only to the dividends of stock to be purchased with the proceeds of the sale of it.

PETER DIXON, by his will dated in November, 1822, disposed of his real and personal estate in the following words:

"I give and bequeath, unto my dear wife Sarah Dixon, the whole of the interest arising from my property, both real and personal, during the period of her "natural life, and, at her decease, to be disposed of as [*637] hereinafter named. I give and bequeath also unto my dear wife Sarah Dixon, all my household furniture, linen, plate and books, to her for ever. At her decease, if I leave issue at my death, I give and bequeath the whole of my property to my child, if only one, or, in equal shares, if more than one, on attaining the age of twenty-one years: the same being held in trust, by C. W. Thompson and my dear wife Sarah Dixon, for the use and benefit of such child or children as I may have at the time of my decease: but should I die without leaving issue, then I give and bequeath, after the death of my dear wife Sarah Dixon aforesaid, the whole of my property, both real and personal, in equal proportions, to my brothers, T. Dixon, O. Dixon, and J. Dixon, and my sister Jane Benn: but, should any of my brothers or sister die without leaving issue, I then give and bequeath such share to the survivor or survivors of them; but, leaving issue, I then give such share to their children, in equal proportions, on attaining the age of twenty-one years, to them and their heirs for ever."

The testator appointed his wife his executrix, and died in January, 1835, without leaving issue. The will was proved by his widow: and the bill was filed, by his brothers and sister, for the administration of his personal estate, which consisted, in part, of a leasehold house at Kennington, in which the testator lived at his death, and in which his widow continued to reside afterwards. The testator also was seised of a small real estate in Cumberland.

The only question in the cause was whether the widow was entitled to the possession of the house during her life, or whether it ought to be sold, and the proceeds invested, and the interest of the same paid to her.

*Mr. *Knight Bruce* and Mr. *Stinton*, for the widow, said that as [*638] the testator, in disposing of his property, had united his personal with his real estate, it was his intention that they should be both enjoyed together, in their then existing state: and that, by the word "interest," the testator must have

(a) *Ex relations.*

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meant "income," as he had used that word with reference to his real as well as his personal estate. They cited *Alcock v. Slopér*;(a) *Collins v. Collins*;(b) and *Pickering v. Pickering*.(c)

Mr. Jacob, Mr. Wigram and Mr. Williams, for the other parties.

THE VICE-CHANCELLOR :—This case must be governed by the general rule.

There is a total absence, in the will, of any thing like a declaration of intention that the property shall be enjoyed in the specific state in which it was at the time of the testator's death.[1]

In the case of *Pickering v. Pickering*[2] the testator gave to his wife,

(a) 2 Myl. & Keen, 699.

(b) Ibid. 703.

(c) 2 Beav. 31; and 4 Myl. & Cr. 289.

[1] In *Alcock v. Slopér*, cited *supra*, Leach, M. R., after referring to the case of *Howe v. The Earl of Dartmouth*, 7 Ves. 137, said; "The true principle upon which Lord Eldon decided that case was this,—that where a testator limits his residuary property to one for life, with remainder over, it is *prima facie* to be intended that the testator means that the same property which is given to the tenant for life should go to those entitled in remainder; and if any part of the residue be of a wasting nature, as long annuities, or *leasehold estate*, in order to effect this general purpose of the testator such wasting property must be sold and converted into permanent property. Although this intention of the testator is *prima facie* to be inferred, it may plainly appear upon the whole context of the will that the testator had not that meaning, but that his intention was, that the tenant for life should derive the same income from the residuary estate as he had himself derived from his property up to the time of his death." The next paragraph of the judgment of the Master of the Rolls is singularly obscure, nor is it helped out by the marginal note, or any previous part of the report. This is one of those cases in which it would be satisfactory to have the formal decree, as entered in the Registrar's book. Indeed, it does not clearly appear, what disposition was made of the leaseholds. In *Collins v. Collins*, cited *supra*, the Master of the Rolls was of opinion, of course, upon the construction of the will, "that it was the intention of the testator that his widow should enjoy the leasehold property for her life."

[2] In this case, the testator bequeathed to his widow, "all the interest, rents, dividends, annual produce and profits, use and enjoyment of all his, the testator's real and personal estate" for life, and at her decease, he gave to E. R. P. "all the rest and residue of his estate and effects whatsoever, both real and personal." It was held, on the context of the will, that the widow was entitled to the enjoyment, during life, of the perishable property of the testator "*in specie*," and without a conversion for the benefit of the remainderman. Lord Langdale, M. R., there said: (2 Beav. 56 *et seq.*) "The next question which arises in this case is, as to the construction of the will, and what were the rights of Mrs. A. under it. Questions of this nature cannot be perfectly clear, but the court endeavors on all occasions of this kind to ascertain from the whole will the intention of the testator, and when that is ascertained, it becomes the duty of the court to carry it into effect. No doubt the general rule is this:—that if the residue of an estate be given to one for life, with remainder to another, then, it being clearly the intention of the testator that the person in remainder shall have something, the court, in order to arrange the rights of the two parties, adopts the rule so often referred to and not disputed; but if the court finds in the will sufficient to show an intention of the testator, that the legatee for life should enjoy the property in the state in which it stood at the time of the testator's death, then that intention must be carried into effect. There is an obscurity which frequently arises in these cases, from the use which is made of the term, 'specific legacy:' when the word 'specific,' is used on such an occasion as this, I do not think it is used in the ordinary sense in which 'specific' is applied to a legacy,—it is used to this extent only, that the property is to be specifically enjoyed. That is the meaning of the term, and is the view taken by Sir John Leach, and which has been since acted on by the Lord Chancellor. The question on this will, therefore, is, whether the testator giving the property absolutely to his widow for life, did intend her to enjoy it in the way he had it himself." In affirming the decision of the Master of the

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the interest, rents, dividends, annual produce, and profits, and use and enjoyment of all his estate and effects whatsoever.

In every will you must look at the words of the whole will.[1] Now in this case, the testator, after the death of his wife, gives the whole of his property to his brothers and sister. What property? "The whole of my property, both real and personal." There it is plain they were to take what his wife was to enjoy during her life. Is that consistent with the idea of her enjoying the property as it existed at the time of the testator's death?

*It is the duty of the executors to deal with the property in such a [*639] manner as that it may continue to produce the same interest after the death of the tenant for life. Suppose that the testator had given a flock of sheep: could it be held that they were to be kept in the same state and not sold? They might all die, and then the subject of the gift could not possibly pass to the persons in remainder; for nothing would be left.

As the will stands, there is nothing, on the face of it, to prevent the application of the rule of law that perishable property must be sold and converted into money, and invested in the funds, in order to produce the same interest to the remainderman as was enjoyed by the tenant for life.[2]

Rolls in this case, Lord Cottenham, (4 Myl. & Cr. 298,) says; "Very nice distinctions have been taken, and must have been taken, in determining whether the tenant for life is to have the income of the property in the state in which it is at the time of the testator's death, or the income of the produce of the conversion of the property. The principle upon which all the cases on the subject turn is clear enough, although its application is not always very easy. All that *Hove v. Lord Dartmouth*, (7 Ves. 137,) decided—and that was not the first decision to the same effect—is that, where the residue or bulk of the property is left *en masse*, and it is given to several persons in succession as tenants for life and remaindermen, it is the duty of the court to carry into effect the apparent intention of the testator. How is the apparent intention to be ascertained, if the testator has given no particular directions? If, although he has given no directions at all, yet he has carved out parts of the property to be enjoyed in strict settlement by certain persons, it is evident that the property must be put in such a state as will allow of its being so enjoyed. That cannot be, unless it is taken out of a temporary fund and put into a permanent fund. But that is merely an inference from the mode in which the property is to be enjoyed, if no direction is given as to how the property is to be managed. It is equally clear that, if a person gives certain property specifically to one person for life, with remainder ever afterwards, then, although there is a danger that one object of his bounty will be defeated by the tenancy for life lasting as long as the property endures, yet there is a manifestation of intention which the court cannot overlook. If a testator gives leasehold property to one for life with remainder afterwards, he is the best judge whether the remainderman is to enjoy. The intention is the other way, so far as it is declared, and the terms of the gift, as a declaration of intention, preclude the court from considering that he might have meant that it should be converted. Those two kinds of cases are free from difficulty, but other cases of very great difficulty may occur in which it may be very doubtful whether the testator has left property specifically, but in which there are expressions which raise the question whether the property is not to be enjoyed specifically. Those are questions of difficulty, because the court has to find out what was the intention of the testator, as to the mode of management, and as to the mode of enjoyment."

[1] Vide 3 Myl. & Cr. 614, n. 2. 1 Sim. 271, n. 1. Am. Ch. Dig. Devise, X. 1 Russ. & Myl. 589, n. 2. *Jennings v. Newman*, ante, 223. *Dover v. Gregory*, ante, 399. *Brett v. Horton*, 4 Beav. 242. *Jones v. Price*, 11 Sim. 563.

[2] In a case decided in the same month with the above, (May, 1840,) Lord Langdale, M. R.

 1840.—*Vaughan v. Marquis of Headfort*.

VAUGHAN v. THE MARQUIS OF HEADFORT.

1840: 8th May.—Will; Construction.

Testator bequeathed 40,000*l.* to Lord H. and his children to be secured for their benefit. Held that Lord H. took for life, with remainder to his children.

MARGARET VAUGHAN made her will dated the 7th of November, 1836, and containing the following bequests:

"I leave two houses in Foley place and 2000*l.* to the Honorable Lady Cockburn: 40,000*l.* in the three per cent. reduced annuities *to the Marquis of Headfort and his children, to be secured for their use.*"

states the general rules in relation to this somewhat perplexed and embarrassing subject, with great clearness and force. He says:—"I take this to be the rule of the court, that when a testator has given an estate, or the residue of an estate, to persons in succession, as to one for life, with remainder to another person; the court, presuming that the testator intended the remainderman should have something, will so deal with the property, if it be a property that is wearing out and may terminate during the life estate, as to secure the accomplishment of that intention, and give the remainderman something; for that purpose it will convert the perishable into a permanent property, and give the income which arises from it to the persons entitled for life in succession, and preserve the capital for the person entitled in remainder. That is the rule; and the court only acts upon the general intention of the testator, that something should be given to the person who is the donee in remainder; but if, upon the construction of the will, it appears the testator had another intention, that is to say, an intention to give to one or more persons who are to take for lives, or during a succession of lives, the enjoyment of the property in the state he left it at the time of his death, then the court will carry that intention into effect; and every one of the cases which have been cited, and every case which can arise, will turn upon this question of construction—whether you can find upon the face of the will, an intention that the legatee for life shall enjoy the property in the way at which it stood at the testator's death, even to the extent of defeating the testator's intention to bequeath something to the remainderman. I believe that in all the cases which have been cited in opposition, there have been words clearly indicating, from the testator's description of the property or some other circumstance, that the testator intended the donee to enjoy it for life, in the same way as it stood at his death." Mr. Chancellor Walworth expresses the general principle as follows: "Where an estate for life, or any other interest short of the absolute ownership, is given in the general residue of the testator's personal estate, terms for years, and other perishable funds or property which may be consumed in the using, are to be converted and invested in such a way as to produce a permanent capital, the income or interest of which permanent capital alone is to go to the owner of the life estate, or other particular estate in the testator's residuary personal property." *Cairns v. Chaubert*, 9 Paige, 163. A testator gave the residue of his estate and effects to trustees, to permit the *rents*, interest and annual proceeds to be received by A. for life, and after his decease to C. and D. when they attained twenty-one with power after the death of A. to apply the *rents*, &c., towards the maintenance of C. and D. until their shares should become vested. Part of the residue consisted of leaseholds. It was held that the tenant for life was entitled to enjoy them in *specie*, and that they were not to be converted for the benefit of those in remainder. The Master of the Rolls considered the use of the words "*rents*" as an indication of the intention of the testator; for without that word, "which was twice repeated in the will,"—"there was no other property belonging to the testator, except the leaseholds, to which the term *rents* was applicable." *Goodenough v. Tremamonde*, 2 Beav. 512. In a note to this case, (p. 514,) Mr. Beavan has arrayed the different decisions which have been given for or against conversion, in the respective cases. *Vaughan v. Buck*, (November, 1841,) 1 Phillips, 75, is a later decision, which, on the construction of the will, was against conversion. See further *Caldecott v. Caldecott*, (March, 1842,) 1 Young & Coll. C. C. 312, 322, as to the authority of the court to direct the mode of investment, where it is apparent from the will that the testator intended conversion:

1840.—*Vaughan v. Marquis of Headfort*.

The testatrix died eleven days after the date of her will. At her death Lord Headfort had six children, all of whom were still infants.

*The questions raised, on behalf of the Marquis of Headfort and his [*640] children, were, first, whether the legacy to the Marquis and his children, were specific or general: 2d. whether the Marquis and his children took the 40,000*l.* as joint-tenants, or whether the Marquis was entitled to it for his life, with remainder to his children.

Mr. *Knight Bruce* and Mr. *Evans* for the plaintiff, the residuary legatee, submitted whether the bequest was general or specific.

The Vice-Chancellor was clearly of opinion that the legacy was general.

Mr. *Jacob* and Mr. *Lovat*, for Lord Headfort, relied on the words, "to be secured," as showing that the children were not intended to have any portion of the fund transferred to them immediately, but that there was to be a trusteeship created during the life of the Marquis, that is, that the father was to take for life with remainder to his children, which construction would let in the future children of the Marquis. *Crawford v. Trotter*,^(a) *Jeffery v. Honeywood*,^(b) *Newman v. Nightingale*.^(c) They also contended that the words, "for their use," meant for the use of the children.

Mr. *Wakefield*, Mr. *Wigram* and Mr. *Ellison*, for the children, said that the gift to the Marquis and his children, made them joint-tenants, and that the words "to be secured," &c., did not destroy the effect of the preceding gift, but meant that a security was to be found "for the fund," [*641] that is, that it was to go into the hands of a trustee for the benefit of the legatees. *Cooper v. Thornton*.^(d)

THE VICE-CHANCELLOR:—This case shows, as I have often observed before, that no light is thrown on questions like the present by quoting other cases.[1] By the laws of this country, every testator, in disposing of his property, is at liberty to adopt his own nonsense: and a decision on the expressions used by one testator, seldom affords any clue to the meaning of another.

On looking through the whole of the will, I do not see anything that throws any light on the question now before me; and, therefore, I must deal with the individual expression as well as I can.

If possible, every word in a will ought to have that meaning given to it, which, in common fairness of construction, it is capable of receiving.[2] Now the words in this case are: "40,000*l.* in the three per cent. reduced annuities, to the Marquis of Headfort and his children." If it stood there, the Marquis and his children would be joint-tenants; but then it goes on: "to be secured for their use." Now it would be absurd to hold that those

(a) 4 Madd. 361. (b) Ibid. 398. (c) 1 Cox, 341. (d) 3 Bro. C. C. 96 and 186.

[1] As to the value of former decisions in cases of wills, see *Wood v. Cox*, 2 Myl. & Cr. 694. *Oddie v. Woodford*, 3 Myl. & Cr. 613, and n. 1, *ibid.* *Rathbone v. Dyckman*, 3 Paige, 26. *Blagge v. Miles*, 1 Story's Rep. 445. *Gudden v. Crowhurst*, post, 652.

[2] Vide *Whatford v. Moore*, 3 Myl. & Cr. 290. *Roosevelt v. Thurman*, 1 Johns. Ch. Rep. 228. *Benn v. Dixon*, ante 638.

1842.—*Godden v. Crowhurst.*

words apply to the Marquis; as he might have taken his own share, and either secured it for himself, or spent it. Those words, therefore, do not comprehend the Marquis: but the plain meaning of them is that the fund is to be secured, for the children, from the dominion of their father; and in my opinion, there is quite enough, in this will, to justify the court in holding [*642] that "the father is to take for his life, and his children after his decease: and that construction will let in any children of the Marquis that may be born hereafter.

Mr. *Wray*, Mr. *Keen* and Mr. *Humphry* appeared for other parties interested in other questions that arose on the will.

GODDEN v. CROWHURST.

1842: 28th January.—Will; Construction; Trust to take effect on alienation or bankruptcy; Bankrupt.

Testator bequeathed his residuary estate to trustees; and, after making a provision out of it, for the benefit of his son, for his life, and, after the son's death, for his wife and children, directed that, if his son should assign or charge the interest to which he was entitled for life, or attempt, or agree to do or commit any act whereby the same or any part thereof, might, if the absolute property thereof were vested in him, be forfeited to or become vested in any person or persons, then the trustees should pay and apply the said interest for the maintenance and support of his son, and any wife and child or children he might have, and for the education of such issue, as the trustees should, in their discretion, think fit. Some years after the testator's death, the son became bankrupt. Held that the trust for the benefit of the son, his wife and children, was valid, and that the assignees were not entitled to any part of the provision.

GEORGE STAFFELL, by his will dated the 25th of April, 1829, devised his real estates unto and to the use of William Manser, deceased, and the defendants Thomas Crowhurst and Justinian Allen, and their heirs, upon trust to sell the same at such time or times as they should think it would be most to the advantage of his estate; and he declared it to be his will that the moneys which should arise from such sale, should be considered to be part of his personal estate; and that the clear yearly rents and profits of his real estates, until the same should be sold, or so much thereof as should be [*643] remaining unsold, should be deemed to be part of the "annual income of his personal estate; and that the same moneys and rents and profits should be subject to the disposition thereafter made concerning his personal estate and the annual income thereof respectively and he gave, to the same trustees, all his ready moneys and securities for money, and moneys in the British and foreign funds, debts, stock in trade and other personal estate, upon trust to get in and sell and dispose of the same: and he declared it to be his will, and that he was particularly desirous that his trustees should not sell any part of his real estate until they should, in their discretion, think it desirable so to do: and he authorized and empowered them to demise the whole or any part thereof for any term of years they might think proper, not exceeding seven years, in possession: and he directed his trustees to stand pos-

1842.—*Godden v. Crowhurst*.

essed of the moneys to be by them raised, received, collected, and got in by the ways and means aforesaid, upon trust, after paying his debts and certain other charges, to place out and invest the residue of such moneys, in their names, upon the usual securities, at interest; and, subject as thereafter mentioned, he gave the interest, dividends and annual produce of one moiety of the residue of his estate, unto his son, Henry Staffell and his assigns, for his life; and subject also as thereafter mentioned, he gave the interest, dividends and annual produce of the other moiety of the residue of his estate, unto his daughter, Grace Allen, the wife of Justinian Allen, and her assigns, during her life: provided always, and he declared it to be his will that, as the interest, dividends and proceeds of the residue of his estate, and the rents of his real estate until sold, should be received by his trustees, the same should, after paying thereout the costs of keeping the messuages, buildings, and premises then remaining unsold in good repair and insured *from [*644] loss by fire or other incidental expenses, be laid out and invested again, as his trustees, in their discretion, should think most advantageous, and be accumulated for the space of five years from the day of his decease; and, at the expiration of that period, he directed his trustees to make out an account of all such interest and dividends and the accumulations thereof, and pay one moiety of such interest, dividends and accumulation to his son, Henry, for his own use and benefit, and to pay the other moiety of such interest, dividends and accumulations to his daughter, Grace Allen, for her own use and benefit: and he directed that, after such division of such interest and produce, the interest, dividends and annual produce of the residue of his estate, should, subject to the deductions aforesaid, be again accumulated for five years, when a like division should be made thereof between his said son and daughter as before mentioned; and that such accumulations and divisions should continue to be made at the expiration of every five years; it being his wish and desire that the interest and produce of the residue of his estate should only be divided once every five years, until the respective moieties thereof should become divisible amongst his grandchildren as thereafter mentioned: and in case his son, Henry, should die in the lifetime of his then present or any future wife, he directed that the interest, dividends and annual produce of the moiety of the residue of his estate to which his son, Henry, was entitled, should be paid to such wife during her life, but, nevertheless, at the same periods and in the same manner only as such interest or produce was payable to his son during his life; and, in case his daughter, Grace, should die in the lifetime of her then husband or any future husband she might have, he directed that the interest, dividends and produce of *the moiety of the residue of his estate to which she was [*645] entitled for life, should be paid to such husband surviving her, during his life, but nevertheless at the same periods and in the same manner only as such interest or produce was payable to his daughter during her life: and he directed that, in case his son should, at any time or times, make any assignment, mortgage or charge of or upon, or in any manner dispose of, by

 1842.—*Godden v. Crowhurst.*

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way of anticipation, the said interest, dividends or accumulations, or any part thereof, to which he was entitled for life as aforesaid, or attempt or agree so to do, or commit any act whereby the same or any part thereof could or might, if the absolute property thereof were vested in him, his said son, be forfeited unto or become vested in any person or persons, then and in any of the said cases his trustees, should, thenceforth, pay and apply the said interest, dividends and accumulations for the maintenance and support of his said son and any wife and child or children he might have, and for the education of such issue or any of them as his trustees for the time being should, in their discretion, think fit; and that, after the decease of his son and of his then present or any future wife, and after the decease of his daughter and her then present or any future husband, his trustees should pay, share and divide the moiety of the clear residue of his estate to which each such son or daughter was entitled for life, unto and equally between and amongst all and every his and her children, if more than one, who, whether sons or daughters, should attain the age of twenty-one years, share and share alike; and in case there should be only one child who should attain 21, then the whole of such moiety of his estate unto such child: and in case either his son or his daughter should die without leaving any child that should live to attain the age of 21 years, he directed his trustees to [*646] "stand possessed of such moiety upon the same trusts, for the benefit of the other of his son or daughter and his or her children, as were thereby mentioned and declared with respect to the moiety thereby given to or in trust for him or her and his or her children: and in case both his son and his daughter should die without leaving any child who should attain the age of 21 years, then he declared that the whole of the residue of his estate, and the stocks, funds or securities on which the same should be invested, should be payable to his own next of kin living at the time of such event happening, and be divisible according to the statute made for the distribution of intestates' estates; such bequests over, however, to be without prejudice and subject to the interest thereinbefore given to any wife of his son, Henry, or any husband of his daughter, Grace, who might respectively survive them.

The testator died on the first of January, 1830, leaving Henry Staffell, his only son and heir at law, and Grace Allen, his daughter and only other child, surviving him: and, upon the death of the testator, the trustees entered into the possession of his real estates; and, after paying the testator's debts and the other charges payable out of his personal estate, they invested the clear surplus thereof in the usual securities; and, in exercise of the discretion entrusted to them by the will, they retained the real estates unsold, and received the rents and profits thereof, and the dividends and interest arising from the investment of the surplus of the personal estate; and, during the period of five years from the death of the testator, they accumulated the same pursuant to the directions of the will; and, at the end of such period, they divided such accumulations between Henry Staffell and Grace Allen; and

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they received and accumulated the 'rents of the real estates, and the dividends and interest of the personal estate which accrued from the time of the aforesaid division. [647]

On the 31st of May, 1837, a fiat in bankruptcy was issued against Henry Staffell, under which he was declared a bankrupt, and the plaintiffs, Henry Godden, and James Foster Groom, were appointed the creditors' and official assignee respectively under the fiat.

The bill was filed against Henry Staffell, his wife and children and the surviving trustees of the will; and, after stating as above, it alleged that, although the testator had, by his will, directed that, in the event of Henry Staffell committing any act whereby the interest, dividends or accumulations to which he should be entitled for life under the will, could or might, if the absolute property thereof were vested in him, be forfeited unto or become vested in any person or persons, the trustees should, thenceforth, pay and apply the interest, dividends and accumulations for the maintenance and support of Henry Staffell, and any wife or child he might have, and for the education of such issue or any of them, as they, in their discretion, should think fit; the plaintiffs were advised that such direction was in itself ineffectual for the purpose of defeating or divesting the right of Henry Staffell and his assigns for his life, under the previous dispositions of the will, to a moiety of the rents, interest and dividends arising from the real and personal estate of the testator, or, if it was, in any event, effectual, that it was not applicable to the claim of the plaintiffs as arising under the bankruptcy of Henry Staffell: and that the plaintiffs, as his assignees, were entitled, notwithstanding such direction, to so much of the said moiety of the interest, dividends and accumulations 'aforesaid as had not been paid to Henry Staffell, previously to his bankruptcy; and to a moiety of the rents, interest and dividends subsequently accruing; or, if such division should, for any reason, be considered to be, to any extent, effectual as against the plaintiffs as such assignees, then they were advised that they were entitled to the whole of Henry Staffell's moiety of the rents, interest, dividends and accumulations which had accrued up to the time of his bankruptcy, and were entitled to some part of his moiety of the rents, interest, dividends and accumulations which had accrued subsequently to his bankruptcy, and which should thereafter accrue, not being less than an equal portion thereof, with the wife and children of Henry Staffell: and that the plaintiffs were also advised that the direction to accumulate, from time to time, the rents, interest and dividends for periods of five years, was not binding upon Henry Staffell previously to his bankruptcy, and was not then binding upon the plaintiffs as his assignees; and that the whole, or such proportion as the plaintiffs might be entitled to of Henry Staffell's moiety of the rents, interest dividends and accumulations which had already accrued, ought to be paid to the plaintiffs forthwith; and such moiety, or proportion of a moiety of the future rents, interest and dividends, ought to be paid to them, as the same

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should from time to time accrue and be received by the trustees : but that the trustees refused to pay, to the plaintiffs, any part of the rents, interest, dividends and accumulations which had accrued since the aforesaid division : and that Henry Staffell and his wife and children insisted that, under the trusts declared, by the will, of Henry Staffell's moiety of the rents, interest, dividends and accumulations, in the event of his committing any such act as before mentioned, they, or some of them, were entitled [*649] "to have the whole of such moiety of the rents, interest, dividends and accumulations, from the time of the aforesaid division thereof, applied for their maintenance, support and education.

The bill prayed that the will might be established ; and that it might be declared that the plaintiffs, as the assignees of Henry Staffell, were entitled to the moiety of the rents, interest, and accumulations arising from the real and personal estates of the testator, which Henry Staffell would have been entitled to if he had not become a bankrupt : and that it might be declared that the direction contained in the will for the accumulation of the said rents, interests and dividends, was not binding upon Henry Staffell previously to his bankruptcy, and was not then binding upon the plaintiffs as his assignees : and, if it should happen that the plaintiffs were not entitled to the whole of Henry Staffell's moiety of the rents, interest, dividends and accumulations accrued since his bankruptcy, then that the plaintiffs might be declared to be entitled to the whole of such rents, interests, dividends and accumulations as accrued previously to such bankruptcy, and to some part, not being less than an equal portion with H. Staffell's wife and children, of his moiety of the rents, interest, dividends and accumulations which had accrued since such a bankruptcy, and of the rents, interest and dividends that should thereafter accrue during the life of Henry Staffell ; and that the trustees might account for the rents, interest, dividends and accumulations which had accrued since the division made by them as before mentioned ; and might pay, to the plaintiffs, one moiety or such other proportion of the rents, interest, dividends and accumulations as they might appear to be entitled to during [*650] the whole or any part or parts of the "period elapsed since such division, and also a moiety or such other proportion as they might happen to be entitled to, of the future rents, interest and dividends of the testator's real and personal estate.

Mr. *G. Richards* and Mr. *Bacon*, for the plaintiffs :—In this case the provision made in the event of the son's assigning his moiety of the interest, dividends and accumulations of the trust property, or doing any act whereby the same might become vested in any other person, is, substantially, for the son's benefit : and, that being so, the assignees under his bankruptcy, are entitled to his share of the interest, dividends and accumulations which have arisen since the last division of the accumulations took place. *Phipps v. Lord Ennismore*.(a) In that case, a settlement was made in consideration

(a) 4 Russ. 131.

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of the marriage of the settlor; and, by a separate but contemporaneous deed made between the same parties, it was agreed that, if the settlor should sell, mortgage or in any manner encumber the lands comprised in the settlement or do or attempt to do any act whereby those lands should be vested in any other person, the trustees should receive the rents and apply them, in such manner as they should think proper, for the maintenance and support of the settlor or his wife or children: and, notwithstanding the marriage consideration extended to that deed, the court held it to be void against subsequent encumbrancers.

If, however the court should be of opinion that the assignees are not entitled to the full extent which we have contended for, it is impossible to hold that they are not entitled to any thing; as the son is one of [*651] the objects of the provision, and no discretion is given to the trustees, to apply his moiety of the interest, &c., for the maintenance and support of him, or of his wife, or of his children. Therefore, if the assignees are not entitled to the whole of the son's moiety, they are entitled to one-half of it, at the least; for the testator places the son in one class, and his wife and children in another class.

We submit that the trust for accumulation can not be supported, as it is repugnant to or inconsistent with the prior trusts of the will.

Mr. *Lovat* and Mr. *Torriano*, for Henry Staffell and his wife and children:—We submit that the assignees are not entitled to any thing. The testator's son has committed an act whereby his share of the interest and accumulations, if the absolute property thereof had been vested in him, would have become vested in some other persons: and the consequence is, that the trustees are to apply his share of the interest, &c., for the maintenance and support of him, his wife and children, as the trustees may, in their discretion think fit. It would be singular to construe this clause, so as to vest the son's moiety in his assignees, when it was clearly intended to prevent that result. There is this important distinction between the case and those in which the property of a bankrupt has been held to be ineffectually protected from the effects of his bankruptcy, namely, that, in those cases, the property was given for the *general* benefit of the party; but, here, the provision in the event of bankruptcy, is not for the general benefit of the testator's son, but the trustees are directed to apply his share of the interest, [*652] &c., of the trust fund, for the *maintenance and support* of him and any wife or children he may have, and for the education of such issue, or any of them, as the trustees may in their discretion, think fit. How is the court to limit the discretion given to the trustees? There is no difference between this case and *Twopeny v. Peyton*,^(a) except that that case is stronger in favor of the assignees than the present case is; for, there, the bankrupt was the sole object of the provision.

(a) Ante, p 437

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Mr. *Whitmarsh*, jun., appeared for the trustees of the will.

M^r. *Richards*, in reply, said, that *Twopeny v. Peyton* was plainly distinguishable from the present case; as, there, the party for whom the provision was made by the will, had become bankrupt at the date of the codicil; and that circumstance was the ground of the decision.

THE VICE-CHANCELLOR:—This is a case quite *sui generis*. It has nothing to do with those cases in which it has been held that, where a trader settles his own estate with such a proviso, as has been introduced into this will, with respect to bankruptcy, the proviso is void as against the creditors: and, therefore, this case must be decided upon the view of the will itself.

Now observe how the will is framed. The testator has given, first of all, his real estate to trustees, in trust to sell; and the proceeds are to be considered as part of his personal estate: and then he gives the following [*653] directions with regard to the disposition of his personal estate, namely, that the trustees are to pay his debts, and invest the residue in the parliamentary stocks or funds of Great Britain, or on real securities at interest. Then he gives: "the interest, dividends and annual produce of one moiety of the residue of my estate, unto my said son Henry and his assigns, for life; and, subject also as hereinafter mentioned, I give and bequeath the interest, dividends or annual produce of the remaining moiety of the residue of my estate, unto my daughter Grace Allen, and her assigns, during her life." Then he introduces this proviso; "provided always, and my express will and desire is that, as the interest, dividends, and proceeds of the residue of my estate, and the rents of my real estate, until sold, shall be received by my said executors and trustees, the same shall, after deducting and paying thereout the costs of keeping the messuages, buildings and premises then remaining unsold in good repair and insured from loss by fire or other incidental expenses, be laid out and invested again as they, my said trustees, in their discretion, shall think most advantageous, and be accumulated for the space of five years from the day of my decease; and, at the expiration of that period, I direct my executors and trustees for the time being, to make out an account of all such interest and dividends and the accumulations thereof, and pay one moiety of such interest, dividends and accumulations unto my said son, Henry, to and for his own use and benefit; and pay the remaining or other moiety of such interest, dividends and accumulations unto my daughter, Grace Allen, to and for her own use and benefit: and I further direct that, after such division of the said interest and produce, the interest, dividends and annual produce of the said residue of my estate, shall, subject to [*654] the deductions aforesaid, be again accumulated for five years: when a like division shall be made thereof between my said son Henry and daughter Grace, as before mentioned; and such accumulations and divisions shall continue to be made at the expiration of every five years; it being my wish and desire that the interest and produce of the residue of my estate, should only be divided once every five years, until the respective moieties

 1849.—*Godden v. Crowhurst*.

thereof shall become divisible amongst my grandchildren as hereinafter mentioned." I have looked to that part of the will with regard to the gift to the children of Henry and Grace, and there, all intention of accumulation disappears: there is no such provision with respect to them at least. Now it was competent to the testator to give this direction; and, as both the son and the daughter were affected by it, I do not conceive that, unless they had both concurred in an application to the trustees to discontinue the accumulation, that it could properly be discontinued. It is not a direction which is void. Whether, in case a bill had been filed, by the son and the daughter, against the trustees, for the purpose of having the question determined, the court would or would not have interfered, is a different consideration. That is a matter which I cannot determine now, because I have not the daughter here; but in my opinion, the trust is unquestionably good, at any rate, until it is put an end to. There was nothing to put an end to it. The accumulations were paid at the end of five years, and were then allowed to continue; and it is too much to say that, in the interval between the first accumulation and the second, it is competent for one only of the parties interested, to interfere with the accumulations; and my opinion, therefore, is, that the trust for accumulation is perfectly good.

"The principal question, however, is: what is the effect of the [*655] proviso?—[Mr. *Richards*: With great deference, sir, supposing that the clause for accumulation is good, then the question would arise whether the accumulations were not vested in the son.]—Yes; I am coming to that: that is the point. Now it seems to me that the accumulations would, by the nature of the trust, go on, that is to say that, nothing having occurred to put an end to the trust after the end of the first five years, it continued in force.

Then the question is, what is the effect of the provision with respect to the son doing any act: "whereby the same" (that is the accumulations) "or any part thereof, could or might, if the absolute property thereof were vested in him, my said son, be forfeited unto or become vested in any person or persons." It is clear that the testator there considered that his son was not to be considered, under his will, as taking the absolute interest. I mean that, independent of the words which follow, which attempt to give the son's interest over, the testator there expresses his opinion that the property was, by the will, so given as that the son did not take an absolute interest for life. Then the will proceeds thus: "Then and in any of the said cases, upon trust that they, my said trustees or trustee for the time being, do and shall, thenceforth, pay and apply the said interest, dividends and accumulations for the maintenance and support of my said son, and any wife and child or children he may have, and for the education of such issue or any of them, as they, my said trustees for the time being, shall, in their discretion think fit." Now I take it that those words: "or any of them," merely apply to the words: "such issue:" such issue meaning: "child or children." [1] I point

[1] As to the construction of the word "issue," see *Peel v. Catlow*, 9 Sim. 372, 377, n. 1.

 1842.—Wilson v. Applegarth.

[*656] that "out in order that I may give an express opinion upon the point, that this fund, if it be given at all, is given, collectively and not distributively, for the maintenance and support of the son, and any wife and child or children he may have. The word *or*, there, is merely addressed to children, collectively, as the substitutes for a single child. It is not a word of distribution which separates the son from the wife, or the wife from the child. I so express myself, because, according to my apprehension, this is a clause in which, whatever benefit is intended, is given, collectively, to the son and the wife and the children; and it appears to me that that is the grammatical construction, for the reason I have stated.[1] Then the property is given: "for the maintenance and support of my said son, and any wife and child or children" (which is the event that has happened) "he may have, and for the education of such issue or any of them, as they, my said trustees for the time being, shall, in their discretion, think fit." Now there is nothing, in point of law, to invalidate such a gift, that I am aware of. It does not follow that anything was, of necessity, to be *paid*; but the property was to be applied; and there might have been a maintenance of the son, and of the wife and of the children, without their receiving any money at all. For instance, the trustees might take a house for their lodging, and they might give directions, to tradesmen, to supply the son and the wife and the children with all that was necessary for maintenance: and, therefore, my opinion is that I am not at liberty to take this as a mere gift for the benefit of the son, simply: but it is a gift for his benefit in the shape of maintenance and support of himself jointly with his wife and children. And, if that is the true construction of the gift in question, the result is that the

[*657] assignees are not entitled to anything:[2] but the "consequence is that, if the trust was a perfect trust for accumulation for the second period, the whole of the accumulated fund will, at the end of that period, be applicable for the maintenance and support of the son, the wife and the children collectively, and the assignees have no interest at all.(a)

Bill dismissed without costs.

 WILSON v. APPLGARTH.

1842: 31st January.—New Orders; Parliamentary accounts and inquiries.

A bill was filed for payment of a legacy; but it appeared, from the answer, that the plaintiff did not correctly answer the description of the legatee, contained in the will.

The court refused to direct a preliminary inquiry, under the 5th order of the 9th of May, 1839.

MARY ELIZA STEEL, by her will dated in October, 1834, bequeathed her residuary estate in trust for her son William Steel, provided he should return

(a) See *Rippon v. Norton*, 2 Beav. 63; and *Page v. Way*, 3 Beav. 20. [*Lord v. Bana*, 2 Ye. & Coll. C. C. 98.]

[1] Vide 9 Sim. 361, n. 1.

[2] Vide *Green v. Spicer*, 1 Russ. & M. 396, 397, n. 1. *Lear v. Leggett*, id. 690, 691, n. 1.

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to England within five years from her death ; but if he should not return within that time, then she gave to her cousins Joseph Wilson and Hannah Wilson, a son and daughter of John Wilson late of High Leaven in the north riding of the county of York, deceased, a legacy of 50*l.* each.

The testatrix died in October, 1834.

In August, 1840, the bill was filed, for payment of the legacies, by two persons named Joseph Wilson and Hannah Wilson, alleging that they were the son and daughter of Joseph Wilson, in the bill by mistake, called John Wilson ; and that the said Joseph Wilson was late of High Leaven in the north riding of Yorkshire ; and that the plaintiffs were the testatrix's *cousins ; and that William Steel, the testatrix's son, was not in [*658] England at the date of the will or at the testatrix's death, and had never since returned to England, but had, in fact died abroad in the testatrix's lifetime.

The answer of the defendant, who was the executor of the will, stated that the defendant had been informed and believed that John Wilson and Joseph Wilson, who were brothers, formerly resided at High Leaven ; that John Wilson married Elizabeth Thirkill, a first cousin of the testatrix, and left High Leaven many years ago, and, afterwards, emigrated to America, and that, upon the death of his wife, he married again and had a numerous family ; and that Joseph Wilson married Mary Steel, and the sister of William Steel, the testatrix's late husband ; but otherwise Joseph Wilson and his wife were, neither of them, related to the testatrix ; and that the defendant believed that the plaintiffs were the children of the said Joseph Wilson.

Mr. *Cole*, for the plaintiffs, now moved, under the third order of the 9th of May, 1839,[1] that it might be referred to the Master, to inquire and state whether William Steel, the testatrix's son named in her will, returned to to England within five years from the testatrix's death.

Mr. *G. Richards*, for the defendant.

The Vice-Chancellor refused the motion on the ground that the plaintiff's title to the legacies, was not sufficiently admitted by the answer.[2]

[1] Vide 1 Beav. xi.

[2] As to inquiry to ascertain identity of legatee, see *Denyer v. Druce*, Taml. 37. *Heming v. Whitam*, 2 Sim. 501.

I N D E X

TO THE PRINCIPAL MATTERS.

ACCOUNTS.

See ADMINISTRATOR, 2.—INFANT, 1, 2.

ACCOUNTS AND INQUIRIES.

See PRELIMINARY ACCOUNTS AND INQUIRIES.

ACCUMULATION.

See CONSTRUCTION, 15.

ACT OF BANKRUPTCY.

On the 9th of May, 1831, M. being a partner with R. in a linen manufactory, sold and assigned his share in the partnership to L.: but being apprehensive that the transaction, if made public, would cause a run on certain banks in which he was engaged, and might prevent his being re-elected for the borough of A, which he then represented, the dissolution of the partnership between him and R., and the formation of the new partnership between R. and L. was at M.'s request, not announced in the Gazette or otherwise made public, until the 3d of January, 1832. On the 2d of that month, M. stopped payment, and, on the 26th, a fiat issued, on a debt incurred in 1830, under which he was found a bankrupt. On the 11th of July, 1831, M. being indebted on bond, to the trustees of his son's marriage settlement, assigned, at his son's request, a house and furniture to the trustees, as a security for the bond debt. At the time of the assignment, M. was in some pecuniary difficulties arising from the failure of stock transactions and other speculations in which he had been engaged. Held that, under all circumstances of the case, the assignment was not a fraudulent conveyance by M., with intent to defeat or delay his creditors, and, therefore, not an act of bankruptcy; and that, at all events, his share in the linen business, was not in his order and disposition at the time of the assignment, *Bannatyne v. Leader*, 350

ACTION.

See TRIAL.

ADMINISTRATION.

See HEIR.—INFANT, 1, 2.—PARTIES, 3.

ADMINISTRATOR.

1. A. died intestate, having *bens notabilis* in two dioceses, and B. took out a prerogative administration to him. One of A.'s next of kin afterwards died intestate, and C. took out administration to him, in the diocese of P. Held, on demurrer, that a bill, by C. against B., relating to A.'s estate, was sustainable; as it did not appear that B. was not residing within the diocese of P. *Beadles v. Burch*, 332
2. A bill was filed, by a residuary legatee against A. and B., the administrators of the deceased's effects, for an account of the assets received by them. A. died without having appeared to the bill: and C. obtained letters of administration of his goods, limited for the purpose only to attend, supply, substantiate and confirm the proceedings in the suit, until a final decree should be made and executed; and C. was brought before the court, by a supplemental bill. Held that, owing to the limited nature of those letters of administration, an account of A.'s receipts could not be taken; but that a general administrator to A. must be brought before the court. *Clough v. Dixon*, 564
3. Pending a litigation in a Spanish court, as to which of two testamentary papers of a deceased Spaniard, ought to be established, the plaintiff, who was resident in Spain, was appointed by the Spanish court, the judicial administrator of the deceased's goods; and the plaintiff, under the authority of that court, afterwards appointed the defendant to be his attorney to recover and receive 10,000*l.* due to the deceased's estate from C. & Co., of London. The defendant, after litigation, in the Prerogative Court of Canterbury, with one of the parties to the Spanish suit, obtained letters of administration to the deceased to be granted to him as the plaintiff's attorney, limited to receive the 10,000*l.* until the plaintiff should obtain administration to the deceased. The defendant afterwards received the 10,000*l.* Held that he might safely pay it over to the plaintiff, although he had not obtained administration to the deceased. *De la Viesca v. Lubbock*, 629

See HEIR AND ADMINISTRATOR.

ADVANCING CAUSE.

1. Costs of an opposed application to advance a cause, directed to be costs in the cause upon the application being granted. *Carthew v. Barclay*, 273
See 2.
2. The costs of a motion to advance a cause under the 4th order of May, 1839, ordered to be paid by the plaintiff. *Browne v. Lockhart*, 420

AFFIDAVITS.

1. Where a motion to dissolve an injunction is ordered to stand over at the plaintiff's request, affidavits filed after 10 o'clock of the day for which the notice was given, cannot be read when the motion is made. *Anonymous*, 50
2. Plaintiff obtained an *ex parte* injunction. Defendant filed his answer, and served a notice of motion to dissolve the injunction. Exceptions were taken to the answer; to which the defendant submitted, and then filed a further answer. Between the filing of the exceptions and the putting in of the further answer, the plaintiff filed affidavits in support of the injunction. The defendant then moved to dissolve on the notice served prior to putting in his further answer. Held that the affidavits so filed by the plaintiff might be read on the hearing of the motion. *Smith v. Cleasby*, 91
3. Special injunction dissolved with costs, office copies of the affidavits in support of it, not having been obtained, when it was moved for. *Jackson v. Cassidy*, 326

AGENT.

See CLERK IN COURT.

AGREEMENT.

1. A deed dated in 1827 and made between J. Pitt, of the one part, and the other persons who had executed the deed, of the other part, recited that Pitt, being seized in fee of the lands delineated in the plan thereto annexed (being Pittville) and having it in contemplation to establish a spa at or near the north end of the lands, and to erect a pump-room at or near the spot marked on the plan, and to lay out the rest of the lands for buildings, pleasure grounds, roads, &c., had caused the plan to be drawn whereby the mode in which the lands were intended to be laid out and the purposes for which they were intended to be converted and used, were described, in order that the beauty and regularity of the whole of the design might be, for ever thereafter, preserved, subject only to such alterations as should be made or approved of by Pitt, his heirs or assigns, and as should not destroy the general beauty of the same design, and that each of the other parties to the deed had purchased or agreed to purchase one or more of the pieces of land described, in the plan, as set out for building. The deed then contained covenants, by Pitt, his heirs and assigns, to complete the

pleasure grounds, roads, &c., and to keep them in repair, and other covenants prescribing the manner in which the pleasure grounds, roads, &c., should be enjoyed and used by the occupiers of the houses to be erected on the building ground, and that Pitt, his heirs or assigns, would on every agreement which should be entered into, by him or them, for the sale of any part of the building ground, require the purchaser to covenant with him, his heirs and assigns, not to erect any messuage, on any part of the ground, which might lessen, in value, any other of the messuages erected or to be erected at Pittville. In 1833 Pitt agreed to sell lots 2, 3, 4 and 5, of the building ground, to Stokes; and Stokes agreed with him to erect three houses on those lots, and that each house should stand back twenty-five feet from the western boundary of the lots, and that Stokes, his heirs or assigns, would not do or suffer to be done on the lots or in any building to be erected thereon, any act, deed, &c., which might be deemed a nuisance, injury or annoyance, or which might lessen in value any adjoining or neighboring lands or property, or any houses to be erected thereon. Stokes built two houses on lots 2 and 3, and in 1833 Pitt conveyed those lots to him, and Stokes for himself, his heirs and assigns, entered into a covenant with Pitt, his heirs and assigns, with respect to those lots and the houses thereon, similar to the last mentioned stipulation in the agreement. Stokes subsequently gave up lots 4 and 5 to Pitt, and abandoned his agreement as to them, and then sold his house on lot 3 to the plaintiff. Pitt afterwards agreed to sell lots 4 and 5 to Creed. The agreement stipulated that the house to be erected on those lots should stand back ten feet at the least from the western boundary thereof, and it contained a stipulation for protecting the adjoining property from injury, &c., similar to that in Stokes' agreement. Both Stokes and Creed executed the deed of 1827. Creed began to build a house on his lots thirteen feet distant from the west boundary, which was twelve feet in advance of the plaintiff's house, and which the plaintiff alleged would be a nuisance or annoyance to him, and would lessen the value of his house, and consequently would be a violation of the covenants in the deed of 1827, and of the agreement of 1833. Held that the plan annexed to the deed of 1827 was merely a general plan, and was not intended to be strictly adhered to, but its details might be varied by Pitt, and, with his sanction, by the purchasers from him; and that the plaintiff was not entitled to avail himself, as against either Creed or Pitt, of the covenants of 1827, or of the agreement of 1833, for the purpose of preventing the completion of Creed's house in the manner intended, or the performance by Pitt of the agreement with Creed. *Schreiber v. Creed*, 9

2. By a contract for the sale of an estate, it was agreed that the purchase should be completed on a certain day, but that all rent to accrue in the interim should belong to the vendor, his heirs, executors, and administrators. The

vendor died intestate before the day appointed for completing the purchase. Held, that rent accrued between that day and the vendor's death, belonged to his heir. *Shadforth v. Temple*, 184
 See ARTICLES OF SEPARATION.—CONSTRUCTION, 8.

ALIEN.

If an alien resident abroad, composes a work there, but publishes it first in this country, he is entitled to the protection of the laws of this country relating to copyright: *semble*. *Bentley v. Foster*, 329

ALIENATION.

See BANKRUPT, 2.

AMENDMENT.

1. Where an order to amend may be made, by the Master, as against some of the defendants, but must be made, by the court, as against one of them, the plaintiff may obtain the order, from the court, as against all the defendants. *Machitt v. Palmer*, 241
2. A bill was filed for a foreclosure of a mortgage and for a transfer of a sum of stock. On the answer being filed, disclosures were made which rendered it advisable to amend the bill, by striking out all that related to the mortgage; and, thereby, nearly one half of the bill and answer, was rendered useless. The court, however, refused to order, on motion, the plaintiff to pay the defendant's costs occasioned by the amendment; as it appeared that the amendment was made under the advice of counsel, and not for the purpose of vexation or oppression. *Monck v. The Earl of Tankerville*, 284

ANNUITY.

1. Testator, by his will, bequeathed sums to his four sons absolutely, and other sums to his four daughters for their lives, with remainder to their children. One of his sons afterwards died; and the testator thereupon made a codicil as follows: "In consequence of the death of my son, J. T., I have opened my will, and now wish to bequeath to my wife, 600*l.* a year; to my three sons, 2000*l.* each; to four daughters, 300*l.* a year each; and, at the death of my wife, the 600*l.* a year to be equally divided amongst my four daughters. This memorandum will, I hope, be attended to in case of death before I make the legal alteration in my will." Held that the gifts by the codicil, were in addition to those by the will; and that the annual sums given by the codicil, were perpetual, and not mere life annuities. *Tweeddale v. Tweeddale*, [See 2.] 453
2. Testator bequeathed to his wife, 600*l.* per annum for her life, and, after her death, the said annuity to be equally divided between A., B., C., D., E. and F., or the survivors or survivor; and he bequeathed to the same six persons 100*l.* per annum each, during their lives, with power to leave their annuities, at their deaths, to any persons they might marry, or any children they might leave; but in case of

either of them dying without exercising such power, then to the survivors or survivor. Held, by the Vice-Chancellor, that the above bequests in favor of A., B., C., D., E., and F., passed the capital of the funds producing the annuities; but the Lord Chancellor reversed His Honor's decision. *Blewitt v. Roberts*, 491

3. Testator, after reciting that the income of his wife, in case she survived him, would consist, in part, of the rent of a leasehold estate, which he had settled on her, directed his trustees, in case the lease should expire in her lifetime, to pay to her, out of the dividends and interest arising from a sufficient part of his personal estate, at their discretion, so much per annum as would be an equivalent for the rent lost thereby; and he gave his residuary personal estate to the trustees, in trust to invest it in the usual securities, and to accumulate the income until the lease should expire in his wife's lifetime, and then, during the remainder of her life, to pay her the income of the accumulated fund, and, after her death, to stand possessed of the capital for his grandchildren. The lease expired in the wife's lifetime; but the income of the residuary fund was not equivalent to the rent lost. Held that the wife was entitled to have the deficiency of her income made good out of the capital of the residuary fund. *Boyd v. Buckle*, 595

ANSWER.

See DISMISSAL, 2.

ANSWER TO A BILL OF REVIVOR.

After the defendants had answered the bill, one of the plaintiffs died; upon which a bill of revivor was filed, praying that the defendants might answer it. The defendants, in their answer, admitted the right to revive, and stated that, since answering the original bill, they had become bankrupt, and obtained their certificates. Held that those statements were not impertinent. *Langley v. Fisher*, 345

APPOINTMENT.

A testator directed that in case of one of his daughters having no child, his trustees should stand possessed of a sum of 3000*l.* and the stock upon which it should be invested, including the accumulations of the surplus dividends which should not have been applied, in manner in the will mentioned, during the daughter's minority, upon such trusts as the daughter should by will appoint; and in default of appointment, or in case of appointment as to such parts of the 3000*l.* as should not be effectually comprised therein, or whereof the trusts to be thereby limited should either never take effect, or should determine, upon the trusts by his will declared of his own residuary estate. The daughter having no child, by her will, after reciting that the 3000*l.* and the accumulated dividends had been blended, with funds to which she was absolutely entitled, in a sum of 6700*l.* consols standing in the names of trustees, proceeded,

in express execution of the power, to direct that the 3000*l.*, and the stock upon which that sum or the surplus dividends should have been invested, should be transferred to certain trustees named in her will, upon trust, as to 2700*l.* consols, for her mother, and as to 250*l.* consols for another person, and, as to the residue, upon the trusts after declared of her residuary estate. She then proceeded to give what she described as "all the residue of my stock in the public funds, and all my moneys and securities for money, and all the residue of my estate and effects," to the same trustees, upon trust to convert, and to invest in the funds such part as should not already be so invested, and to stand possessed of all such funds, and also of the residue of the said trust funds which should remain after paying and satisfying the several legacies of stock before directed to be paid or transferred thereout to her mother and the other person referred to, upon certain trusts which she proceeded to declare. The mother died in the daughter's lifetime. Held that the 2700*l.* consols was not well appointed, and that it was subject to the trusts declared, by the testator, of his residuary estate. *Easum v. Appleford*, 274

APPORTIONMENT.

See **DIVIDENDS.**

ARTICLES OF SEPARATION.

By articles of separation, the husband covenanted with his wife's trustee, to secure an annuity of 1000*l.* on her, on or before a certain day; and the trustee covenanted with the husband, that, on the annuity being secured, he would enter into a covenant to indemnify the husband against the wife's debts. Held that the latter covenant, though conditional, was sufficient to support the articles. *Wellesley v. Wellesley*, 256

See **HUSBAND AND WIFE**, 1, 2, 3.

ASSETS.

See **HEIR**, 1, 2.—**INFANT**, 1, 2.—**MARSHALLING OF ASSETS.**

ASSIGNABLE INTEREST.

The Commissioners of Customs, by the direction of the Lords of the Treasury, granted to A., as a compensation for the loss of an office which he had held in the custom-house, 500*l.* a year, payable quarterly by the Receiver General of Customs. A. assigned the allowance to B. for a valuable consideration, and, subsequently took the benefit of the insolvent debtors' act. The court, in a suit by B. against A. and the assignees of his estate, but to which neither the Lords of the Treasury nor the Commissioners of Customs, were parties, restrained the Receiver General from paying over to the defendants, moneys in his hands on account of the arrears of the allowance, unless the Lords of the Treasury, or the Commissioners of Customs, should order the contrary. *Semle*, that such compensation allowance, though revocable at the pleasure of the

Government, is assignable. *Tunstall v. Boothby*, 542

BANKRUPT.

1. Testatrix bequeathed a share of her residue in trust for her nephew for life. By a codicil, after reciting that her nephew had become a bankrupt and insane, she directed the trustees to apply, during his life, the whole or such part of the interest of the fund, at such times, in such proportions, and in such manner, for the maintenance and support of her nephew, and for no other purpose whatsoever, as they, in their discretion, should think most expedient. Held that the nephew's assignees were not entitled to any portion of the provision made for him. *Twopeny v. Peyton*, 487
 2. Testator bequeathed his residuary estate to trustees, and, after making a provision out of it, for the benefit of his son, for his life, and, after the son's death, for his wife and children, directed that, if his son should assign or charge the interest to which he was entitled for life, or attempt or agree so to do, or commit any act whereby the same, or any part thereof, might, if the absolute property thereof were vested in him be forfeited to or become vested in any person or persons, then the trustees should pay and apply the said interest for the maintenance and support of his son, and any wife and child or children he might have, and for the education of such issue, as the trustees should, in their discretion, think fit. Some years after the testator's death, the son became bankrupt. Held that the trust for the benefit of the son, his wife and children, was valid, and that the assignees were not entitled to any part of the provision. *Godden v. Crowhurst*, 642
- See **ACT OF BANKRUPTCY.**

BEDFORD LEVEL ACT.

By the Bedford level act, it was enacted, that all conveyances by indenture, of the 95,000 acres allotted to the then Earl of Bedford, or any part thereof, entered with the registrar of the level, should be of equal force to convey the freehold and inheritance thereof, as if the same were for valuable considerations, enrolled, within six months, in one of the King's courts of record at Westminster, and that no lease, grant, or conveyance of, or charge out of or upon the 95,000 acres, or any part thereof, except leases for seven years or under in possession, should be of force but from the time it should be entered with the registrar. Conveyances were afterwards made of part of the 95,000 acres, but were not registered. Held that those conveyances were nevertheless valid for all purposes, except for entitling the grantees to the privileges conferred by the act, on the owners of lands within the level, and for the other purposes of the act. *Willis v. Brown*, 127

BIDDINGS.

- E. B., one of several defendants, having purchased an estate sold under the decree, for 810*l.*, without having obtained leave to bid;

another defendant moved that the estate might be again put up to sale at 810*l.*, and if it should fetch more, that the sale to E. B. might be set aside, and that he might pay the expenses of the re-sale and the costs of the motion. The court refused the application, but without costs. *Elworthy v. Billing*, 98

BILL OF REVIVOR.

See ANSWER TO BILL OF REVIVOR.

CERTIFICATE.

See SCANDAL AND IMPERTINENCE.

CERTIORARI.

1. A certiorari issued out of the Court of Chancery on an order made by a judge at common law is irregular. *Worthington v. Remnant*, 558
2. The Court of Chancery has issued a certiorari to the Court of Common Pleas at Lancaster. *Ib.*

CHARGE OF DEBTS.

Testator expressed an intention to dispose of all his worldly effects, and directed all his just debts and funeral expenses, to be fully discharged by his executor thereafter named: and, after giving several legacies, he devised all his copyhold lands, to his son John, and left all the rest and residue of his estate and effects, unto and to the use of his son John, whom he thereby appointed sole executor and residuary legatee. Held that, taking the whole of the will together, the words were sufficient to pass the fee in the copyholds, and to charge them with the testator's debts. *Dover v. Gregory*, 393

CHARGING ORDER.

See CONSTRUCTION, 2.

CHARITY.

1. Where two classes of persons claim, adversely to each other, the right of administering the funds of a charity, the court will not decide the question, on a petition presented under 52 Geo. 3, c. 101. *In re West Retford Church Lands*, 101
2. The court has no jurisdiction to make an order on a petition presented under 52 Geo. 3, c. 101, for transferring the funds of a dispensary to a hospital, and amalgamating the two institutions. *In re Reading Dispensary*, 118

CLERK IN COURT.

A defendant's clerk in court is not his agent for the purpose of receiving notice of an injunction granted in the cause. *Gooseman v. Dann*, 517

COMMISSION TO EXAMINE WITNESSES ABROAD.

If a demurrer to a bill praying relief, and a commission to examine witnesses abroad, is good

as to the relief, it is good as to the commission. *Morris v. Morgan*, 341

COMPENSATION ALLOWANCE.

The Commissioners of Customs, by the direction of the Lords of the Treasury, granted to A., as a compensation for the loss of an office which he had held in the custom-house 500*l.* a year, payable quarterly by the Receiver General of Customs. A. assigned the allowance to B. for a valuable consideration, and, subsequently, took the benefit of the insolvent debtors' act. The court, in a suit by B. against A. and the assignees of his estate, but to which neither the Lords of the Treasury nor the Commissioners of Customs were parties, restrained the Receiver General from paying over, to the defendants, moneys in his hands on account of the arrears of the allowance, unless the Lords of the Treasury or the Commissioners of Customs, should order the contrary.

Seemle, that such compensation allowance, though revocable at the pleasure of the Government, is assignable. *Tunstall v. Boothby*,

CONDITIONAL BEQUEST.

Testator bequeathed 4000*l.* in trust for his daughter (a single woman), for her life, for her separate use, independently of any husband with whom she might intermarry, and, after her death, in trust for her children, and if there should be no children, then, if she should survive any husband with whom she might intermarry, in trust for her, her executors, &c.: but if her husband should survive her, then in trust as she should, by will, appoint, and, in default of appointment, in trust for her next of kin, as if she had died intestate, and without having married. The daughter died a spinster. Held that the words: "if my daughter shall survive any husband with whom she may intermarry," were words of condition and not of mere limitation, and, consequently, the residuary legatee, and not the daughter's executor, became entitled to the 4000*l.* on her death. *Lenox v. Lenox*, 400

CONDITIONAL SALE.

W. conveyed an estate to O. absolutely, as in pursuance of a sale: and, by a separate instrument, O. agreed to re-convey the property, on W. repaying the consideration money and the expenses of the conveyance (which O. had paid) within a year; and O. was, at his option, either to retain the intermediate rents, or to be paid interest. The agreement bore the same date, and purported to be executed on the same day as the conveyance; but that fact was not admitted in the answer, and there was no evidence of it. A. was an attorney, and prepared the conveyance. O. paid the expenses of it, and was immediately let into possession, and the consideration money was, very nearly, the full value of the estate. Held, nevertheless, that the transaction was, in fact, a mortgage, and that W.'s heir, was, long af-

ter the year had expired, entitled to redeem the estate. *Williams v. Owen*, 386
 Note.—This decision was reversed by Lord Cottenham.

CONDITIONS OF SALE.

One of the conditions of sale provided that, if the purchaser should raise objections to the title which the vendor should not be able or willing to remove, the vendor should be at liberty to rescind the contract, and that all objections which should not be taken, in writing, within ten days after the delivery of the abstract, should be considered as waived. Held that the condition referred to the 'first delivery of objections, and, if the vendor expressed his willingness to answer them, he could never afterwards rescind the contract. *Tanner v. Smith*, 410

CONFIDENTIAL COMMUNICATIONS.

The schedule to a defendant's answer of the documents in his power, contained as follows. "Letters from Messrs. K. & C., the defendant's solicitors, to Mr. F., one of the witnesses examined for the defendant at the trial of the action, bearing date, &c.:" and the defendant, in the body of his answer, stated that all the documents in the schedule, related to and were connected with the matters in question in the suit, and were prepared and written, after the institution of it, for the purpose of the defendant's defence to the suit, and for the purpose of the action between the parties to which the suit related. Held, that the letters were not sufficiently characterized as being of a confidential nature, to protect them from being produced. *Corporation of Dartmouth v. Holdsworth*, 476

CONSIDERATION.

See ARTICLES OF SEPARATION.—HUSBAND AND WIFE, 1.

CONSTRUCTION.

1. Testator gave whatsoever property or effects he might die possessed of, after his debts were paid, or might become entitled to, to his wife, and appointed her sole executrix of his will; "And my reason for so doing, is the constant abuse of trustees which I daily witness among men; at the same time trusting she will, from the love she bears to me and our dear children, so husband and take care of what property there may be, for their good; and should she marry again, then I wish she may convey, to trustees, in the most secure manner possible, what property she may then possess, for the benefit of the children as they may severally need or deserve, taking justice and affection for her guide;" and, at the conclusion of his will, he gave the capital of his business to his wife, trusting that she would deal justly and properly to and by all their children. Held that no trust was created for their children. *Pope v. Pope*, 1
2. Stock standing in the Accountant General's

name to the separate account of a party against whom a judgment debt has been recovered, may be charged, under 1 and 2 Vict. c. 110, with the debt; but the charging order must be made, not by a judge in equity, but by a judge at common law; and, although such order, in terms, charges the stock, it affects only the interest of the debtor in the stock, and, therefore, does not interfere with the rights of prior incumbrancers. *Hulkes v. Day*, 41

3. Testator devised his real estates, to trustees, in trust for his son for life, and, after the son's death, in trust to sell and stand possessed of the proceeds, in trust for all his grandchildren, the children of his son and three daughters, (whom he named) who should attain the age of twenty-four years. The son and daughters had children living at the testator's death, but none born afterwards. Held that the trust for the grandchildren was void for remoteness. *Newman v. Newman*, 51
4. Testator gave all his estates real and personal, to his executors, in trust to be disposed of by them as after mentioned. He then gave all his real estates, houses, and lands, to his wife, for life: "and, after the decease of my wife, I give my houses, lands, and estates in B. to J. B., but at his death, I will that the whole shall be for the use of the said J. B.'s wife and children, and which children, at the death of their mother, shall inherit the same jointly during their lives; and, if the said children shall die before they arrive at the age of twenty-one, I will that my houses and estates at B. go to H. S.," who was the testator's heir. J. B. and his wife had three daughters and one son. The daughters were living at the date of the will, and at the testator's death. The son was born afterwards. After the death of J. B., but in the lifetime of his wife, two of the daughters died, intestate and unmarried, one before and the other after attaining twenty-one, leaving their brother their heir. After the deaths of the prior devisees, the son and the surviving daughter, both of whom had long attained twenty-one, executed a deed in the nature of a recovery, by which they limited the lands in B. to the use of themselves and their heirs as tenants in common. Held that they took an estate in fee-simple, as tenants in common, in the lands in B. *Spry v. Blomfield*, 94
5. Testator gave his real and personal property, to trustees, their heirs, &c., upon trust to pay and divide the same unto and amongst all and every his children who might be living at his decease, share and share alike, for their lives: "and in case any of my said children, being daughters, shall marry, and shall happen to depart this life in the lifetime of her or their husband or husbands, I direct that the share or shares of her or them so dying, shall go to her or their respective husband or husbands, for his or their life or lives, and, from and after his or their decease, then to be equally divided amongst all and every the child or children of my said daughter and daughters then living; and, in default of any such child or children, then I direct such share or shares shall go

- and be divided, equally, to and amongst all and every my said children who shall be then living." The testator left a son and seven daughters. One of the daughters died a spinster. Held that, on her death, her share in the testator's property did not go to her surviving brothers and sisters, but became undisposed of. *Lett v. Randall*, 112
6. Testator gave 2000*l.* to his daughter Martha, for life, with a testamentary power to her to appoint that sum amongst her children; but if she should die without leaving a child, then he gave it to such of his children as should be living at his decease; and, if either of his said children should die before they should be entitled to receive a share, leaving issue, their shares should be distributed amongst their children. The testator left Martha and four other children living at his decease. Two of them died leaving issue, and two, without issue; and, afterwards, Martha died without issue. Held that her personal representatives were entitled to one-fifth of the fund. *Jennings v. Newman*, 219
7. The court may appoint new trustees under 11 Geo. 4, and 1 Will. 4, c. 60, s. 22, although the instrument creating the trusts contains a power to appoint new trustees. *In re Fauntleroy*, 352
8. By articles of separation between A. and his wife, dated in June, 1834, A. covenanted that he would, on or before the 1st February, 1835, either by a charge on freehold estates of inheritance, or by investing an adequate sum in the purchase of stock, or by the best means which might be then in his power, secure an annuity of 1000*l.* to a trustee for his wife. In December, 1834, A. and his sons joined in limiting freehold and copyhold estates, of which A. was tenant for life, with remainder to his son in tail male, to trustees, in trust to raise 462,000*l.*, and, thereout, to pay off encumbrances on the estates, and to pay the surplus to A.; and subject thereto, to stand possessed of the estates, in trust for such persons as A. and his son should jointly appoint; and, subject thereto, in trust for A. for life, with remainder in trust for his son in fee if he should survive A., but if he should die in A.'s lifetime, then, in trust for him in tail male, with remainder in trust for A. in fee; and A. was empowered, subject to the raising of 462,000*l.*, to charge the estates with a jointure of 1500*l.* a year, for his then or any future wife. Held that the articles and the deeds of December, 1834, formed but one transaction, and that the wife was entitled to have the covenant in the articles performed by means of the provisions, for A.'s benefit, contained in the deeds of December, 1834. *Wellesley v. Wellesley*, 256
9. Testator directed the interest of a sum of money to be applied for the maintenance and education of his infant nephew, but made no disposition of the principal. Held that the nephew was entitled to the interest during his life. *Samers v. Martin*, 267
10. Testator devised to trustees all his messuages or tenements, farms, lands, hereditaments, and premises, with the appurtenances, situate in C. and W., and all other his freehold lands and tenements whatsoever; to hold all such his said real estate, with the appurtenances, to the trustees and their heirs, upon trust for the use of his wife for life, with limitations after her decease, which were applicable to freeholds only. And he gave all his household goods, implements of husbandry, farming stock, moneys, securities for money, and all other his personal estate and effects whatsoever, to his wife, for her own sole use. The testator was seized, in fee, of freehold lands in C. W. and S., but there was no messuage or other building on any of those lands, except a wooden barn and stable on the land in S. He was also possessed of land in C. for a long term of years, on which there were a messuage and farm buildings; and, at his death, and for six years before, he occupied the freehold and leaseholds as one farm, but they did not adjoin each other. Held that the leaseholds did not pass, under the devise of all the testator's messuages or tenements, farms, &c., but under the bequest of the testator's personal estate. *Arkell v. Fletcher*, 299
11. Testator gave legacies of 200*l.* to each of the children, of his nephews and nieces begotten or to be begotten, and directed that the legacies should be paid to them at the usual periods. Held that the children of the nephews and nieces who were born after the testator's death, were not entitled to participate in the legacies. *Butler v. Lowe*, 317
12. Testator gave all his property to his wife and two other persons, in trust for the under mentioned purpose, namely, to pay the income to his wife, for the education and support of his children by her; and, after her death, the property to be divided among his children: and he gave his furniture, plate, &c., to his wife, absolutely. Held that the children were not entitled to the trust property on their father's death; but that their mother was entitled to the income, for her life, she maintaining and educating the children out of it. *Gilbert v. Bennett*, 371
13. Testator expressed an intention to dispose of all his worldly effects, and directed all his just debts and funeral expenses, to be fully discharged by his executor thereafter named: and after giving several legacies, he devised all his copyhold lands, to his son John, and left all the rest and residue of his estate and effects, unto and to the use of his son John, whom he thereby appointed sole executor and residuary legatee. Held that taking the whole of the will together, the words were sufficient to pass the fee in the copyholds, and to charge them with the testator's debts. *Dover v. Gregory*, 393
14. Testator bequeathed 4000*l.* in trust for his daughter, (a single woman,) for her life, for her separate use, independently of any husband with whom she might intermarry, and after her death, in trust for her children, and, if there should be no children, then, if she should survive any husband with whom she might intermarry, in trust for her, her executors, &c.; but if her husband should survive her, then in trust as she should, by will, appoint, and, in default of appointment, in trust for her next of kin, as if she had died intestate, and without having married. The daughter died a spinster.

- Held that the words: "if my daughter shall survive any husband with whom she may intermarry," were words of condition and not of mere limitation, and, consequently, the residuary legatees, and not the daughter's executor, became entitled to the 4000*l.* on her death. *Lenox v. Lenox*, 400
15. Testator directed his trustees to invest the proceeds of his real and personal estate, and to accumulate the interest until the youngest child of his brother should attain twenty-one, and then to stand possessed of the trust fund and its accumulations in trust for all the children of his brother who shall be then living. The brother had seven children, and all of them were living at the date of the will, and at the testator's death. All the children, except the second, died, and none of them, except the eldest, the second, and the fourth, attained twenty-one. The fifth was the last that died. Held that the trust for accumulation did not continue until the seventh child would have attained twenty-one, if living, but that it ceased on the death of the fifth child, and that the second child then became entitled to the trust fund. *Evans v. Pilkington*, 412
16. Testator bequeathed his residue to trustees, in trust to pay an annuity to his wife, and subject thereto, in trust for his daughter for life, and, after her death, in trust for her children. Provided that, if his daughter should die without leaving any issue, then the trustees should pay 3000*l.* as she should appoint: and, if his wife should survive his daughter, and his daughter should die without issue, then that the trustees should pay 2000*l.* to his wife, and assign the residue of the trust moneys unto the nearest of kin of his own family for ever. The daughter survived the wife, and died without leaving issue. Held that the next of kin of the daughter, were entitled to the fund. *Clapton v. Bulmer*, 426
17. Testator bequeathed his residuary estate in trust for his nephew for life; and, after his death, in trust to transfer the whole to his children by any lawful marriage, on the day of their attaining the age of twenty-one. Held that the time of payment was annexed to the gift, and, therefore, none of the nephew's children would be entitled to take, unless they attained twenty-one. *Murray v. Tancred*, 465
18. Testatrix bequeathed a share of her residue in trust for her nephew for life. By a codicil, after reciting that her nephew had become a bankrupt and insane, she directed the trustees to apply, during his life, the whole or such part of the interest of the fund, at such times, in such proportions, and in such manner, for the maintenance and support of her nephew, and for no other purpose whatsoever, as they, in their discretion, should think most expedient. Held that the nephew's assignees were not entitled to any portion of the provision made for him. *Twopeny v. Peyton*, 487
19. Testator, after reciting that the income of his wife, in case she survived him, would consist, in part, of the rent of a leasehold estate, which he had settled on her, directed his trustees, in case the lease should expire in her lifetime, to pay to her, out of the dividends and interest arising from a sufficient part of his personal estate, at their discretion, so much per annum as would be an equivalent for the rent lost thereby; and he gave his residuary personal estate to the trustees, in trust to invest it in the usual securities, and to accumulate the income until the lease should expire in his wife's lifetime, and then, during the remainder of her life, to pay her the income of the accumulated fund, and, after her death, to stand possessed of the capital for his grandchildren. The lease expired in the wife's lifetime; but the income of the residuary fund was not equivalent to the rent lost. Held that the wife was entitled to have the deficiency of her income made good out of the capital of the residuary fund. *Boyd v. Buckle*, 595
20. A person beneficially entitled to part of the dividends of a sum of stock, has a sufficient interest to support a petition under 11 Geo. 4, and 1 W. 4, c. 60, for the appointment of a new trustee of the stock. The words in the 10th section of the act which empower the court to order "any person appointed as aforesaid to receive and pay over or join in receiving and paying over the dividends of such stock in such manner as the said court shall direct," authorize the court to direct one of the officers of the bank to receive the dividends of the trust stock and pay them over, not to the party beneficially entitled, but to the new trustee. *In re King*, 605
21. Testatrix bequeathed her residue to A. T., after her death to be equally divided between S. L. and M. S., the daughters of her sister E. S. and E. B., the daughter of her sister S. M., and her children. E. B. had eight children living at the testatrix's death, and one born afterwards, and during A. T.'s life. Held that the residue on A. T.'s death, was divisible amongst S. L., M. S., and E. B. and her nine children, equally. *Lenden v. Blackmore*, 626
22. Testator bequeathed 40,000*l.* to Lord H. and his children, to be secured for their benefit. Held that Lord H. took for life with remainder to his children. *Vaughan v. The Marquis of Headfort*, 639
- See ANNUITY.—APPOINTMENT.—BANKRUPT, 2.—CONVERSION.—INFANT, 3.—LEGACY.—PRACTICE, 14.—PRELIMINARY ACCOUNTS AND INQUIRIES.—VENDOR AND PURCHASER.—WILL, 3, 5, 9.

CONSTRUCTION OF THE BEDFORD LEVEL ACT. 15 CHA. 2, c. 17.

By the Bedford Level act, it was enacted that all conveyances by indenture, of the 95,000 acres allotted to the then Earl of Bedford, or any part thereof, entered with the registrar of the Level, should be of equal force to convey the freehold and inheritance thereof, as if the same were for valuable considerations, enrolled, within six months, in one of the King's courts of record at Westminster, and that no lease grant, or conveyance of, or charge out of or upon the 95,000 acres, or any part thereof, except leases for seven years or under in possession, should be of force but from the time it should be entered with the registrar. Conveyances were afterwards made of part of the

95,000 acres, but were not registered. Held that those conveyances were nevertheless valid for all purposes, except for entitling the grantees to the privileges conferred, by the act, on the owners of lands within the Level, and for the other purposes of the act. *Willis v. Brown*, 127

CONSTRUCTION OF 48TH ORDER OF AUGUST, 1841. See MASTER'S REPORT.

CONTEMPT.

The plaintiff obtained an injunction, with a direction to try his right in an action. A year afterwards and shortly before the spring assizes, the defendant moved that the plaintiff might proceed to trial at those assizes, or that the injunction might be dissolved. The court refused the motion with costs, but intimated that it expected the plaintiff to go to trial at the next summer assizes. The defendant being in contempt for non-payment of the costs of the motion, the plaintiff, shortly before the summer assizes, moved to defer the trial until the defendant should have cleared his contempt. Motion refused. *Bickford v. Skewes*, 193

CONVERSION.

Testator gave to his wife, the whole of the interest arising from his property, both real and personal, during her life; and, in case he should die without issue, he gave, after the death of his wife, the whole of his property, both real and personal, to his brothers and sister. The testator died possessed of leasehold, and also of real property. Held that the widow was not entitled to the leasehold property, in specie, during her life, but only to the dividends of stock to be purchased with the proceeds of the sale of it. *Benn v. Dixon*, 636
See HEIR AND ADMINISTRATOR.

COPYHOLDS.

1. There is no case in which the court has established a will of copyholds; *semble*. *Archer v. Slater*, 624
2. The probate copy of a copyholder's will, is sufficient to lead the uses of a surrender to the use of his will. *Ib.*

COPYRIGHT.

If an alien resident abroad, composes a work there, but publishes it first in this country, he is entitled to the protection of the laws of this country relating to copyright; *semble*. *Bentley v. Foster*, 329

COSTS.

1. After the filing of the bill, the defendant took the benefit of the insolvent debtors' act, and, in his schedule, admitted the plaintiff to be a creditor for the subject matter of the suit. The defendant afterwards moved to dismiss

the bill for want of prosecution, with costs. The court ordered the bill to be dismissed, but without costs, the defendant having by his own act, destroyed the subject matter of the suit. *Blanchard v. Drew*, 240

2. Costs of an opposed application to advance a cause, directed to be costs in the cause upon the application being granted. *Cartlew v. Barclay*, 273
See 5.

3. A bill was filed for a foreclosure of a mortgage and for a transfer of a sum of stock. On the answer being filed, disclosures were made which rendered it advisable to amend the bill by striking out all that related to the mortgage; and, thereby, nearly one-half of the bill and answer, was rendered useless. The court, however, refused to order, on motion, the plaintiff to pay the defendant's costs occasioned by the amendment; as it appeared that the amendment was made under the advice of counsel, and not for the purpose of vexation or oppression. *Monck v. Earl of Tankerville*, 284

4. The infant heir of a mortgagee in fee, having been found, by the Master, to be a trustee of the mortgaged estate, for the executor of the mortgagee, the executor petitioned that the infant might be ordered to convey the estate to the mortgagor, who had offered to pay the principal and interest due on the mortgage. Held that the costs of the proceeding before the Master, must be paid by the mortgagor. *Ex parte Ommancey*, 298

5. The costs of the motion to advance a cause under the 4th order of May, 1839, ordered to be paid by the plaintiff. *Browne v. Lockhart*, 420
See 2.

6. Where a trustee for a mortgagee is made a defendant to a foreclosure suit, the plaintiff must pay his costs and add them to his own. *Ib.*, 426

7. If a motion is made to enforce an order under 11 Geo. 4 and 1 Will. 4, c. 60, and the order appears to be an improper one, the court has jurisdiction to give the party resisting it the costs of the motion. *In re King*, 605

8. A plaintiff resident abroad, having made default in giving security for costs, the court ordered that he should give the security within four days, or that an injunction which he had obtained *ex parte*, should be dissolved; but it refused to order the bill to be dismissed. *Fort v. Bank of England*, 616
See NEW ORDERS, 3.

COURT OF COMMON PLEAS AT LANCASTER.

The Court of Chancery has issued a certiorari to the Court of Common Pleas at Lancaster. *Worthington v. Remnant*, 558

COVENANT.

- A deed dated in 1827, and made between J. Pitt, of the one part, and the other persons who had executed the deed, of the other part, recited that Pitt, being seised in fee of the lands delineated in the plan thereto annexed (being

Pittville) and having it in contemplation to establish a spa at or near the north end of the lands, and to erect a pump-room at or near the spot marked on the plan, and to lay out the rest of the lands for buildings, pleasure grounds, roads, &c., had caused the plan to be drawn whereby the mode in which the lands were intended to be laid out and the purposes for which they were intended to be converted and used, were described, in order that the beauty and regularity of the whole of the design might be, for ever thereafter, preserved, subject only to such alterations as should be made or approved of by Pitt, his heirs or assigns, and as should not destroy the general beauty of the same design, and that each of the other parties to the deed had purchased or agreed to purchase one or more of the pieces of land described, in the plan, as set out for building. The deed then contained covenants, by Pitt, his heirs and assigns, to complete the pleasure grounds, roads, &c., and to keep them in repair, and other covenants prescribing the manner in which the pleasure grounds, roads, &c., should be enjoyed and used by the occupiers of the houses to be erected on the building ground, and that Pitt, his heirs or assigns, would on every agreement which should be entered into, by him or them, for the sale of any part of the building ground, require the purchaser to covenant with him, his heirs and assigns, not to erect any messuage, on any part of the ground, which might lessen, in value, any other of the messuages erected or to be erected at Pittville. In 1833 Pitt agreed to sell lots 2, 3, 4 and 5, of the building ground, to Stokes; and Stokes agreed with him to erect three houses on those lots, and that each house should stand back twenty-five feet from the western boundary of the lots, and that Stokes, his heirs or assigns, would not do or suffer to be done on the lots or in any building to be erected thereon, any act, deed, &c., which might be deemed a nuisance, injury or annoyance, or which might lessen in value any adjoining or neighboring lands or property, or any houses to be erected thereon. Stokes built two houses on lots 2 and 3, and in 1833 Pitt conveyed those lots to him, and Stokes for himself, his heirs or assigns, entered into a covenant with Pitt, his heirs and assigns, with respect to those lots and the houses thereon, similar to the last mentioned stipulation in the agreement. Stokes subsequently gave up lots 4 and 5 to Pitt, and abandoned his agreement as to them, and then sold his house on lot 3 to the plaintiff. Pitt afterwards agreed to sell lots 4 and 5 to Creed. The agreement stipulated that the house to be erected on those lots should stand back ten feet at the least from the western boundary thereof, and it contained a stipulation for protecting the adjoining property from injury, &c., similar to that in Stokes' agreement. Both Stokes and Creed executed the deed of 1827. Creed began to build a house on his lots thirteen feet distant from the west boundary, which was twelve feet in advance of the plaintiff's house, and which the plaintiff alleged would be a nuisance or annoyance to him, and would lessen the value of his house, and consequently would be a

violation of the covenants in the deed of 1827, and of the agreement of 1833. Held that the plan annexed to the deed of 1827 was merely a general plan, and was not intended to be strictly adhered to, but its details might be varied by Pitt, and, with his sanction, by the purchasers from him; and that the plaintiff was not entitled to avail himself, as against either Creed or Pitt, of the covenants of 1827, or of the agreement of 1833, for the purpose of preventing the completion of Creed's house in the manner intended, or the performance by Pitt of the agreement with Creed. *Schreiber v. Creed*, 9

See ARTICLES OF SEPARATION.—CONSTRUCTION, 6.
—HUSBAND AND WIFE, 1.

COVENANT TO PRODUCE TITLE DEEDS.

The vendor of a piece of copyhold land, enfranchised in 1799, delivered, to the purchaser, two abstracts commencing in 1736, one of the title to the land, and the other of the title to the manor. The deed of 1799, which was forty years old, recited that the then lord and the then owner of the land were respectively seized in fee; and several of the deeds relating to the lord's title, were bargains and sales enrolled, and, therefore, copies of them, as well as of the surrenders and admittances, which would be good evidence, might be procured by the purchaser at any time. The vendor was unable to deliver, to the purchaser, the deed of 1799, or any of the prior instruments, but was willing to covenant to produce that deed. Held that he was bound to give the purchaser covenants for the production, not only of that deed, but of all the prior instruments mentioned in the abstracts. *Cooper v. Emery*, 609

CREDITOR'S SUIT.

1. After a decree and order on further directions in a suit by creditors, the plaintiffs discovered that there was an infant tenant in tail of the deceased's real estates in existence, who was born prior to the filing of the bill. On the hearing of a supplemental suit, by which the infant was first brought before the court, the accounts were directed to be taken over again as against the infant, with liberty to the Master to adopt any of the accounts before taken, if he should find it beneficial to the infant so to do. *Baillie v. Jackson*, 167
 2. In a suit for administering the property of a person deceased, if an infant defendant is interested in the real estates, the Court will not direct those estates to be sold, until the accounts of the personal estate have been taken and the cause heard for further directions. *Id*
- See NEW ORDERS, 2.—PARTIES, 3. PLAINTIFF, 1.—WITNESS, 1.

CROSS-EXAMINATION.

A party who intends to cross-examine a witness, must, himself, make an appointment for that purpose, with the examiner, and give notice of the time appointed, to the witness and the so-

licitor of the opposite party. *Keymer v. Peering*, 179

CUMULATIVE LEGACIES.

1. Testator, by his will, bequeathed sums to his four sons absolutely, and other sums to his four daughters for their lives, with remainder to their children. One of his sons afterwards died; and the testator thereupon made a codicil as follows: "In consequence of the death of my son, J. T., I have opened my will, and now wish to bequeath to my wife, 600*l.* a year; to my three sons, 2000*l.* each; to my four daughters, 300*l.* a year each; and, at the death of my wife, the 600*l.* a year to be equally divided amongst my four daughters. This memorandum will, I hope, be attended to in case of death before I make the legal alteration in my will." Held that the gifts by the codicil, were in addition to those by the will; and that the annual sums given by the codicil, were perpetual, and not mere life annuities. *Tweedale v. Tweedale*, [See 2.] 453
See ANNUITY, 2.

CUSTODY OF INFANTS.

See VIC-CHANCELLOR.

DEBT.

A person who was a lunatic, but had not been found to be so by inquisition, died seized of a small freehold estate, but not possessed of any personal property. His stepfather had received the rents of the estate, and had expended more than the amount of them in maintaining the lunatic; he also paid the lunatic's funeral expenses. Held that he was not entitled, under 3 and 4 W. 4, c. 104, to be paid either the surplus expenditure, or the amount of the funeral expenses, out of the lunatic's freehold estate. *Carter v. Beard*, 7

DEBTOR AND CREDITOR.

See CONSTRUCTION, 2.—EXECUTOR.—INFANT, 1, 2.

DEBTS.

See CHARGE OF DEBTS.

DECREE.

See FORECLOSURE, 3.—INFANT, 1.

DEEDS.

See FOUR DAY ORDER.

DEFENDANT.

If a defendant denies the plaintiff's title and says, positively, that the documents, in his custody, relating to the matters in the bill, will not show the plaintiff's title, the court will not order him to produce them; but if he says merely that he believes that they will not show the plaintiff's title, the court will order him to produce them. *Bannatynes v. Leader*, 230

See ELECTION.—EXCEPTION, 1, 2.—INFANT, 1, 2.—INFANT DEFENDANT.—STATUTE OF LIMITATIONS, 1.

DEMURRER.

1. A. filed a bill against a company and also against some of the directors of the company, praying relief against the company, and if he should be held not to be entitled to relief against the company, then praying relief against the directors. Held that the bill was demurrable. *Seddon v. Connell*, 79
2. If a demurrer to a bill praying relief and a commission to examine witnesses abroad, is good as to the relief, it is good as to the commission. *Morris v. Morgan*, 341
3. If a plaintiff has one remedy against A., and that remedy and another against B. for the same cause of suit, neither A. nor B. can demur for multifariousness, on the ground that the bill seeks to enforce both the remedies against B. and only one of them against A. *Manners v. Rowley*, 470
4. A bill for forming a deck company, passed the House of Commons before three-fourths of the capital had been subscribed. As the orders of the House of Lords required that proportion of the capital to be subscribed before the bill could be brought into that House, certain of the subscribers to the undertaking subscribed for additional shares, in order to make up the deficiency. Those persons, afterwards, signed a memorandum declaring that the additional shares were to be held in trust for the company. The bill was then brought into the House of Lords and passed. One of the sections provided that, on the trial of an action to be brought, by the company against a shareholder, for money due on a call, it should only be necessary to prove that such call was made, and that twenty-one days' notice of it was given, without proving the appointment of the directors who made the call; and that the company should, thereupon, be entitled to recover, unless it should appear that the call exceeded 5*l.* per share, or that the required notice had not been given. At the first meeting of the company directors were chosen; at another meeting it was resolved that the trust declared, by the memorandum, of the additional shares, should be annulled, and that those shares should be transferred to the secretary, for the use of the company: but the members present at those meetings did not hold the number of shares required, by the act, to constitute a valid meeting, exclusive of the additional shares. Afterwards the directors having made a call, the company brought an action, against one of the original subscribers, for the amount of it; whereupon he filed a bill, to restrain the action, alleging that the additional subscriptions were fraudulently made, and consequently the meetings were not duly constituted, and the appointment of the directors who had made the call, and the other proceedings of those meetings, were invalid; but that, by the special provisions of the act, he was prevented from giving evidence, at the trial of the action, to show that the appointment of the directors was not duly made. A demurrer to the bill, for want of equity, was

allowed. Mangles v. The Grand Collier Dock Company, 519
See ADMINISTRATOR.—JOINT STOCK COMPANY.—PARTIES, 4.

DEPOSITIONS.

Depositions were suppressed for irregularity in the order under which they had been taken. The Examiner, on the witnesses again going before him for examination under an order for that purpose, read over to them their depositions taken under the former order, and inquired whether they were correct; and, on being answered in the affirmative, he caused them to be signed by the witnesses. The court suppressed the depositions as having been irregularly taken. *Attorney General v. Nethercote,* 311

DEVISEE.

See INFANT, 1, 2.—DISMISSAL, 3.

DISCLAIMER.

If some of the defendants in a foreclosure suit disclaim, the court will decree them to be foreclosed, and not simply dismiss the bill as against them. *Perkin v. Stafford,* 563

DISCOVERY.

See PARTIES, 4.

DISMISSAL.

1. After the filing of the bill, the defendant took the benefit of the insolvent debtor's act, and, in his schedule, admitted the plaintiff to be a creditor for the subject matter of the suit. The defendant afterwards moved to dismiss the bill for want of prosecution, with costs. The court ordered the bill to be dismissed, but without costs, the defendant having, by his own act, destroyed the subject matter of the suit. *Blanchard v. Drew,* 240
2. Where a defendant, after his answer is to be deemed sufficient, files a supplemental answer, the plaintiff is not allowed two months to except to it; but, as it cannot be excepted to without leave, it is to be deemed sufficient from the time when it is filed; and, therefore, the defendant may move to dismiss at the end of two months from the filing of the supplemental answer. *Barnes v. Tweddle,* 481
3. On the death of a sole defendant, the plaintiff filed a bill of revivor and supplement against his heir, executor and devisee, but did not obtain an order to revive. The devisee joined with the heir and executor in moving that the plaintiff might revive within a week, or that the suit might be dismissed. The motion was refused, because the devisee, who was unaffected by the revivor of the suit, had joined in it. *Folland v. Lamotte,* 486
4. A plaintiff amended his bill, not requiring an answer; the defendant, however, answered the amendments. Held that he could not move to dismiss until the expiration of two months from the time when the answer was to be deemed sufficient. *Strickland v. Strickland,* 628

See COSTS, 8.—DISCLAIMER.

DIVIDENDS.

A tenant for life of stock died on the day on which a half-year's dividends became due. Held that they belonged to his personal estate. *Patton v. Sheppard,* 186

DOCUMENTS.

See FOUR DAY ORDER.—INSPECTION.—PRODUCTION OF DOCUMENTS.

DONATIO MORTIS CAUSA.

A. being in a declining state of health, delivered to B. a locked cash-box, and told her, at his death, to go to his son for the key; and that the box contained money for herself, and entirely at her disposal after he was gone; but that he should want it, every three months, whilst he lived. The box was twice delivered to A. by his desire, and he delivered it again to B., and it was in her possession at his death. The box was broken open by B. after A.'s death, and contained a check for 500*l.*, drawn by C. in favor of A., and enclosed in a cover endorsed with B.'s name; and the key (which A.'s son had refused to deliver to B.) had a piece of bone attached to it with B.'s name written on it. Held that there was no *donatio mortis causa.* *Reddel v. Dobree,* 244

EASEMENT.

See WATER RIGHT.

ELECTION.

Although the time for excepting to the answer to the bill may have expired, yet, if the plaintiff amends his bill, the defendant cannot obtain an order for the plaintiff to elect whether he will proceed at law or in equity, until the time for excepting to the answer to the amendments has expired. Whether that time is to be computed according to the old practice, or the new orders: *Qu?* *Leicester v. Leicester,* 87

EQUITY.

See DEMURRER, 4.

EVIDENCE.

1. Depositions were suppressed for irregularity, in the order under which they had been taken. The Examiner, on the witnesses again going before him for examination under an order for that purpose, read over to them their depositions taken under the former order, and inquired whether they were correct; and, on being answered in the affirmative, he caused them to be signed by the witnesses. The court suppressed the depositions as having been irregularly taken. *Attorney General v. Nethercote,* 311
2. Under 37 Geo. 3. c. 52, s. 27, a copy of an entry in the Stamp-office books, proved in the regular way, is evidence of payment of the legacy. *Harrison v. Borwick,* 380

EXAMINATION OF WITNESSES

See DEPOSITIONS.

EXCEPTIONS.

1. The Master having allowed all the exceptions taken to a bill for impertinence, the plaintiff took one general exception to the report, alleging that the Master ought not to have found the bill impertinent in all the points excepted to. The exception will be supported, if the court thinks that the Master ought not to have allowed one of the exceptions. *Woods v. Woods*, 197
2. A bill interrogated to all the statements and charges except one, and, the defendant having omitted to answer it, the plaintiff excepted; but, in his exception, he set forth the statement shortly and in the form of a question. Held that the statement, being material, ought to have been answered, and that the exception was sufficient, as it plainly pointed out the passage to which it applied. *Woodroffe v. Daniel*, 243
3. Where an exception to a report not only states that the Master ought not to have reported as he has done, but suggests what he ought to have found, the court, if it allows the exception and refers it back to the Master to review his report, intends not to adopt the conclusion suggested, but that the whole subject of the reference shall be re-considered, by the Master, either upon the old evidence, or upon that and any other evidence which may be brought before him. *Livesey v. Livesey*, 331
See PRACTICE, 11.

EXECUTION OF CONVEYANCE.

The conveyance of an estate sold under the decree, had been settled by the Master, and one of the defendants was made a party, but refused to execute it. The court refused an application, by the purchaser, that the plaintiffs should procure the defendant to execute the conveyance. *Stillwell v. Mellersh*, 367

EXECUTOR.

To an action brought by a creditor of a testator, the executors pleaded the decree in a suit for the administration of the testator's assets. The plea was held to be bad in law, and judgment was given for the plaintiff at law. The court restrained him from enforcing his judgment against the testator's assets, but not against the executors personally. *Burles v. Popplewell*, 283
See CONVERSION.

EXECUTORY TRUST.

Lord Le Despencer being seised of the ancient barony of Le Despencer in fee, conveyed real estates to trustees, in trust, after the death of himself and his eldest son, to settle the estates to the use of such persons, for such estates, and in such manner that the same should, so far as the law would permit, be strictly settled so as to go along with the dignity of Le Despencer, so long as the person possessed of the same dignity should be a lineal descendant of the settlor, and be held and enjoyed by the person for the time being possessed of the

same dignity, and being such lineal descendant as aforesaid; and that, during every suspension or abeyance of the same dignity within the limits prescribed by law for strict settlements, the rents of the estates might be equally divided amongst the co-heirs *per stirpes* of the person or persons respectively, by reason of whose death or deaths without issue male, such suspension or abeyance, should be, for the time being, occasioned. Held that the above trust was not void for remoteness; and the Master was directed to approve of a proper settlement accordingly. *Bankes v. Le Despencer*, 576

FEME COVERTE.

Testator bequeathed all his property to his daughter (a single woman), in terms amounting to a gift to her for her separate use, and appointed her sole executrix. She married after her father's death; and a sum of stock, part of the property bequeathed to her, was assigned, to trustees, in trust for her separate use, for life, and, if she survived her husband, in trust for her absolutely, and, if not, then in trust as she should appoint by will, and, subject thereto, in trust for her husband; but the settlement did not notice any other part of the property. Held that the husband did not become entitled, in his marital right, to the property remainder unsettled, but was a trustee of it for her; and, therefore, it could not be taken in execution under a judgment recovered against him. *Newlands v. Paynter*, 377
See HUSBAND AND WIFE, 1, 2, 3, 4.

FIFTH ORDER OF MAY, 1839.

1. Under the fifth order of May, 1839, the court will order preliminary accounts to be taken although the cause has been set down for hearing. *Strother v. Dutton*, 288
2. The court will not direct preliminary inquiries to be made under the fifth order of May, 1839, unless it is plain that they would be directed at the hearing, and would be binding on the parties to the suit. *Meinertzhagen v. Davis*, 289
See COSTS, 5.—NEW ORDERS, 1, 7, 10.

FIXTURES.

See HOUSEHOLD FURNITURE.

FORECLOSURE.

1. Where a trustee for a mortgagee is made a defendant to a foreclosure suit, the plaintiff must pay his costs and add them to his own. *Browne v. Lockhart*, 426
2. Order made, on motion in a foreclosure suit, to the same effect as a decree, although the order could not be made under the 7th Geo. 2, c. 20, owing to some of the parties interested in the equity of redemption being infants, and consequently incapable of admitting the plaintiff's title. *Grane v. Mitchell*, 484
3. If some of the defendants in a foreclosure suit disclaim, the court will decree them to be fore-

closed, and not simply dismiss the bill as against them. *Perkin v. Stafford*, 563
See AMENDMENT.—INSPECTION OF MORTGAGE DEED.

FOREIGN COPYRIGHT.

See ALIEN.

FOUR DAY ORDER.

It is not irregular to obtain the four day order for production of deeds, before the certificate of the defendant's default has been filed. *Askew v. Peddle*, 182

FRAUD.

1. Where a bill is filed for relief in respect of a fraud alleged to have been committed by several persons, it is not necessary that all the persons charged with the fraud should be made defendants. *Seddon v. Connell*, 79
2. A solicitor who has joined with his client in practising a fraud, may be made a co-defendant to a suit to set aside the transaction. *Beadles v. Burch*, 332
3. A suit to set aside a decree at the Rolls, on the ground of fraud, may be heard by the Vice-Chancellor. *Archer v. Slater*, 624

FRAUD IN OBTAINING A LOCAL ACT OF PARLIAMENT.

A bill for forming a dock company passed the House of Commons before three-fourths of the capital had been subscribed. As the orders of the House of Lords required that proportion of the capital to be subscribed before the bill could be brought into that House, certain of the subscribers to the undertaking subscribed for additional shares, in order to make up the deficiency. Those persons, afterwards, signed a memorandum declaring that the additional shares were to be held in trust for the company. The bill was then brought into the House of Lords and passed. One of the sections provided that, on the trial of an action to be brought, by the company against a shareholder, for money due on a call, it should only be necessary to prove that such call was made, and that twenty-one days' notice of it was given, without proving the appointment of the directors who made the call; and that the company should, thereupon, be entitled to recover, unless it should appear that the call exceeded 5*l.* per share, or that the required notice had not been given. At the first meeting of the company directors were chosen; at another meeting, it was resolved that the trust declared, by the memorandum, of the additional shares, should be annulled, and that those shares should be transferred to the secretary, for the use of the company: but the members present at those meetings did not hold the number of shares required, by the act, to constitute a valid meeting, exclusive of the additional shares. Afterwards the directors having made a call, the company brought an action, against one of the original subscribers, for the amount of it; whereupon he filed a bill, to restrain the action, alleging that the additional

subscriptions were fraudulently made, and consequently the meetings were not duly constituted, and the appointment of the directors who had made the call, and the other proceedings of those meetings, were invalid; but that, by the special provisions of the act, he was prevented from giving evidence, at the trial of the action, to show that the appointment of the directors was not duly made. A demurrer to the bill, for want of equity, was allowed. *Mangles v. The Grand Collier Dock Company*, 519

See JOINT STOCK COMPANY.

FRAUDULENT PREFERENCE.

On the 9th of May, 1831, M., being a partner with R. in a linen manufactory, sold and assigned his share in the partnership to L.; but being apprehensive that the transaction, if made public, would cause a run on certain banks in which he was engaged, and might prevent his being re-elected for the borough of A., which he then represented, the dissolution of the partnership between him and R., and the formation of the new partnership between R. and L. was, at his request, not announced in the Gazette, or otherwise made public, until the 3d of January, 1832. On the 2d of that month, M. stopped payment, and, on the 26th, a fiat issued, on a debt incurred in 1830, under which he was found a bankrupt. On the 11th of July, 1831, M. being indebted, on bond, to the trustees of his son's marriage settlement, assigned, at his son's request, a house and furniture, to the trustees, as a security for the bond debt. At the time of the assignment, M. was in some pecuniary difficulties arising from the failure of stock transactions and other speculations in which he had been engaged. Held that, under all circumstances of the case, the assignment was not a fraudulent conveyance by M., with intent to defeat or delay his creditors, and, therefore, not an act of bankruptcy; and that, at all events, his share in the linen business was not in his order and disposition at the time of the assignment. *Bannatyne v. Leader*, 350

FUNERAL EXPENSES.

See DEBT.

FURNITURE.

See HOUSEHOLD FURNITURE.

HEIR.

1. To a suit for administering the real assets of a testator, under 3 and 4 Will. 4, c. 104, the heir, as well as the devisee, is a necessary party. The case of *Weeks v. Evans*, reported ante, vol. 7, p. 546, overruled. *Brown v. Weatherby*, 125
2. Under the 3 and 4 Will. 4, c. 106, s. 3, an heir to whom lands are devised by his ancestor, takes them as devisee, to all purposes; and, therefore, the pecuniary legatees are not entitled to have the assets marshalled as against him. *Strickland v. Strickland*, 374

HEIR AND ADMINISTRATOR.

By a contract for the sale of an estate, it was agreed that the purchase should be completed on a certain day, but that all rent to accrue in the interim, should belong to the vendor, *his heirs*, executors, and administrators. The vendor died intestate before the day appointed for completing the purchase. Held that rent accrued between that day and the vendor's death, belonged to his heir. *Shadforth v. Temple*, 184

HEIR LOOMS.

See PERPETUITY.

HOUSEHOLD FURNITURE.

Under a bequest of household furniture, fixtures, belonging to the testator, in a leasehold house, occupied by him, will pass. *Paton v. Sheppard*, 186

HUSBAND AND WIFE.

1. A separation deed recited that divers unhappy differences subsisted between the husband and wife, in consequence of which they had agreed to live separate. The husband then covenanted to pay an annuity to a trustee for the wife, during her life; but there was no covenant on the part of the trustee or any other person, to indemnify the husband against the debts of the wife. The husband died, and the annuity became in arrear. Held, that the covenant might be enforced against the husband's executors; for, there being no evidence to the contrary, there might have been circumstances, alluded to by the recital, which would have warranted a divorce *a menas et thero*; but that the covenant, being voluntary, could not be enforced against the husband's creditors. *Clough v. Lambert*, 174
2. A married lady who was entitled to an income of 500*l.* a year out of the property in the cause, being of unsound mind, the court ordered the whole of the 500*l.* to be paid to her husband; but directed the arrears and future payments of an annuity of 100*l.*, to which she was entitled for her separate use, to be carried to her separate account, notwithstanding the husband deposed that the expenses incurred by him in her care and maintenance exceeded 500*l.* a year. *Nettleship v. Nettleship*, 236
3. A husband and wife lived separate from each other. At the death of the wife she was possessed of cash and bank notes, arisen from property settled to her separate use. Held that the husband was entitled to them in his marital right. *Molony v. Kennedy*, 254
4. By articles of separation, the husband covenanted with his wife's trustee, to secure an annuity of 1000*l.* on her, on or before a certain day; and the trustee covenanted with the husband, that, on the annuity being secured, he would enter into a covenant to indemnify the husband against the wife's debts. Held that the latter covenant, though conditional, was sufficient to support the articles. *Wellesley v. Wellesley*, 256

See FEME COVERTE.

IMPERTINENCE.

1. A bill was filed against A., to set aside a purchase made by him, on the ground of fraud. A. died after filing his answer. The plaintiff then filed a supplemental bill against A.'s devisees, stating the allegations in the original bill, and several passages in the answer, some of which were stated by way of pretence, and charges were founded upon them. Held that the supplemental bill was not impertinent. *Woods v. Woods*, 197
2. The Master having allowed all the exceptions, taken to a bill, for impertinence, the plaintiff took one general exception to the report, alleging that the Master ought not to have found the bill impertinent in all the points excepted to. The exception will be supported, if the court thinks that the Master ought not to have allowed one of the exceptions. *Ib.*
3. After the defendants had answered the bill, one of the plaintiffs died; upon which a bill of revivor was filed, praying that the defendants might answer it. The defendants, in their answer, admitted the right to revive, and stated that, since answering the original bill, they had become bankrupt, and obtained their certificates. Held that those statements were not impertinent. *Langley v. Fisher*, 345
See SCANDAL, AND IMPERTINENCE.

INFANT.

1. After a decree and order on further directions, in a suit by creditors, the plaintiffs discovered that there was an infant tenant in tail of the deceased's real estates, in existence, who was born prior to the filing of the bill. On the hearing of a supplemental suit, by which the infant was first brought before the court, the accounts were directed to be taken over again as against the infant, with liberty to the Master to adopt any of the accounts before taken, if he should find it beneficial to the infant so to do. *Baillie v. Jackson*, 167
2. In a suit for administering the property of a person deceased, if an infant defendant is interested in the real estates, the court will not direct those estates to be sold, until the accounts of the personal estate have been taken, and the cause heard for further directions. *Ib.*
3. Testator made a certain provision for the infant son of his relation M. W., until the age of sixteen, and then left the infant to the care of his trustees, to provide for him in some business or profession, and his future maintenance, out of the testator's funded property. Held that the infant on attaining sixteen, was entitled to receive, out of the testator's funded property, a sum sufficient to provide for him in some business or profession, and to an annual allowance for his future maintenance during his life; and it was referred, to the Master, to inquire and state what sums were proper to be allowed for those purposes. *Kilvington v. Gray*, 293
See LEGACY, 2.—VICE-CHANCELLOR, 1.

INFANT DEFENDANT.

The 21st order of August, 1841, does not apply

to the case of an infant defendant. *Emery v. Newson*, 564

INFANT HEIR.
See MORTGAGOR AND MORTGAGEE.

INJUNCTION.

1. The court will grant the common injunction on any day, although out of term, and not a seal day, or continuance of the seal. *Reece v. Humble*, 117
2. An order nisi for dissolving an injunction cannot be obtained on putting in a plea. *Wroe v. Clayton*, 185
3. Special injunction dissolved with costs, office copies of the affidavits, in support of it, not having been obtained, when it was moved for. *Jackson v. Cassidy*, 326
4. To an action brought by a creditor of a testator, the executors pleaded the decree in a suit for the administration of the testator's assets. The plea was held to be bad in law, and judgment was given for the plaintiff at law. The court restrained him from enforcing his judgment against the testator's assets, but not against the executor's personality. *Burles v. P'opplewell*, 383
5. Where one of the defendants to a bill of interpleader is suing the plaintiff in equity, and another is suing him at law, the court will grant an injunction to restrain the suit in equity as well as the action at law. *Crawford v. Fisher*, 479
6. A defendant's clerk in court is not his agent for the purpose of receiving notice of an injunction granted in the cause. *Gooseman v. Dann*, 517

See AFFIDAVITS, 1, 3—ASSIGNABLE INTEREST.—
WATER RIGHT.

INROLMENT.
See BEDFORD LEVEL ACT.

INSOLVENT.
See DISMISSAL, 1.—PARTIES, 1.—POWER.

INSPECTION OF DOCUMENTS.

Where documents which a defendant is ordered to produce are permitted to remain in his solicitor's office for the plaintiff's inspection, the solicitor is not entitled to charge the plaintiff for inspecting them, although the clerk in court would have been entitled to demand 6s. 8d. per hour. *Woodroffe v. Daniel*, 126
See SOLICITOR, 3.

INSPECTION OF MORTGAGE DEED.

A mortgagee is not bound to produce his mortgage deed to the devisee of the mortgaged estate, until payment of principal and interest, notwithstanding the devisee may be ignorant of the amount of the interest, the time of payment, and all the other particulars of the security. *Browne v. Lockhart*, 421

INSUFFICIENCY.

A bill interrogated to all the statements and

charges except one, and, the defendant having omitted to answer it, the plaintiff excepted; but, in his exception, he set forth the statement shortly, and in the form of a question. Held that the statement being material, ought to have been answered, and that the exception was sufficient, as it plainly pointed out the passage to which it applied. *Woodroffe v. Daniel*, 243

INTERPLEADER.

Where one of the defendants to a bill of interpleader is suing the plaintiff in equity, and another is suing him at law, the court will grant an injunction to restrain the suit in equity, as well as the action at law. *Crawford v. Fisher*, 479

JOINT STOCK COMPANY.

1. A. filed a bill against the public officer of a joint stock bank, alleging that he had been induced to purchase 500 shares in the bank, by fraudulent representations made by the directors, in their reports, as to the prosperous state of the company's affairs, and praying for a declaration to that effect and that the purchase might be declared void, as between him and the company, and that the latter might repay him his purchase money. Held that, as the litigation was between one member of the partnership as such, and the other member as such, the public officer was improperly made a party to it as representing the company; and a demurrer by him was allowed. *Seddon v. Connell*, 58
2. A joint stock banking company, under 7 Geo. 4, c. 46, may sue, by their public officer, members of the company jointly with strangers. *Manners v. Rowley*, 471
See DEMURRER, 1, 2.

JUDGMENT.
See INJUNCTION, 4.

JUDGMENT CREDITOR.

1. Stock standing in the Accountant General's name to the separate account of a party against whom a judgment debt has been recovered, may be charged, under 1 and 2 Vict. c. 110, with the debt; but the charging order must be made, not by a judge in equity, but by a judge at common law; and, although such order, in terms, charges the stock, it affects only the interest of the debtor in the stock, and, therefore, does not interfere with the rights of prior incumbrancers. *Hulkes v. Day*, 41
2. A court of equity will make a stop order, as auxiliary to the charging order. *Ibid.*

JURISDICTION.

1. Where two classes of persons claim, adversely to each other, the right of administering the funds of a charity, the court will not decide the question, on a petition presented under 52 Geo. 3, c. 101. *In re West Retford Church Lands*, 101
2. The court has no jurisdiction to make an or-

- der on a petition presented under 53 Geo. 3, c. 101, for transferring the funds of a dispensary to a hospital, and amalgamating the two institutions. *In re Reading Dispensary*, 118
3. The Vice-Chancellor has jurisdiction to make orders under 2 and 3 Vict. c. 54, (for amending the law relating to the custody of infants,) although the Lord Chancellor and Master of the Rolls are alone mentioned in the act. *In re Taylor*, 291
4. The Vice-Chancellor has no jurisdiction under the 12th order of May, 1837, to order a fund standing in trust in a Lord Chancellor's cause to be transferred to a Rolls' cause. *Wright v. Irving*, 625
- See CONTRA*, 7.—VICE-CHANCELLOR, 2, 3.

LEASEHOLDS.

Testator devised to trustees all his messuages or tenements, farms, lands, hereditaments, and premises, with the appurtenances, situate in C. and W., and all other his freehold lands and tenements whatsoever; to hold all such his said real estate, with the appurtenances, to the trustees and their heirs, upon trust for the use of his wife for life, with limitations after her decease, which were applicable to freeholds only. And he gave all his household goods, implements of husbandry, farming stock, moneys, securities for money, and all other his personal estate and effects whatsoever, to his wife, for her own sole use. The testator was seized, in fee, of freehold lands in C. W. and S., but there was no messuage or other building on any of those lands, except a wooden barn and stable on the land in S. He was also possessed of land in C. for a long term of years, on which there were a messuage and farm buildings; and, at his death, and for six years before, he occupied the freehold and leaseholds as one farm, but they did not adjoin each other. Held that the leaseholds did not pass, under the devise of all the testator's messuages or tenements, farms, &c., but under the bequest of the testator's personal estate. *Arkell v. Fletcher*, 299

See CONVERSION.

LEGACY.

1. Testator directed the interest of a sum of money to be applied for the maintenance and education of his infant nephew, but made no disposition of the principal. Held that the nephew was entitled to the interest during his life. *Stames v. Martin*, 287
2. Testator gave 5000*l.* stock to a female infant, to be paid or transferred to, or settled on her, by his executors, by such deed or instrument in writing, as they should think most prudent and proper, on her attaining twenty-one. The infant married in the testator's lifetime, and, afterwards, attained twenty-one. The court ordered the stock to be transferred to her, on her sole receipt. *Laing v. Laing*, 315
3. Under 36 Geo. 3, c. 52, s. 27, a copy of an entry in the Stamp office books, proved in the regular way, is evidence of payment of the legacy. *Harrison v. Borwell*, 380

4. Testator bequeathed his residuary estate in trust for his nephew for life; and, after his death, in trust to transfer the whole to his children by any lawful marriage, on the day of their attaining the age of twenty-one. Held that the time of payment was annexed to the gift, and, therefore, none of the nephew's children would be entitled to take, unless they attained twenty-one. *Murray v. Tancred*, 465

See CONDITIONAL REQUEST—CUMULATIVE LEGACIES.—WILL, 2, 3, 4, 9, 12.

LIEN.

By articles of separation between A. and his wife, dated in June, 1834, A. covenanted that he would, on or before the 1st February, 1835, either by a charge on freehold estates of inheritance, or by investing an adequate sum in the purchase of stock, or by the best means which might be then in his power, secure an annuity of 1000*l.* to a trustee for his wife. In December, 1834, A. and his sons joined in limiting freehold and copyhold estates, of which A. was tenant for life, with remainder to his son in tail male, to trustees, in trust to raise 462,000*l.*, and, thereout, to pay off encumbrances on the estates, and to pay the surplus to A.; and subject thereto, to stand possessed of the estates, in trust for such persons as A. and his son should jointly appoint; and, subject thereto, in trust for A. for life, with remainder in trust for his son in fee if he should survive A., but if he should die in A.'s lifetime, then, in trust for him in tail male, with remainder in trust for A. in fee; and A. was empowered, subject to the raising of 462,000*l.*, to charge the estates with a jointure of 1500*l.* a year, for his then or any future wife. Held that the articles and the deeds of December, 1834, formed but one transaction, and that the wife was entitled to have the covenant in the articles performed by means of the provisions, for A.'s benefit, contained in the deeds of December, 1834. *Wellesley v. Wellesley*, 256

LIMITED ADMINISTRATION.

See ADMINISTRATOR, 2, 3.

LOCAL ACT.

See FRAUD IN OBTAINING.

LUNATIC.

A person who was a lunatic, but had not been found to be so by inquisition, died seized of a small freehold estate, but not possessed of any personal property. His stepfather had received the rents of the estate, and had expended more than the amount of them in maintaining the lunatic; he also paid the lunatic's funeral expenses. Held that he was not entitled, under 3 and 4 W. 4, c. 104, to be paid either the surplus expenditure, or the amount of the funeral expenses, out of the lunatic's freehold estate. *Carter v. Beard*, 7

See SEPARATE PROPERTY, 1.

MAINTENANCE.

Testator made a certain provision for the infant son of his relation M. W., until the age of sixteen, and then left the infant to the care of his trustees, to provide for him in some business or profession, and his future maintenance, out of the testator's funded property. Held that the infant, on attaining sixteen, was entitled to receive, out of the testator's funded property, a sum sufficient to provide for him in some business or profession, and to an annual allowance for his future maintenance during his life; and it was referred, to the Master, to inquire and state what sums were proper to be allowed for those purposes. *Kilvington v. Gray*, 293
See DEBT.—HUSBAND AND WIFE, 2,—WILL, 7.

MARITAL RIGHT.

See HUSBAND AND WIFE, 3.—SEPARATE PROPERTY, 4.

MARSHALLING OF ASSETS.

Under the 3 and 4 Will. 4, c 106, s. 3, an heir to whom lands are devised by his ancestor, takes them as devisee, to all purposes; and, therefore, the pecuniary legatees are not entitled to have the assets marshalled as against him. *Strickland v. Strickland*, 374

MASTER.

See SCANDAL AND IMPERTINENCE.

MASTER'S REPORT.

Under the 48th order of August 1841, it is not sufficient for the Master to give a short description of the documents laid before him, and then to state his finding, but he ought to mention on which of those documents he proceeded, and to show what were the contents thereof from which he drew his conclusion, and then to state his finding. *In re Grant*, 573

MORTGAGOR AND MORTGAGEE.

1. The infant heir of a mortgagee in fee, having been found, by the Master, to be a trustee of the mortgaged estate, for the executor of the mortgagee, the executor petitioned that the infant might be ordered to convey the estate to the mortgagor, who had offered to pay the principal and interest due on the mortgage. Held that the costs of the proceeding before the Master, must be paid by the mortgagor. *Ex parte Onmaney*, 298
2. A mortgagee is not bound to produce his mortgage deed to the devisee of the mortgaged estate, until payment of principal and interest, notwithstanding the devisee may be ignorant of the amount of the interest, the time of payment, and all the other particulars of the security. *Browne v. Lockhart*, 421
3. Order made on motion in a foreclosure suit to the same effect as a decree, although the order could not be made under the 7th Geo. 2, c. 20, owing to some of the parties interested in the equity of redemption being infants, and conse-

quently incapable of admitting the plaintiff's title. *Grane v. Mitchell*, 484

See FORECLOSURE.

MOTION.

See AFFIDAVIT.—COSTS, 5, 7.

MULTIFARIOUSNESS.

If a plaintiff has one remedy against A., and that remedy and another against B for the same cause of suit, neither A. nor B. can demur for multifariousness, on the ground that the bill seeks to enforce both the remedies against B. and only one of them against A. *Manners v. Rowley*, 470

NEAREST OF KIN OF MY OWN FAMILY.

Testator bequeathed his residue to trustees, in trust to pay an annuity to his wife, and, subject thereto, in trust for his daughter for life, and, after her death, in trust for her children. Provided that, if his daughter should die without leaving any issue, then the trustees should pay 3000*l.* as she should appoint: and, if his wife should survive his daughter and his daughter should die without issue, then that the trustees should pay 2000*l.* to his wife, and assign the residue of the trust moneys unto the nearest of kin of his own family for ever. The daughter survived the wife, and died without leaving issue. Held that the next of kin of the daughter, were entitled to the fund. *Clapton v. Bulmer*, 426

NEW ORDERS.

1. The 5th order of May, 1839, merely enables the court to direct such inquiries as must be made prior to the discussion of the question in the cause, but not to prejudice or decide that question. Therefore, where a bill is filed for an account, the court will not, under the 5th order, direct the account to be taken. *Lee v. Shaw*, 369
2. The prosecution of a decree in a creditor's suit, having been taken from the plaintiff, and committed to another creditor, under the 56th order of 1828, the plaintiff's solicitor was ordered to allow that other creditor's solicitor to inspect and take copies of all the papers in the cause, in his possession. *Bennett v. Baxter*, 417
3. Under the 31st order of 1828, if a plea to the whole bill is argued and allowed, the plaintiff, although he undertakes to reply to the plea, must pay the costs of it, but the other costs of the suit will be reserved. *Fry v. Richardson*, 475
4. The 21st order of August, 1841, does not apply to the case of an infant defendant. *Emery v. Newson*, 564
5. Under the 48th order of August, 1841, it is not sufficient for the Master to give a short description of the documents laid before him, and then to state his finding; but he ought to mention on which of those documents he proceeded, and to show what were the contents

- thereof from which he drew his conclusion, and then to state his finding. *In re Grant*, 573
6. Petition by tenant in tail, on the death of the tenant for life, for payment of a fund in court, arisen from the sale of timber improperly cut by the tenant for life. The decree, on further directions, was made by the Master of the Rolls, but it did not reserve liberty to apply. Held that the case was not affected by the 11th order of May, 1837, and therefore the application was not improperly made to the Vice-Chancellor. *Aburrow v. Aburrow*, 602
7. If on an application by the plaintiff, under the 5th order of the 9th of May, 1839, for preliminary accounts to be taken, the defendant objects that certain persons ought to have been made co-plaintiffs, the court will not make the order. *Logan v. Baines*, 604
8. A party is not at liberty to disregard an order of the court, although it is irregular; but ought to move to discharge it. Consequently, if a party has obtained an order for setting down a cause before the Master of the Rolls, which, under the orders of May, 1837, ought to have been set down before the Lord Chancellor, the opposite party has no right to treat that order as a nullity, and to proceed, before the Lord Chancellor or the Vice-Chancellor, just as if no such order had been obtained. *Wilkins v. Stevens*, 617
9. Before the orders of May, 1837, came into operation, a cause was heard, at the Rolls, both originally and for further directions; and exceptions to a report on a reference ordered at the latter hearing, were heard before the Vice-Chancellor, who merely referred it back to the Master to review his report. Held (the new orders being then in operation) that the cause was a Rolls cause. *Ib.*
10. A bill was filed for payment of a legacy, but it appeared from answer that the plaintiff did not correctly answer the description of the legatee contained in the will. The court refused to direct a preliminary inquiry under the 5th order of the 9th May, 1839. *Wilson v. Applegarth*, 657
- See ADVANCING CAUSE, 1, 2.—DISMISSAL, 2.—ELECTION.—FIFTH ORDER OF MAY, 1839, 1, 2.—FOUR-DAY ORDER.—JURISDICTION, 4.—SCANDAL AND IMPERTINENCE.

ORDER AND DISPOSITION.

See ACT OF BANKRUPTCY.

PARTIES.

1. An allegation in a bill that H. was dead, insolvent, and without leaving any assets for payment of his debts, is sufficient to dispense with his representative being made a party. *Seddon v. Connell*, 79
2. Where a bill is filed for relief in respect of a fraud alleged to have been committed by several persons, it is not necessary that all the persons charged with the fraud should be made defendants. *Ib.*
3. To a suit for administering the real assets of a testator, under 3 and 4 W. 4, c. 104, the heir, as well as the devisee, is a necessary party. The case of *Weeks v. Evans*, reported *ante*, vol. 7, p. 546, overruled. *Brown v. Weatherby*, 125
4. The decision in *Irving v. Thompson*, *ante*, vol. 9, p. 17, approved of by the Lord Chancellor. *Kerr v. Rew*, 370
5. A bill was filed, by a residuary legatee, against A. and B., the administrators of the deceased's effects, for an account of the assets received by them. A. died without having appeared to the bill: and C. obtained letters of administration of his goods, limited for the purpose only to attend, supply, substantiate, and confirm the proceedings in the suit, until a final decree should be made and executed; and C. was brought before the court, by a supplemental bill. Held that, owing to the limited nature of those letters of administration, an account of A.'s receipts could not be taken; but that a general administrator to A. must be brought before the court. *Clough v. Dixon*, 564

See FRAUD.—TRESPASS.

PENSION.

See ASSIGNABLE INTEREST.

PERISHABLE PROPERTY.

See CONVERSION.

PERPETUITY.

1. Testator devised his reversion in fee, expectant on his decease without issue male, in his mansion house and estates at D. to his brother, for life, with remainder to his first and other sons in tail male, with divers remainders over: and he bequeathed his plate, pictures, &c., in and about his mansion house at D., to trustees, in trust to permit the same to be used and enjoyed by the person and persons who, for the time being, should be entitled to the possession of his mansion house under the settlement on his marriage, or the limitations contained in his will, until a tenant in tail of the age of twenty-one years should be in the possession of his mansion house, and then the plate, pictures, &c. were to go and belong to such tenant in tail; and he gave the residue of his personal estate to the person who, at his decease, would be beneficially entitled, in possession, to his mansion house. The testator's brother had a son born at the date of the will, and both he and his son survived the testator. Held that the trust declared of the plate, pictures, &c. was void for remoteness, so far as it was intended to take effect after the death of the brother. *Ibbetson v. Ibbetson*, 495
2. Lord Le Despencer being seized of the ancient barony of Le Despencer in fee, conveyed real estates to trustees, in trust, after the death of himself and his eldest son, to settle the estates to the use of such persons, for such estates, and in such manner that the same should, so far as the law would permit, be strictly settled so as to go along with the dignity of Le Despencer, so long as the person possessed of the same dignity should be a lineal descendant of the settlor, and be held and enjoyed by the person for the time being possessed of the

same dignity, and being such lineal descendant as aforesaid; and that, during every suspension or abeyance of the same dignity within the limits prescribed by law for strict settlements, the rents of the estates might be equally divided amongst the co-heirs *per stirpes* of the person or persons respectively, by reason of whose death or deaths without issue male, such suspension or abeyance should be, for the time being, occasioned. Held that the above trust was not void for remoteness; and the Master was directed to approve of a proper settlement accordingly. *Banks v. Le Despencer*, 576

See REMOTENESS, 1, 2.

PERSONAL ESTATE.
See DIVIDENDS.—LEASEHOLDS.

PERSONAL REPRESENTATIVE.
See ADMINISTRATOR, 1, 2.

PLAINTIFF.

1. Although the plaintiffs, in a creditor's suit, have no common interest, yet the court will not, even after decree, allow one of them to examine the other, as a witness in the Master's office, in support of his debt. *Edwards v. Goodwin*, 123
2. A plaintiff resident abroad, having made default in giving security for costs, the court ordered that he should give the security within four days, or that an injunction which he had obtained *ex parte*, should be dissolved; but it refused to order the bill to be dismissed. *Fort v. Bank of England*, 616

PLAN.

See AGREEMENT.

PLEA AND PLEADING.

1. A. filed a bill against a company, and also against some of the directors of the company, praying relief against the company, and if he should be held not to be entitled to relief against the company, then praying relief against the directors. Held that the bill was demurrable. *Seddon v. Connell*, 79
2. An allegation in a bill that H. was dead, insolvent, and without leaving any assets for payment of his debts, is sufficient to dispense with his representative being made a party. *Ib.*
3. An order *nisi* for dissolving an injunction cannot be obtained on putting in a plea. *Wroe v. Clayton*, 185
4. A defendant who has answered, cannot have the benefit of the statute of limitations, at the hearing, unless he has insisted on it in his answer. *Harrison v. Borwell*, 362
5. A joint stock banking company, under 7 Geo 4, c. 46, may sue, by their public officer, members of the company jointly with strangers. *Manners v. Rowley*, 471
6. Plaintiff sued as administrator. Defendant pleaded that plaintiff was not administrator, but did not deny, by answer, the usual charge as to documents. Held that the plea was not bad on that account. *Fry v. Richardson*, 475
7. Under the 31st order of 1828, if a plea to the

whole bill is argued and allowed, the plaintiff although he undertakes to reply to the plea, must pay the costs of it, but the other costs will be reserved. *Fry v. Richardson*, 475

See EXECUTOR.—MULTIFARIOUSNESS.—PARTIES.—PUBLIC OFFICER.—SUPPLEMENTAL BILL.—TRESPASS.

POWER.

1. In 1819, an estate was settled to such uses as W. T. D. and F. his wife, should, during their joint lives, appoint, and, in default of appointment, to the use of W. T. D. for life, with remainder to trustees to preserve, &c., with remainder to the use of the wife for life, with remainder to trustees to preserve, &c., with remainder to the use of the sons of W. T. D. and his wife, successively in tail, with remainder to the use of their daughters as tenants in common in tail, with cross-remainders in tail, with remainder to W. T. D. in fee. In 1824 W. T. D. took the benefit of the insolvent debtors' act, and conveyed all his estate to the provisional assignee. In 1828 W. T. D. and F. his wife, in execution of their joint power, appointed the estate to trustees in fee, in trust to sell. The trustees afterwards sold the estate. Held that the power of appointment was not destroyed by the conveyance to the provisional assignee; and that the appointment of 1828 vested in the trustees the whole inheritance in fee, except that portion of it which was vested in the provisional assignee. The decision in *Badham v. Mee*, 7 Bing. 695, and 1 Myl. & Keen, 32, disented from. *Jones v. Winwood*, 153
2. An estate was devised to O. W. for life, with remainder to trustees to preserve, &c., with remainder to O. W.'s first and other sons successively, in tail, with remainder to the trustees and their heirs, in trust for the separate use of the testator's niece, for her life, with remainder to the use of her children, in tail, with remainder to the testator's right heirs; and power to lease the estate was given to the tenants for life, and, during the minorities of the issue in tail, to the trustees. Held that, though the power was given for an indefinite period, yet, as either of the tenants for life might concur with his or her children, in destroying it, it was not void. *Wallis v. Freestone*, 225

See APPOINTMENT.

PRACTICE.

1. A party intending to apply for a stop-order, must give notice of his application to all other persons having like orders on the fund. *Hulkes v. Day*, 41
2. Where a motion to dissolve an injunction is ordered to stand over at the plaintiff's request, affidavits filed after 10 o'clock of the day for which the notice was given, cannot be read when the motion is made. *Anonymous*, 50
3. Although the time for excepting to the answer to the bill may have expired, yet, if the plaintiff amends his bill, the defendant cannot obtain an order for the plaintiff to elect whether he will proceed at law or in equity, until the time

- for excepting to the answer to the amendments has expired. Whether that time is to be computed according to the old practice, or the new orders: *Qu?* *Leicester v. Leicester*, 87
4. Plaintiff obtained an *ex parte* injunction. Defendant filed his answer, and served a notice of motion to dissolve the injunction. Exceptions were taken to the answer; to which the defendant submitted, and then filed a further answer. Between the filing of the exceptions and the putting in of the further answer, the plaintiff filed affidavits in support of the injunction. The defendant then moved to dissolve on the notice served prior to putting in his further answer. Held that the affidavits so filed by the plaintiff might be read on the hearing of the motion. *Smith v. Cleasby*, 91
 5. The court will grant the common injunction on any day, although out of term, and not a seal day, or continuation of the seal. *Reece v. Humble*, 117
 6. It is not irregular to obtain the four day order for production of deeds before the certificate of the defendant's default has been filed. *Akew v. Peddle*, 182
 7. An order *nisi* for dissolving an injunction cannot be obtained, on putting in a plea. *Wroe v. Clayton*, 185
 8. A necessary party may be brought before the court by supplemental bill, where the cause is in such a stage that the original bill cannot be amended. *Semple v. Price*, 238
 9. Where an order to amend may be made, by the Master, as against some of the defendants, but must be made, by the court, as against one of them, the plaintiff may obtain the order, from the court, as against all the defendants. *Machitt v. Palmer*, 241
 10. Where a defendant, after his answer is to be deemed sufficient, files a supplemental answer, the plaintiff is not allowed two months to except to it; but, as it cannot be excepted to without leave, it is to be deemed sufficient from the time when it is filed; and, therefore, the defendant may move to dismiss at the end of two months from the filing of the supplemental answer. *Barnes v. Tweddle*, 481
 11. A supplemental answer, cannot be excepted to without leave; and therefore it is to be deemed sufficient, *prima facie*, from the time when it is filed. *Ib.*
 12. On the death of a sole defendant, the plaintiff filed a bill of revivor and supplement against his heir, executor and devisee, but did not obtain an order to revive. The devisee joined with the heir and executor in moving that the plaintiff might revive within a week, or that the suit might be dismissed. The motion was refused, because the devisee, who was unaffected by the revivor of the suit, had joined in it. *Folland v. Lamotte*, 486
 13. A certiorari issued out of the Court of Chancery on an order made by a judge at common law is irregular. *Worthington v. Remnant*, 558
 14. The 21st order of August, 1841, does not apply to the case of an infant defendant. *Emery v. Newson*, 564
 15. A plaintiff amended his bill, not requiring an answer; the defendant, however, answered

the amendments. Held that he could not move to dismiss until the expiration of two months from the time when the answer was to be deemed sufficient. *Strickland v. Strickland*, 628

See AMENDMENT.—COSTS.—FIFTH ORDER OF MAY, 1839.—INJUNCTION.—INTERPLEADER.—PLAINTIFF.—SETTING DOWN CAUSE.—SOLICITOR.—TRIAL.—VENDOR AND PURCHASER, 1.—WITNESS, 1, 2.

PRELIMINARY ACCOUNTS AND INQUIRIES.

1. Under the fifth order of May, 1839, the court will order preliminary accounts to be taken although the cause has been set down for hearing. *Strother v. Dutton*, 288
2. The court will not direct preliminary inquiries to be made under the fifth order of May, 1839, unless it is plain that they would be directed at the hearing, and would be binding on the parties to the suit. *Meinertzhagen v. Davis*, 369
3. The fifth order of May, 1839, merely enables the court to direct such inquiries as must be made prior to the discussion of the question in the cause, but not to prejudice or decide that question. Therefore, where a bill is filed for an account, the court will not, under the fifth order, direct the account to be taken. *Lee v. Shaw*, 369
4. If on an application by the plaintiff, under the fifth order of the 9th May, 1839, for preliminary accounts to be taken, the defendant objects that certain persons ought to have been made co-plaintiffs, the court will not make the order. *Logan v. Baines*, 604
5. A bill was filed for payment of a legacy, but it appeared from answer that the plaintiff did not correctly answer the description of the legatee contained in the will. The court refused to direct a preliminary inquiry under the fifth order of the 9th May, 1839. *Wilson v. Applegarth*, 657

PRIVILEGED COMMUNICATIONS.

See CONFIDENTIAL COMMUNICATIONS.

PRIVITY.

See AGREEMENT, 1.

PRODUCTION OF DOCUMENTS.

1. If a defendant denies the plaintiff's title, and says, positively, that the documents, in his custody, relating to the matters in the bill, will not show the plaintiff's title, the court will not order him to produce them; but if he says merely that he believes that they will not show the plaintiff's title, the court will order him to produce them. *Bannatyne v. Leader*, 230
2. The schedule, to a defendant's answer, of the documents in his power, contained as follows: "Letters from Messrs. K. & C., the defendant's solicitors, to Mr. F., one of the witnesses examined for the defendant at the trial of the action, bearing date, &c.:" and the defendant, in the body of his answer, stated that all the documents in the schedule, related to and were connected with the matters in question in the suit, and were prepared and written, after the institution of it, for the pur-

pose of the defendant's defence to the suit, and for the purpose of the action between the parties to which the suit related. Held, that the letters were not sufficiently characterized as being of a confidential nature, to protect them from being produced. *Corporation of Dartmouth v. Holdenworth*, 476
See COVENANT TO PRODUCE TITLE DEEDS.—FOUR DAY ORDER.—INSPECTION OF MORTGAGE DEED.

PUBLIC OFFICER.

A. filed a bill against the public officer of a joint stock bank, alleging that he had been induced to purchase 500 shares in the bank, by fraudulent representations made by the directors, in their reports, as to the prosperous state of the company's affairs, and praying for a declaration to that effect and that the purchase might be declared void, as between him and the company, and that the latter might repay him his purchase money. Held that, as the litigation was between one member of the partnership as such, and the other members as such, the public officer was improperly made a party to it as representing the company; and a demurrer by him was allowed. *Seddon v. Connell*, 58
See JOINT STOCK COMPANY.

PUMP.

See WATER RIGHT.

REAL ESTATES.

See INFANT, 2.

RECEIVER.

Pending a contest, between the plaintiff and defendant, in the Ecclesiastical Court, as to the validity of two wills made by the testatrix, the plaintiff filed a bill for a receiver of the testatrix's estate, and to set aside an assignment made by the testatrix to the defendant. The court declined to appoint a receiver of the property comprised in the assignment, that property being claimed, by the defendant, independently of either will. *Jones v. Goodrich*, 327

REDEMPTION.

See CONDITIONAL SALE.

REGISTRATION.

See BEDFORD LEVEL ACT.

RELIEF.

See COMMISSION TO EXAMINE WITNESSES ABROAD.

RE MOTENESS.

1. Testator devised his real estates, to trustees, in trust for his son for life, and, after the son's death, in trust to sell and stand possessed of the proceeds, in trust for all his grandchildren, the children of his son and three daughters, (whom he named) who should attain the age of twenty-four years. The son and daughters had children living at the testator's death, but none born afterwards. Held that the trust for the grandchildren was void for remoteness. *Newman v. Newman*, 51

2. An estate was devised to O. W. for life, with remainder to trustees to preserve, &c., with remainder to O. W.'s first and other sons successively, in tail, with remainder to the trustees and their heirs, in trust for the separate use of the testator's niece, for her life, with remainder to the use of her children, in tail, with remainder to the testator's right heirs; and power to lease the estate was given to the tenants for life, and, during the minorities of the issue in tail, to the trustees. Held that, though the power was given for an indefinite period, yet, as either of the tenants for life might concur with his or her children, in destroying it, it was not void. *Wallis v. Freestone*, 225

3. Testator devised his reversion in fee, expectant on his decease without issue male, in his mansion house and estates at D. to his brother, for life, with remainder to his first and other sons in tail male, with divers remainders over: and he bequeathed his plate, pictures, &c. in and about his mansion house at D., to trustees, in trust to permit the same to be used and enjoyed, by the person and persons who, for the time being, should be entitled to the possession of his mansion house, under the settlement on his marriage, or the limitations contained in his will, until a tenant in tail of the age of twenty-one years, should be in possession of his mansion house, and then the plate, pictures, &c. were to go and belong to such tenant in tail; and he gave the residue of his personal estate to the person who, at his decease, would be beneficially entitled, in possession, to his mansion house. The testator's brother had a son born at the date of the will, and both he and his son survived the testator. Held that the trust declared of the plate, pictures, &c. was void for remoteness, so far as it was intended to take effect after the death of the brother. *Ibbetson v. Ibbetson*, 495
See PERPETUITY, 2.

RENT.

See HEIR AND ADMINISTRATOR

REPORT.

See EXCEPTIONS, 1.—MASTER'S REPORT.—SCANDAL AND IMPERTINENCE.

REPRESENTATION.

See ADMINISTRATOR, 1, 2.

RE-SALE.

See BIDDING.

RESIDUARY BEQUEST.

A testator directed that in case of one of his daughter's having no child, his trustees should stand possessed of a sum of 3000*l.* and the stock upon which it should be invested, including the accumulations of the surplus dividends which should not have been applied in manner in the will mentioned during the daughter's minority, upon such trusts as the daughter should by will appoint; and in default of appointment, or in case of appointment as, to such parts of the 3000*l.* as should not be effectually comprised therein, or whereof the trusts to be there-

by limited should either never take effect, or should determine upon the trusts by his will declared, of his own residuary estate. The daughter having no child, by her will, after reciting that the 3000*l.* and the accumulated dividends had been blended with funds to which she was absolutely entitled, in a sum of 6700*l.* consols, standing in the names of trustees, proceeded in express execution of the power, to direct that the 3000*l.*, and the stock upon which that sum or the surplus dividends should have been invested, should be transferred to certain trustees named in her will, upon trust, as to 2700*l.* consols, for her mother, and as to 250*l.* consols for another person, and, as to the residue, upon the trusts after declared of her residuary estate. She then proceeded to give what she described as "all the residue of my stock in the public funds, and all my moneys and securities for money, and all the residue of my estate and effects," to the same trustees, upon trust to convert, and to invest in the funds such part as should not already be so invested, and to stand possessed of all such funds, and also of the residue of the said trust funds which should remain after paying and satisfying the several legacies of stock before directed to be paid or transferred thereout to her mother and the other person referred to, upon certain trusts which she proceeded to declare. The mother died in the daughter's lifetime. Held that the 2700*l.* consols was not well appointed, and that it was subject to the trusts declared, by the testator, of his residuary estate. *Easum v. Appleford*, 274

REVIVOR.

See DISMISSAL, 3.—IMPERTINENCE.—PRACTICE, 12.

SALE UNDER DECREE.

E. B., one of several defendants, having purchased an estate sold under the decree, for 810*l.*, without having obtained leave to bid, another defendant moved that the estate might be again put up to sale at 810*l.*, and if it should fetch more, that the sale to E. B. might be set aside, and that he might pay the expenses of the re-sale and the costs of the motion. The court refused the application, but without costs. *Elworthy v. Billing*, 89
See EXECUTION OF CONVEYANCE.

SCANDAL AND IMPERTINENCE.

The Master's decision, on a question of scandal or impertinence, brought before him under the 73d order of 1828, is not final; and, therefore, he ought to issue a certificate of his opinion. *Phipps v. Henderson*, 634

SECURITY FOR COSTS.

See COSTS, 8.

SEPARATE PROPERTY.

2. A married lady who was entitled to an income

of 500*l.* a year out of the property in the cause, being of unsound mind, the court ordered the whole of the 500*l.* to be paid to her husband; but directed the arrears and future payments of an annuity of 100*l.*, to which she was entitled for her separate use, to be carried to her separate account, notwithstanding the husband deposed that the expenses incurred by him in her care and maintenance exceeded 500*l.* a year. *Nettleship v. Nettleship*, 236

2. A husband and wife lived separate from each other. At the death of the wife, she was possessed of cash and bank notes arisen from property settled to her separate use. Held that the husband was entitled to them in his marital right. *Molony v. Kennedy*, 254
Testator bequeathed all his property to his daughter, (a single woman) in terms amounting to a gift to her for her separate use, and appointed her sole executrix. She married after her father's death; and a sum of stock, part of the property bequeathed to her, was assigned, to trustees, in trust for her separate use, for life, and, if she survived her husband, in trust for her absolutely, and, if not, then in trust as she should appoint by will, and, subject thereto, in trust for her husband; but the settlement did not notice any other part of the property. Held that the husband did not become entitled, in his marital right, to the property remaining unsettled, but was a trustee of it for her; and, therefore, it could not be taken in execution under a judgment recovered against him. *Newlands v. Paynter*, 377

SEPARATION DEED.

1. A separation deed recited that divers unhappy differences subsisted between the husband and wife, in consequence of which they had agreed to live separate. The husband then covenanted to pay an annuity to a trustee for the wife, during her life; but there was no covenant on the part of the trustee or any other person, to indemnify the husband against the debts of the wife. The husband died, and the annuity became in arrear. Held, that the covenant might be enforced against the husband's executors; for, there being no evidence to the contrary, there might have been circumstances, alluded to by the recital, which would have warranted a divorce *a mensa et thoro*; but that the covenant, being voluntary, would not be enforced against the husband's creditors. *Clough v. Lambert*, 174

See ARTICLES OF SEPARATION.

SETTING DOWN CAUSE.

1. A party is not at liberty to disregard an order of the court, although it is irregular; but ought to move to discharge it. Consequently, if a party has obtained an order for setting down a cause before the Master of the Rolls, which, under the orders of May, 1837, ought to have been set down before the Lord Chancellor, the opposite party has no right to treat that order as a nullity, and to proceed, before the Lord Chancellor or the Vice-Chancellor,

just as if no such order had been obtained.
Wilkins v. Stevens, 617

2. Before the orders of May, 1837, came into operation, a cause was heard at the Rolls, both originally and for further directions; and exceptions to a report on a reference ordered at the latter hearing, were heard before the Vice-Chancellor, who merely referred it back to the Master to review his report. Held (the new orders being then in operation) that the cause was a Rolls cause. 1b

SETTLEMENT.

See FEME COVERT.

SETTLEMENT OF ESTATES TO GO ALONG WITH A BARONY IN FEE.

See EXECUTORY TRUST.

SOLICITOR.

1. Where documents which a defendant is ordered to produce are permitted to remain in his solicitor's office for the plaintiff's inspection, the solicitor is not entitled to charge the plaintiff for inspecting them, although the clerk in court would have been entitled to demand 6s. 8d. per hour. *Woodroffe v. Daniel*, 126
2. A solicitor who has joined with his client in practising a fraud, may be made a co-defendant to a suit to set aside the transaction. *Beadles v. Burch*, 332
3. The prosecution of a decree in a creditor's suit, having been taken from the plaintiff, and committed to another creditor, under the 56th order of 1828, the plaintiff's solicitor was ordered to allow that other creditor's solicitor to inspect and take copies of all the papers in the cause in his possession. *Bennett v. Baxter*, 417

SPECIFIC PERFORMANCE.

- A. agreed to sell, to B. a piece of land in the occupation of his tenant, and to buy up the tenant's interest. B. having entered on the land before payment of his purchase money, A. and his tenant served him with notices not to trespass; and, afterwards, A. filed a bill, against B., for a specific performance and to restrain the trespass. Held that the tenant was not a necessary party to the suit. *Robertson v. The Great Western Railway Company*, 314
See CONSTRUCTION, 8.—LIEN.—TITLE.

STAMP OFFICE BOOKS.

See EVIDENCE, 2.

STATUTES.

- 15 CAR. 2, c. 17.—See BEDFORD LEVEL ACT.
7 Geo. 2, c. 20.—See FORECLOSURE, 2.
36 Geo. 3, c. 52.—See LEGACY, 3.
52 Geo. 3, c. 101.—See JURISDICTION, 1, 2.
7 Geo. 4, c. 46.—See JOINT STOCK COMPANY, 2.
11 Geo. 4 & 1 W. 4, c. 60.—See COSTS, 4.—TRUSTEES, 1, 2, 3.
3 & 4 W. 4, c. 104.—See PARTIES, 3.
3 & 4 W. 4, c. 106.—See HEIR, 2.
1 & 2 Vict. c. 110.—See CONSTRUCTION.
2 & 3 Vict. c. 54.—See VICE-CHANCELLOR, 1.

STATUTE OF LIMITATIONS.

A defendant who has answered, can not have the benefit of the statute of limitations, at the hearing, unless he has insisted on it in his answer. *Harrison v. Borwell*, 382

STOP ORDER.

1. A court of equity will make a stop order as auxiliary to a charging order under 1 & 2 Vict. c. 110. *Hulkes v. Day*, 41
2. A party intending to apply for a stop order, must give notice of his application to all other persons having like orders on the fund. 1b

SUPPLEMENTAL ANSWER.

A supplemental answer cannot be excepted to without leave, and therefore it is to be deemed sufficient, *prima facie*, from the time when it is filed. *Barnes v. Tweddle*, 481
See DISCLAIMER, 2.

SUPPLEMENTAL BILL.

1. A bill was filed against A., to set aside a purchase made by him, on the ground of fraud. A. died after filing his answer. The plaintiff then filed a supplemental bill against A.'s devisees, stating the allegations in the original bill, and several passages in the answer, some of which were stated by way of pretence, and charges were founded upon them. Held that the supplemental bill was not impertinent. *Woods v. Woods*, 197
2. A necessary party may be brought before the court by supplemental bill, where the cause is in such a stage that the original bill cannot be amended. *Simple v. Price*, 238

SUPPLEMENTAL SUIT.

See CREDITOR'S SUIT.

TENANT.

See TRESPASS.

TENANT FOR LIFE OF STOCK.

A tenant for life of stock died on the day on which a half year's dividend became due. Held that they belonged to his personal estate. *Paton v. Sheppard*, 186

TITLE.

If A. agrees to sell an estate, and it is afterwards discovered that a small portion of it is the property of another person; the court will not discharge the purchaser from his contract, without giving A. an opportunity of acquiring a title to that portion. *Chamberlain v. Lee*, 444

See CONDITIONS OF SALE.—COVENANT TO PRODUCE TITLE DEEDS.

TITLE DEEDS.

See COVENANT TO PRODUCE.

TRESPASS.

1. A. agreed to sell to B., a piece of land in the occupation of his tenant, and to buy up the tenant's interest. B. having entered on the land before payment of his purchase money, A and his tenant served him with notices not to trespass; and, afterwards, A. filed a bill, against B., for a specific performance and to restrain the trespass. Held that the tenant was not a necessary party to the suit. *Robertson v. The Great Western Railway Company*, 314

TRIAL.

The plaintiff obtained an injunction, with a direction to try his right in an action. A year afterwards, and shortly before the spring assizes, the defendant moved that the plaintiff might proceed to trial at those assizes, or that the injunction might be dissolved. The court refused the motion with costs, but intimated that it expected the plaintiff to go to trial at the next summer assizes. The defendant being in contempt for non-payment of the costs of the motion, the plaintiff, shortly before summer assizes, moved to defer the trial until the defendant should have cleared his contempt. Motion refused. *Bickford v. Skewes*, 193

TRUST.

See EXECUTORY TRUST.

TRUST BY IMPLICATION.

Testator gave whatsoever property or effects he might die possessed of, after his debts were paid, or might become entitled to, to his wife, and appointed her sole executrix of his will: "And my reason for so doing, is the constant abuse of trustees which I daily witness among men; at the same time trusting she will, from the love she bears to me and our dear children, so husband and take care of what property there may be, for their good; and should she marry again, then I wish she may convey, to trustees, in the most secure manner possible, what property she may then possess, for the benefit of the children, as they may severally need or deserve, taking justice and affection for her guide;" and at the conclusion of his will, he gave the capital of his business to his wife, trusting that she would deal justly and properly to and by all their children. Held that no trust was created for the children. *Pope v. Pope*, 1

TRUST TO TAKE EFFECT ON ALIENATION OR BANKRUPTCY.

Testator bequeathed his residuary estate to trustees, and, after making a provision out of it, for the benefit of his son, for his life, and, after the son's death, for his wife and children, directed that, if his son should assign or charge the interest to which he was entitled for life, or attempt or agree to do, or commit any act whereby the same, or any part thereof, might, if the absolute property thereof were vested in him be forfeited to or become vested in any person or persons, then the trustees should pay

and apply the said interest for the maintenance and support of his son, and any wife and child or children he might have, and for the education of such issue, as the trustees should, in their discretion, think fit. Some years after the testator's death, the son became bankrupt. Held that the trust for the benefit of the son, his wife and children, was valid, and that the assignees were not entitled to any part of the provision. *Godden v. Crowhurst*, 642

TRUSTEES.

1. The court may appoint new trustees under 11 Geo. 4, and 1 Will. 4, c. 60, s. 22, although the instrument creating the trusts contains a power to appoint new trustees. *In re Fauntleroy*, 252
2. A person beneficially entitled to part of the dividends of a sum of stock, has a sufficient interest to support a petition under 11 Geo. 4, and 1 Will. 4, c. 60, for the appointment of a new trustee of the stock. The words in the 10th section of the act, which empower the court to order "any person appointed as aforesaid to receive and pay over, or join in receiving and paying over the dividends of such stock in such manner as the said court shall direct," authorize the court to direct one of the officers of the bank to receive the dividends of the trust stock and pay them over, not to the party beneficially entitled, but to the new trustee. *In re King*, 605
3. If a motion is made to enforce an order under the act, and the order appears to be an improper one, the court has jurisdiction to give the party resisting it the costs of the motion. *Ib.*

See COSTS, 4, 6.—FORECLOSURE.

VENDOR AND PURCHASER.

1. The conveyance of an estate sold under the decree, had been settled by the Master, and one of the defendants was made a party, but refused to execute it. The court refused an application, by the purchaser, that the plaintiff should procure the defendant to execute the conveyance. *Stillwell v. Mellersh*, 367
2. One of the conditions of sale provided that, if the purchaser should raise objections to the title which the vendor should not be able or willing to remove, the vendor should be at liberty to rescind the contract, and that all objections which should not be taken, in writing, within ten days after the delivery of the abstract, should be considered as waived. Held that the condition referred to the first delivery of objections, and, if the vendor expressed his willingness to answer them, he could never afterwards rescind the contract. *Tanner v. Smith*, 410
3. If A. agrees to sell an estate, and it is afterwards discovered that a small portion of it is the property of another person; the court will not discharge the purchaser from his contract, without giving A. an opportunity of acquiring a title to that portion. *Chamberlain v. Lee*, 444
4. The vendor of a copyhold of piece land, enfranchised in 1799, delivered, to the purchaser,

two abstracts commencing in 1736, one of the title to the land, and the other of the title to the manor. The deed of 1799, which was forty years old, recited that the then lord and the then owner of the land were respectively seized in fee; and several of the deeds relating to the lord's title, were bargains and sales enrolled, and, therefore, copies of them, as well as of the surrenders and admittances, which would be good evidence, might be procured by the purchaser at any time. The vendor was unable to deliver, to the purchaser, the deed of 1799, or any of the prior instruments, but was willing to covenant to produce that deed. Held that he was bound to give the purchaser covenants for the production, not only of that deed, but of all the prior instruments mentioned in the abstracts. *Cooper v. Emery*, 609
See AGREEMENT, 2.

VICE-CHANCELLOR.

1. The Vice-Chancellor has jurisdiction to make orders under 2 and 3 Vict. c. 54, (for amending the law relating to the custody of infants,) although the Lord Chancellor and Master of the Rolls are alone mentioned in the act. *In re Taylor*, 291
2. Petition by tenant in tail, on the death of the tenant for life, for payment of a fund in court, arisen from the sale of timber improperly cut by the tenant for life. The decree, on further directions, was made by the Master of the Rolls, but it did not reserve liberty to apply. Held that the case was not affected by the 11th order of May, 1837, and therefore the application was not improperly made to the Vice-Chancellor. *Aburrow v. Aburrow*, 602
3. A suit to set aside a decree at the Rolls, on the ground of fraud, may be heard by the Vice-Chancellor. *Archer v. Slater*, 624
4. The Vice-Chancellor has no jurisdiction under the 12th order of May, 1837, to order a fund standing in trust in a Lord Chancellor's cause to be transferred to a Rolls' cause. *Wright v. Irving*, 625

VOLUNTARY COVENANT.

See HUSBAND AND WIFE, 1.

WATER RIGHT.

Whether the owner of an old well can prevent his neighbor from sinking a well in his own land, on the ground that thereby the supply of water to the old well will be drawn off or diminished, *Qu. ? Hammond v. Hall*, 551

WELL.

See WATER RIGHT.

WILL.

1. Testator gave all his estates real and personal, to his executors, in trust to be disposed of by them as after mentioned. He then gave all his real estates, houses, and lands, to his wife, for life: "and, after the decease of my wife,
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I give my houses, lands, and estates in B. to J. B., but at his death, I will that the whole shall be for the use of the said J. B.'s wife and children, and which children, at the death of their mother, shall inherit the same jointly during their lives; and, if the said children shall die before they arrive at the age of twenty-one, I will that my houses and estates at B. go to H. S.," who was the testator's heir. J. B. and his wife had three daughters and one son. The daughters were living at the date of the will, and at the testator's death. The son was born afterwards. After the death of J. B., but in the lifetime of his wife, two of the daughters died, intestate and unmarried, one before and the other after attaining twenty-one, leaving their brother their heir. After the deaths of the prior devisees, the son and the surviving daughter, both of whom had long attained twenty-one, executed a deed in the nature of a recovery, by which they limited the lands in B. to the use of themselves and their heirs as tenants in common. Held that they took an estate in fee-simple, as tenants in common, in the lands in B. *Spry v. Bromfield*, 94

2. Testator gave his real and personal property, to trustees, their heirs, &c., upon trust to pay and divide the same unto and amongst all and every his children who might be living at his decease, share and share alike, for their lives; "and in case any of my said children, being daughters, shall marry, and shall happen to depart this life in the lifetime of her or their husband or husbands, I direct that the share or shares of her or them so dying, shall go to her or their respective husband or husbands, for his or their life or lives and, from and after his or their decease, then, to be equally divided amongst all and every the child or children of my said daughter and daughters then living; and, in default of any such child or children, then I direct such share or shares shall go and be divided, equally, to and amongst all and every my said children who shall be then living." The testator left a son and seven daughters. One of the daughters died a spinster. Held that, on her death, her share in the testator's property did not go to her surviving brothers and sisters, but became undisposed of. *Lett v. Randall*, 113
3. Under a bequest of household furniture, fixtures, belonging to the testator, in a leasehold house, occupied by him, will pass. *Paton v. Sheppard*, 186
4. Testator gave 2000*l.* to his daughter Martha, for life, with a testamentary power to her to appoint that sum amongst her children; but if she should die without leaving a child, then he gave it to such of his children as should be living at his decease; and, if either of his said children should die before they should be entitled to receive a share, leaving issue, their shares should be distributed amongst their children. The testator left Martha and four other children living at his decease. Two of them died leaving issue, and two, without issue; and, afterwards, Martha died without issue. Held that her personal representatives were

- entitled to one-fifth of the fund. *Jennings v. Newman*, 219
5. Testator gave 5000*l.* stock to a female infant, to be paid or transferred to, or settled on her, by his executors, by such deed or instrument in writing, as they should think most prudent and proper, on her attaining twenty-one. The infant married in the testator's lifetime, and, afterwards, attained twenty-one. The court ordered the stock to be transferred to her, on her sole receipt. *Laing v. Laing*, 315
6. Testator gave legacies of 200*l.* to each of the children, of his nephews and nieces begotten or to be begotten, and directed that the legacies should be paid to them at the usual periods. Held that the children of the nephews and nieces who were born after the testator's death, were not entitled to participate in the legacies. *Butler v. Lowe*, 317
7. Testator gave all his property to his wife and two other persons, in trust for the under-mentioned purpose, namely, to pay the income to his wife, for the education and support of his children by her; and, after her death, the property to be divided among his children: and he gave his furniture, plate, &c., to his wife, absolutely. Held that the children were not entitled to the trust property on their father's death; but that their mother was entitled to the income, for her life, she maintaining and educating the children out of it. *Gilbert v. Bennett*, 371
8. Testator directed his trustees to invest the proceeds of his real and personal estate, and to accumulate the interest until the youngest child of his brother should attain twenty-one, and then to stand possessed of the trust fund and its accumulations, in trust for all the children of his brother who should be then living. The brother had seven children, and all of them were living at the date of the will, and at the testator's death. All the children, except the second, died, and none of them, except the eldest, the second, and the fourth, attained twenty-one. The fifth was the last that died. Held that the trust for accumulation did not continue until the seventh child would have attained twenty-one, if living, but that it ceased on the death of the fifth child, and that the second child then became entitled to the trust fund. *Evans v. Pilkington*. 412
9. Testator bequeathed to his wife, 600*l.* per annum for her life, and, after her death, the said annuity to be equally divided between A., B., C., D., E. and F., or the survivors or survivor; and he bequeathed to the same six persons 100*l.* per annum each, during their lives, with power to leave their annuities, at their deaths, to any persons they might marry, or any children they might leave; but in case of either of them dying without exercising such power, then to the survivors or survivor. Held, by the Vice-Chancellor, that the above bequests in favor of A., B., C., D., E., and F., passed the capital of the funds producing the annuities; but the Lord Chancellor reversed His Honor's decision. *Blewitt v. Roberts*, 491
10. There is no case in which the court has established a will of copyholds; *semble*. *Archer v. Slater*, 624
11. The probate copy of a copyholder's will is sufficient to lead the uses of a surrender to the use of his will. *Archer v. Slater*, 624
12. Testator bequeathed 40,000*l.* to Lord H. and his children, to be secured for their benefit. Held that Lord H. took for life, with remainder to his children. *Vaughan v. The Marquis of Headfort*. 639
- See ANNUITY.—APPOINTMENT.—BANKRUPT.—CHARGE OF DEBTS.—CONDITIONAL BEQUEST.—CONSTRUCTION, 1, 3, 16, 17, 19, 21.—CONVERSION.—LEASEHOLDS.—LEGACY.—MAINTENANCE.—REMOTENESS, 1, 2, 3.

WITNESS.

1. Although the plaintiffs, in a creditor's suit, have no common interest, yet the court will not, even after decree, allow one of them to examine the other, as a witness in the Master's office, in support of his debt. *Edwards v. Goodwin*, 123
2. A party who intends to cross-examine a witness, must, himself, make an appointment for that purpose, with the examiner, and give notice of the time appointed to the witness and the solicitor of the opposite party. *Keymer v. Pering*, 179
- See DEMURRER, 2.—DEPOSITIONS.

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